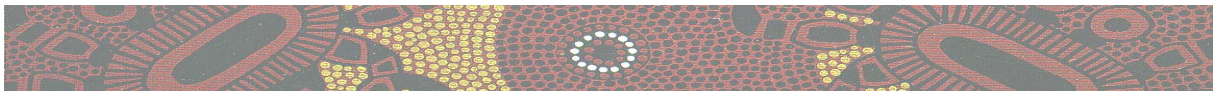


Submission to the Review of the Aboriginal and Torres  
Strait Islander Heritage Protection Act 1984

Indigenous Advisory Committee - Environment Protection and  
Biodiversity Conservation Act

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Committee Secretariat  
Mrs Sheryl Hedges  
Director, Indigenous Policy Branch  
[Sheryl.hedges@environment.gov.au](mailto:Sheryl.hedges@environment.gov.au)  
02 6274 2333



Dr John Avery  
Indigenous Heritage Law Reform  
5 Farrell Place  
CANBERRA ACT 2601

Dear Dr Avery,

Please find enclosed the submission of the Indigenous Advisory Committee to the review of the Aboriginal and Torres Strait Islander Heritage Protection Act.

The IAC had the fortune to meet with you at its September 2009 meeting which provided a valuable opportunity for Committee members to put forward their views. This submission elaborates on the views provided at this meeting and will hopefully provide you with valuable advice regarding the direction that the Aboriginal and Torres Strait Islander Heritage Protection Act needs to take.

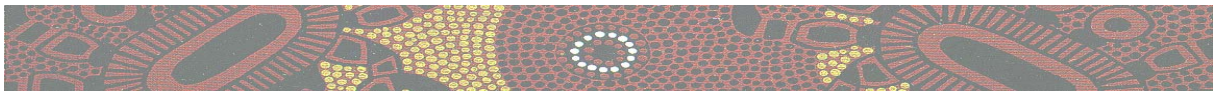
Please note that reference to 'country' in this submission incorporates all aspects of Aboriginal and Torres Strait Islander Peoples relationship with their lands, freshwater sources and sea country.

Finally, I would like to take this opportunity to wish you all the best in your consideration of the submissions you will receive through this review. If the IAC can be of any further assistance please do not hesitate to contact us through our Secretariat.

Kind regards,

**Melissa George**  
**Chairperson**  
**Indigenous Advisory Committee**





# 1 Recommendations

## List of Recommendations

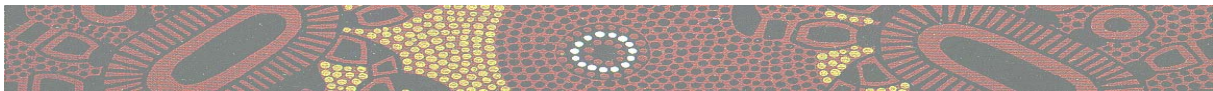
### 3.1.2 Interim Report

The IAC is of the view that the ultimate aims of this process will be enhanced through the presentation of an interim report that will facilitate further discussion and negotiation in the design of the evolving legal framework.

### 3.2.1 Review Proposals, Clarifying the purposes of the legislation

- Recognise the importance of land and water in all its spiritual and physical manifestations to Indigenous Australians and their right to protect all interests including traditional knowledge and access to natural resources
- Acknowledge that Indigenous Australians are the guardians of their traditional laws and customs with rights and responsibilities for the protection of their customary objects and places
- Provide a guiding framework for Indigenous Australians to be more effectively involved in, and add value to the decision making processes related to local and regional planning and conservation activities
- Provide an overarching and nationally consistent framework for the reservation and management of Indigenous Protected Areas
- Establish formal procedures for the resolution of disputes arising out of the proposed or actual destruction of traditional areas and objects
- Establish a dedicated competent authority to promote fairness, transparency and efficiency with a desire to minimise the costs associated for all involved
- Facilitate the repatriation, housing and transportation of all Indigenous remains and objects (not intended for sale) to the rightful custodians in a means that is in accordance with their customary laws and traditions. In doing so the ATSIHP Act needs to effectively guide and assist the work of the recently established Repatriation Advisory Committee established within FaHCSIA





### 3.2.2 Review Proposals Making terminology consistent with the purposes

The IAC would caution against the adoption of the term 'Indigenous' to define Aboriginal and Torres Strait Islander peoples. The term 'Indigenous' is commonly used and applied at the international level, but is not generally seen as being acceptable as a common use term. The IAC prefers the use of the term 'Aboriginal peoples and Torres Strait Islanders'

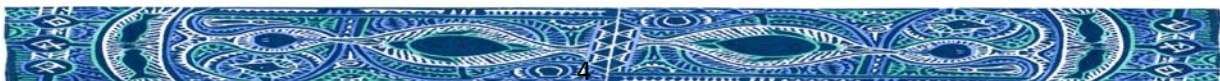
### 3. Promoting effective laws through accreditation (3)

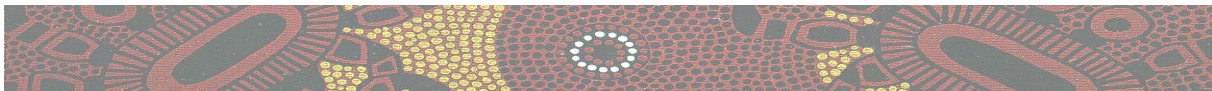
- Effective Aboriginal and Torres Strait Islander participation in decision making processes
- Respect for the importance and value of Aboriginal and Torres Strait Islander heritage protection
- Regional Aboriginal and Torres Strait Islander heritage surveys and plans
- Incentive for all stakeholders to embrace the changes required thus ensuring ongoing compliance with the system resulting in a reduction to the amount of unnecessary damage to heritage objects and places

### 5. Traditional Custodians

Rather than necessarily restricting who can apply for heritage protection it may be more appropriate and effective to require that the application has the full endorsement of the traditional custodians. This will provide a more effective means of building capacity both within traditional owner groups and their representative or partner bodies.

### 6. Indigenous land use agreements (ILUA)





As a matter of principle applying for heritage protection over areas that are subject to a recognised ILUA should not be permitted unless it is applied for by the ‘traditional custodians’ or their authorised representative or partner body. To enable people who are not recognised traditional owners to apply for heritage protection over areas that are subject to an ILUA only serves to undermine the integrity of ILUAs by making ‘traditional custodians’ rights potentially subservient to the views of others.

#### 7. Secret sacred objects and remains

As part of this approach it would be advisable that some type of hotline service be established, whereby witnesses of certain activities can call in to anonymously report where objects and places have been discovered and/or damaged.

#### 8. Treatment of secret sacred objects and emails

Legislate to prohibit the sales of cultural and moveable heritage items and establish an appropriate set of standards for accreditation.

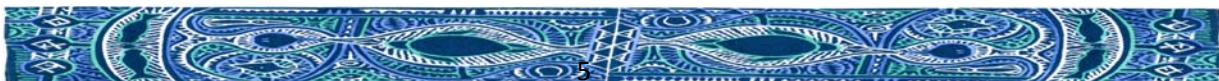
#### 9. Application process

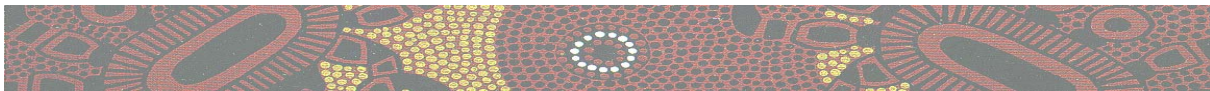
The circumstances where applications might not proceed are reasonable, in so far as a state or territory can not be accredited for a system whereby the standards are lower than is required if an applicant were able to submit directly to the Commonwealth. The threshold for accrediting state and territory systems has to be based on how those systems will actually perform, not on the basis of how they intend to perform

#### 10. Use of Conferences

The proposal to use conferences as a means of providing information about the handling of applications and seeking to resolve contested issues and interests is in principle a sound means of providing for fairness in the application process. It is the view of the IAC that such conferences should be afforded to all stakeholders at the earliest practical opportunity within the application process. This list of stakeholders identified who need to be consulted through conference provides the appropriate balance of interest groups who have “legal rights and interests”

#### 11. Protecting sensitive information





Establish ethical guidelines (or adapt appropriate existing ones) for protection of sensitive information and have an Advisory body on significance to administer and apply ethical guidelines to deal with the range of issues

## 12. Interim Protection

Given the potential implications of any decision to authorise an emergency or interim protection order the IAC respects that these are decisions that can not be made lightly, yet their very nature requires the quickest possible reasonable assessments. It is therefore appropriate that an officer of the status of Secretary of the Minister's department have the delegated authority to make such decision. Taking into consideration the need to process such applications quickly it is also appropriate that the Secretary have the capacity to delegate the decision making authority to another officer or entity

## 13. Longer-term protection

The issues raised in this proposal give rise to some potentially concerning developments arising out of the reforms to the ATSIHP Act. Rather than consider the implications of providing long-term protection against the backdrop of other stakeholders competing demands it should be required that the Minister take value of long-term protection in accordance with the 'national interest'. Simply basing decisions to provide long-term protection on the "consequences for other persons and the community" is offensive to Aboriginal and Torres Strait Islander peoples

## 14. Penalties and Enforcement

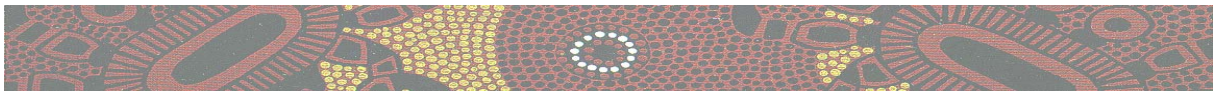
Other factors which should guide the potential revoking of long-term protection orders include:

- Establishing a category of protection for those exceptional circumstances where the heritage values are of such significance and importance that they justify permanent protection that can only be revoked by an act of parliament;
- Having in place a competent Indigenous authority that is responsible for advising the Minister about revoking long-term protection orders

## 15. Reviewing the effectiveness of the Act

It is imperative that all aspects of the accreditation are reviewed every three years





## 2 Background and Context

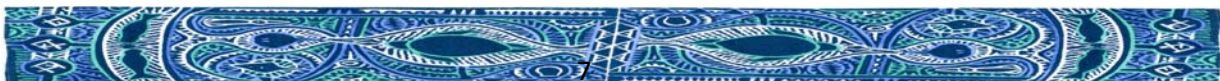
### 2.1 Indivisibility of 'country' from Aboriginal and Torres Strait Islander culture and heritage

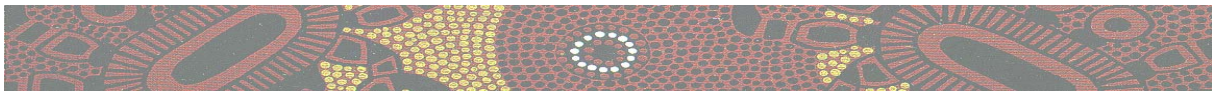
The indivisibility of country from Aboriginal and Torres Strait Islander peoples' cultures and heritage is recognised, but not so well understood by most other Australians. There are those in the broader Australian society who dismiss the critical value and importance of culture and heritage to Aboriginal and Torres Strait Islander peoples. Sadly this is generally reflected in the protection mechanisms provided at the commonwealth, state and territory levels.

While there is a growing recognition among many Australians, often demonstrated through acknowledgements of country, this has regrettably not led other Australians to appreciate the true worth and value of Aboriginal and Torres Strait Islander peoples cultures and heritage on a broad enough scale. Hence we have a national system of Aboriginal and Torres Strait Islander heritage protection that provides no certainty for any stakeholder and exacerbates rather than alleviates the problems associated with the legal and policy regimes established in the states and territories.

It is therefore not difficult to understand why this situation has arisen given that the ATSIHP Act was not intended to protect archaeological or historical heritage that is not particularly significant in accordance with Indigenous traditions. It only was intended as an interim measure to be replaced by 1986 under a national scheme for Aboriginal land rights that was then being negotiated with the states, but which did not eventuate.

While there has been a history of attempts to reform this legislation since 1995 this has also never eventuated. This led the Federal member for Gordon, Brendan O'Connor MHR, on 27 November 2006, in response to the second reading speech the Aboriginal and Torres Strait Islander Heritage Protection Amendment Bill 2005, to succinctly state that:





It is a piece of legislation with a gestation period that has been sufficiently long to have produced several elephants, but it does not produce even a mouse.<sup>1</sup>

The Aboriginal and Torres Strait Islander Heritage Protection Act (ATSIHP Act) should not simply be a tool to “provide strong protection for traditional areas and objects, in the form of penalties that help to prevent or remedy damage”<sup>2</sup>. The ATSIHP Act can be utilised to enhance the role of Aboriginal and Torres Strait Islander peoples generally across State and Commonwealth planning and land and sea management regimes. Such an aim can provide for a range of benefits while at the same time providing recognition of the Aboriginal and Torres Strait Islander people’s whose country is being reshaped to support the ‘national interest’.

## 2.2 Linkages with other relevant Legislative Frameworks

While the discussion paper prepared for this review often refers to the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), there are no options considered for how these two pieces of legislation could work together more effectively. The interim report into the review of the EPBC Act noted that submissions suggested that the review of the EPBC Act should take a broad view of the legislation and its role in the Commonwealth’s approach to Australia’s heritage. In particular, the report noted that the heritage provisions of the Act interact with the *Australian Heritage Council Act 2003*, the *Historic Shipwrecks Act 1976*, the *Protection of Movable Cultural Heritage Act 1986* and the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.<sup>3</sup>

There are a number of options available to merge these two pieces of legislation. One option could be to make ‘traditional Aboriginal’ areas or areas that are ‘significant in accordance with Aboriginal tradition’ a matter of national environmental significance (NES). This would require proponents to meet with traditional owners at an early stage in the development process to identify any areas that may be impacted on by the development. As with the consideration of impacts on other matters of NES this process would allow:

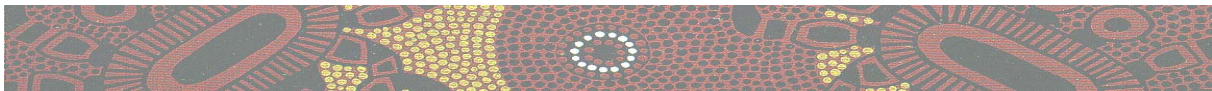
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<sup>1</sup> <http://www.brendanoconnor.com.au/speeches/november-2006/aboriginal-and-torres-strait-islander-heritage-protection-amendment-bill-2005/>

<sup>2</sup> Australian Government, Department of the Environment, Water, Heritage and the Arts, Indigenous Heritage Law Reform, For Discussion, August 2009 (The Hon Peter Garrett AM MP)

<sup>3</sup> 11.1





- The proponent and traditional owners to assess the significance of the area and identify ways to minimise potential impacts.
- A variety of assessment processes to suit circumstances of the action, including the use of bilateral agreements and strategic assessments to streamline the assessment and approval process.
- The ability to negotiate conservation agreements.
- Strong compliance and enforcement process.

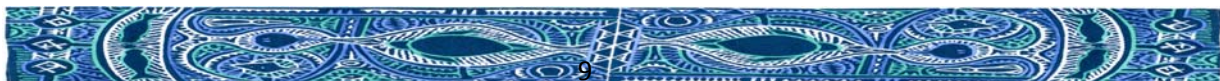
The merging of these two pieces of legislation would also stop the current circumstance where one Minister considers the same development under two separate pieces of legislation. This situation has created the potential for a Minister to approve a development under the EPBC Act and then stop the same development by the making of a declaration or 'protection order' under the existing, and potentially the reformed, ATSIHP Act.

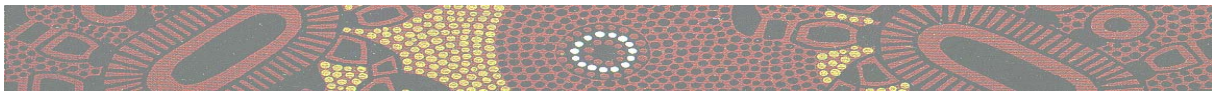
A number of applications have been made under the current ATSIHP Act to protect areas from actions that had been referred and/or approve under the EPBC Act. This includes the Pluto development on Site B of the Burrup Peninsula (EPBC 2006/2968), the joint Commonwealth and State funded upgrade of the pacific highway on Alum Mountain at Bulahdelah (2003/1174), the Roe Highway extension in Western Australia (EPBC 2009/5031) the Wodonga rail bypass (EPBC 2001/372) and the Iluka sand mine development at Kulwin in Victoria (EPBC 2004/1636)

Another option for reforming the ATSIHP Act would be make Indigenous heritage protection consistent across all states and territories. Until 2006 the primary legislation for the protection of Indigenous heritage in Victoria was Commonwealth legislation (Part IIA of the ATSIHP Act). The responsibility for administrating this section of the Act was delegated to the Victorian government. This approach could be used to make Indigenous heritage protection consistent across all states and territories. The Commonwealth could pass one law providing for the protection of Indigenous heritage (archaeological and traditional) and the responsibility for administrating the legislation could be delegated to states or territories where they agree.

### **2.3 Links to Native Title**

Although the recognition of native title acknowledged the traditions and customs of Indigenous people, it did not provide a comprehensive system for the protection of Indigenous culture which would include Indigenous heritage. The 2000 report into Native Title noted that '...when Indigenous peoples have complained about the inadequacies of the NTA to protect Indigenous heritage, the response has been that heritage protection should





be achieved through specifically targeted legislation, rather than through a comprehensive land rights protection scheme.<sup>4</sup>

This report also states that the capacity of the *Native Title Act 1993* to protect Indigenous culture is limited in three ways.

- The extinguishment of native title through the confirmation provisions in Division 2B of Part 2 of the amended NTA. The total and permanent extinguishment of native title through the confirmation provisions of the amended NTA (Division 2B of Part 2) means that a significant area of the traditional lands of Indigenous people cannot be protected under the concept of native title.
- The denial and erosion of procedural rights by the amendments to the NTA. The amendments to the NTA have substantially reduced the procedural rights available to native title holders in relation to a broad range of future acts now covered by Division 3 of Part 2; and
- The reliance in the NTA upon inadequate protection provided in commonwealth, state and territory heritage legislation. Where the protection of Indigenous heritage and native title coincide under the NTA the protection of Indigenous heritage is diverted to inadequate commonwealth, state and territory Indigenous heritage legislation. In addition the NTA provides no procedural rights to native title holders in relation to a range of future primary production activities and acts giving effect to the renewal, re-grant, re-making or extension of certain leases, licences, permits or authorities. The effect of this denial of procedural rights is extensive, covering the agricultural land of Australia where native title continues to exist. In these instances, the protection of Indigenous heritage is left exclusively to commonwealth, state and territory legislative regimes of Indigenous heritage protection.

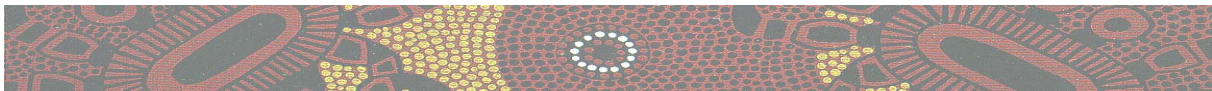
As a result there are dangers in relying on native title processes, such as Indigenous Land Use Agreements, as the basis to protect heritage. In addition a five-year detailed examination of 45 contracts by Griffith University academic Ciaran O'Faircheallaigh has found almost all agreements promised Aboriginal people some ability to control environmental damage to their traditional lands done in the process of mining, yet that rarely happened and a large number of agreements offered little say in cultural heritage protection.<sup>5</sup>

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<sup>4</sup> Jonas 2000 native title report

<sup>5</sup> <http://www.minesandcommunities.org/article.php?a=118>





In addition ILUAs often include potential future activities that a proponent may undertake. Where the right to negotiate applies, negotiations in good faith must occur before the future act can be done, however if no agreement is reached an application can be made to the National Native Title Tribunal to determine whether the act can be done and if so under what, if any, conditions (Subdivision P Division 3 Part 2 NTA).

Ciaran O’Faircheallaigh states that:

While Aboriginal communities are increasingly entering negotiations with mining companies and with State agencies involved in the project approval process, it should be stressed that their decision to do so need not reflect either support for mining or an expectation that negotiations will yield sustainable benefits. It may just as easily result from a desire to obtain from a project which Aboriginal people would not prefer to proceed with, but which they can not stop...<sup>6</sup>

As the former Aboriginal and Torres Strait Islander Social Justice Commissioner stated in 2000:

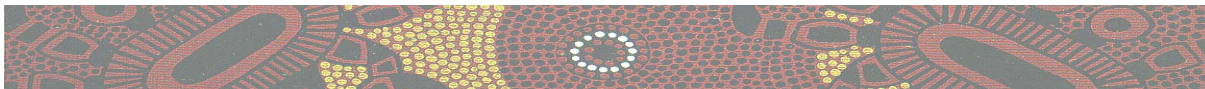
The recognition of native title is an opportunity to re-frame the protection of Indigenous heritage within the broader framework of a human right to enjoy one's culture. However, developments within the common law of native title, and amendments to the Native Title Act 1993 (NTA) have placed heritage protection outside of this broader frame. The bundle of rights approach to native title has meant that contemporary practices of protecting and respecting significant or sacred sites are considered insufficiently connected to the actual practices of the original inhabitants to be included in a native title determination. In addition, the amendments to the NTA have significantly reduced the protection available to Indigenous heritage and the right of native title holders to participate in decisions about protecting their cultural heritage.<sup>7</sup>

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<sup>6</sup> C. O’Faircheallaigh 1995, *Negotiations between Mining Companies and Aboriginal Communities: process and Structure*, CAEPR Discussion Paper No. 86

<sup>7</sup> Dr William Jonas AM, Aboriginal and Torres Strait Islander Social Justice Commissioner, 2000 Native Title Report [http://www.hreoc.gov.au/social\\_Justice/nt\\_report/ntreport00/chap4.html](http://www.hreoc.gov.au/social_Justice/nt_report/ntreport00/chap4.html)





## 2.4 Rationale for Commonwealth Aboriginal and Torres Strait Islander Heritage Protection

### 2.4.1 Purposes of the ATSIHP Act

It can be well argued that the ATSIHP Act has not been effective in meeting its purpose, but it is the Act's very 'purpose' that is at the core of the problem. Having been adopted as an interim measure<sup>8</sup> 25 years ago the ATSIHP Act has continued to provide a national legal framework for Aboriginal and Torres Strait Islander heritage protection with minimal change and nothing of any significance for Indigenous Australians.

State and Territory laws governing Aboriginal and Torres Strait Islander people's heritage are generally inadequate. At its introduction the ATSIHP Act was not challenging the legal paradigm of the time, but rather reinforcing what were and continue to be expensive and discriminatory planning and conservation regimes. The one exception is that this Act at least provided the first recognition of the need to protect Indigenous cultural heritage for reasons other than scientific or archaeological research.

In order to achieve any meaningful purpose the ATSIHP Act has to enable Aboriginal and Torres Strait Islander people to be appropriately involved in the planning and land use decisions that takes place on their country.

### 2.4.2 Assessments of the ATSIHP Act

The most substantive review of the ATSIHP Act to date, undertaken by The Hon. Elizabeth Evatt, AC, identified a number of key areas for reform, while also acknowledging some of benefits that have arisen. Recognising that the number of declarations made under the Act was at that time very small Dr Evatt also pointed out that this is not in itself a measure of the performance of the ATSIHP Act<sup>9</sup>.

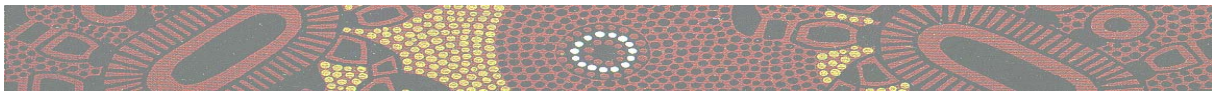
While the IAC recognises the benefits arising out of the Commonwealth having the capacity to intervene in what are largely State and Territory matters this has not resulted in a sufficient number of meaningful outcomes. The ATSIHP Act needs to operate not as a statute of last resort, but one that provides 'blanket' coverage of Aboriginal and Torres Strait Islander people's heritage.

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<sup>8</sup> The Hon Elizabeth Evatt AC, Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984

<sup>9</sup> The Hon Elizabeth Evatt AC, Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984, p.11





Extensive assessments and analysis of the ATSIHP Act are still very much relevant to this process and their findings provide considerable guidance in the view of the IAC as to the types of reforms that are required.

## **2.5 Evaluation of Effectiveness**

The ineffectiveness of the current operation of the ATSIHP Act is fairly well understood by all stakeholders largely because it does not serve the interests of any stakeholders.

### **2.5.1 Key Factors Causing Ineffectiveness**

The following provides a list of the key factors that cause the inefficiency in the operation of the ATSIHP Act:

#### **(1) The complexity of the application process**

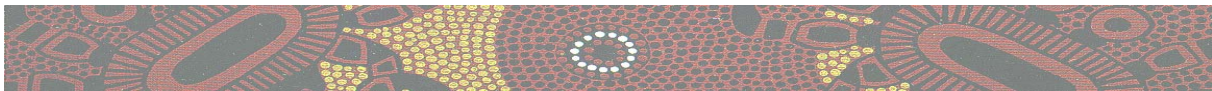
The application process is extremely complex, is one that takes too long and for Aboriginal and Torres Strait Islander peoples and rarely delivers a meaningful outcome. The efforts required to apply for protection under the ATSIHP Act are difficult to justify given that they generally result in no or unsatisfactory outcomes for Indigenous peoples.

The complexity of the process is exacerbated by ambiguous terminology which provides a generous entre into applying under the Act thus increasing the number of applications made. The Minister, in making determinations that require an interpretation of certain terms therefore takes further time to consider, thus presenting a blockage in the system. It appears that in making decisions successive ministers have not been so concerned about heritage significance, but rather, not to make a decision that will create a precedent that will encourage more applications or give rise to a higher level of expectation from Aboriginal and Torres Strait Islander peoples.

This situation highlights that the complexity within the system is not only experienced by those applying, but also others involved in the decision making processes.

#### **(2) Lack of interface with planning and conservation regimes**





The ATSIHP Act does not operate in any coordinated way with any national, state and local planning and conservation regimes until it gets to the point of emerging potential crisis. The ATSIHP Act needs to provide a foundation for Aboriginal and Torres Strait Islander heritage protection in concert with the other planning and conservation regimes. In doing so the ATSIHP Act needs to plug the gaps in the existing planning and conservation regimes which overall provide minimal protection for Aboriginal and Torres Strait Islander culture and heritage.

### **(3) Scope of the decision making powers within the ATSIHP Act**

The ATSIHP Act provides the Minister with a broad range of powers that he/she may or may not exercise, while providing very little direction in how those powers are to be used. This presents an unenviable task for any Minister on top of what is an already very demanding role.

The Minister should not necessarily be removed from having decision making powers however, as recommended in the Evatt review the Minister should not be responsible for making any assessments relating to 'significance'. For this reason Ministers need to only be a part of a formal process where the assessment of significance is undertaken by others. Unambiguous guidelines also need to be put in place any decision making process under the ATSIHP Act as well as ensuring that similar standards are established in each of the States and Territories.

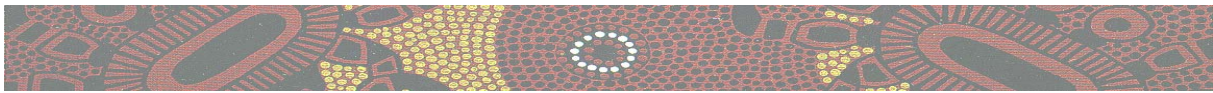
### **(4) No formal process for negotiation between stakeholders**

As there is no process for negotiation between stakeholders the minister is then exposed to having to consider the related competing interests against the backdrop of the 'national interest'. A formal negotiation process enables, in so far as is possible, the opportunity to convert many of the competing interests into agreements before they have to be addressed by any decision making authority.

Where there is an understanding by stakeholders that there is going to be a requirement to negotiate they will be inclined to seek out those potential competing stakeholder to attempt to resolve their differences in advance.

## **2.5.2 Productivity Commission – Overcoming Indigenous Disadvantage**

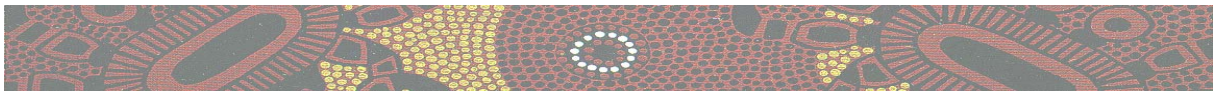




While the Productivity Commission collects and publishes comprehensive data on the socio-economic status of Aboriginal and Torres Strait Islander peoples it provides little analysis of the importance and value of culture and heritage. The assessments of the standards of protection of Aboriginal and Torres Strait Islander culture and heritage is generally provided through inefficient and ad-hoc systems maintained by State and Territory agencies.

Empirical evidence is emerging which demonstrates the socio-economic advantages arising out of Aboriginal and Torres Strait Islander peoples living and working on country. This facilitates people's access to their culture and their heritage sites and places, which in turn results in healthier, happier and more engaged people. It is imperative that data related to the protection of heritage and culture be captured and used for future policy initiatives.





## 3 Review Process and Proposals

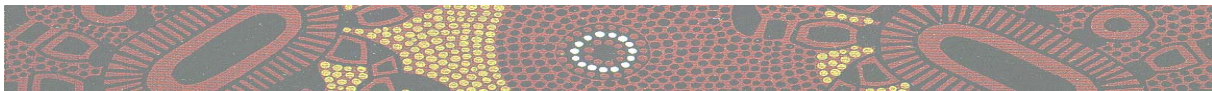
### 3.1 Review Process

#### 3.1.1 Clear Statement of Government Intentions

The presentation of ‘Proposals’ as opposed to ‘terms of reference’ for this review indicates that the government has fairly clear intentions regarding the direction that the ATSIHP Act reforms will take. The IAC respects the value of having such potential directions discussed through this format, however, there are a number of highly pertinent matters that need to be considered through this review that do not directly associate with the ‘Proposals’.

It is therefore understandable that many, including members of the IAC, are disappointed that the discussion paper only offers one approach to the reform of the legislation largely through an accreditation mechanism. Given the failure of states and territories to provide effective protection of Aboriginal and Torres Strait Islander heritage many see no good reason to question why they should retain any responsibility at all.





### 3.1.2 Interim Report

The IAC is of the view that the ultimate aims of this process will be enhanced through the presentation of an interim report that will facilitate further discussion and negotiation in the design and eventual implementation of the evolving legal framework.

## 3.2 Review Proposals

### (1) Clarifying the purposes of the legislation

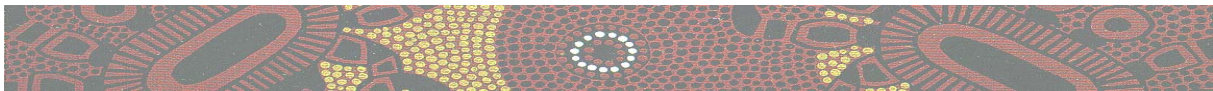
In order to achieve effective Aboriginal and Torres Strait Islander heritage reform it is critical that the ATSIHP Act be used as a means to 'guide' and 'direct' States and Territories as opposed to simply "support other processes that consider the impacts on Indigenous traditional areas and objects"<sup>10</sup>. Utilising the proposed purposes of the legislation outlined on page 11 of the Discussion Paper the IAC puts forward this recommended list of purposes for inclusion in the revised ATSIHP Act:

- Recognise the importance of land and water in all its spiritual and physical manifestations to Indigenous Australians and their right to protect all interests including traditional knowledge and access to natural resources
- Acknowledge that Indigenous Australians are the guardians of their traditional laws and customs with rights and responsibilities for the protection of their customary objects and places.
- Provide a guiding framework for Indigenous Australians to be more effectively involved in, and add value to the decision making processes related to local and regional planning and conservation activities.
- Provide an overarching and nationally consistent framework for the reservation and management of Indigenous Protected Areas.
- Establish formal procedures for the resolution of disputes arising out of the proposed or actual destruction of traditional areas and objects
- Establish a dedicated competent authority to promote fairness, transparency and efficiency with a desire to minimise the costs associated for all involved.

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<sup>10</sup> Australian Government, Department of Environment, Water, Heritage and the Arts, Indigenous Heritage Law Reform, For Discussion, August 2009, p. 11





- Facilitate the repatriation, housing and transportation of all Indigenous remains and objects (not intended for sale) to the rightful custodians in a means that is in accordance with their customary laws and traditions. In doing so the ATSIHP Act needs to effectively guide and assist the work of the recently established Repatriation Advisory Committee established within FaHCSIA.

## **(2) Making terminology consistent with the purposes**

There are a number of terms arising out of the ATSIHP Act, as well as other related statutes that requires clear thought in their adoption so that there is common understanding about their application. The discussion paper suggests a series of new definitions of what the Act is protecting including a definition of ‘traditional area’. The discussion paper suggestions that traditional area means an area that meets both of the following criteria:

- The area has a use or function under traditional laws and customs, or is a subject of a narrative that is part of traditional laws and customs.
- The area is protected or regulated under traditional laws and customs.

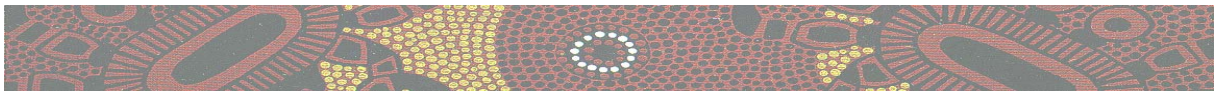
While recognising the ambiguity of ‘particular significance’ in the current legislation basing protection on ‘traditional laws and customs’ may not be an improvement on the current situation. This definition draws on the native title notion of ‘continuing connection to land’, and does not allow for areas or objects which *formerly* had uses or functions under traditional laws and customs.

In addition, places that may meet this definition may not have traditional laws or customs that regulate the place. For example while rock art sites may represent traditional narrative, there are not always traditional regulations associated with this type of place.

While Indigenous people may wish to protect these places, it is difficult to provide evidence that there is a tradition associated with the protection of places that has been handed down from generation to generation. This is generally because Indigenous people have only recently needed to seek the protection of these types of places due the threats arising from development activities.

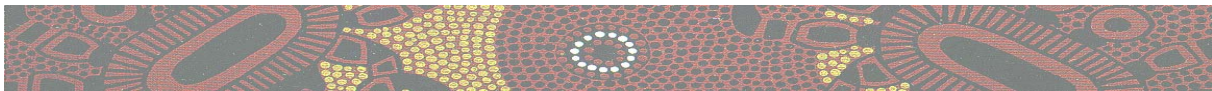
The definition will still require evidence that the traditional laws and customs have been handed down from generation to generation – this is one of the major stumbling





blocks of the current legislation – the traditions may not have been recorded, or may have only been known to a small group of people within a community.





The proposed new definitions<sup>11</sup> do not give rise to a feeling that more Aboriginal and Torres Strait Islander protected areas will result through any reforms that adopt these changes. Notwithstanding the incorporation of the term ‘or is a subject of a narrative that is part of traditional laws and customs’. Further advice is required on the value of this term being included in any definitions.

As much as terminology has the capacity to offend, it is not simply how terms are defined that is always the problem. It is how they are applied to the decisions that are required to be made under this legal framework. Given the bias in the current system towards not protecting Aboriginal heritage places and objects it stands to reason that critical terms will be defined in a way that is most convenient to the decision-making authority. This paradigm must be challenged in this review

### **(3) Promoting effective laws through accreditation**

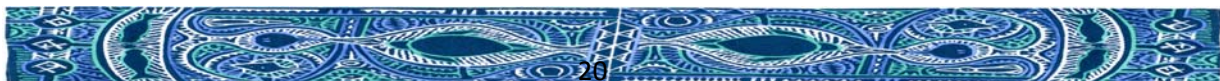
Taking into consideration the range of stakeholders and the existing legal responsibilities for Aboriginal and Torres Strait Islander heritage the IAC appreciates the challenges to be faced in reforming the ATSIHP Act. Hence it is understandable that given the current legal arrangements ‘accreditation’ of State and Territory regimes is seen as practical and cost-effective arrangement.

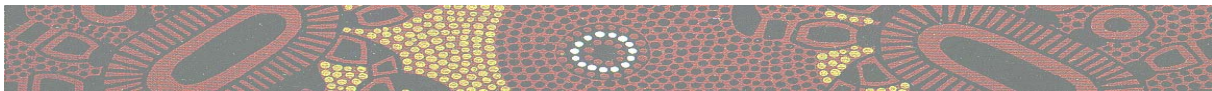
Could the proposed method of accreditation be improved? The proposed model of accreditation is still lacking in too little detail to be able to form an opinion on its suitability. If such a model is to be developed and implemented it must contain the following elements:

- Effective Aboriginal and Torres Strait Islander participation in decision making processes;
- Respect for the importance and value of Aboriginal and Torres Strait Islander heritage protection;
- Regional Aboriginal and Torres Strait Islander heritage surveys and plans; and
- Incentive for all stakeholders to embrace the changes required thus ensuring ongoing compliance with the system resulting in a reduction to the amount of unnecessary damage to heritage objects and places.

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<sup>11</sup> Australian Government, Department of Environment, Water, Heritage and the Arts, Indigenous Heritage Law Reform, For Discussion, August 2009, p. 14





While it may arise outside of the domain of this review there is also a question as to the impact that an ‘accreditation’ process may impose on the States and Territories costs associated with planning, conservation and heritage protection. Where there is a rise in costs that is not covered through an adequate revenue stream it is likely to impact on both the quality and scope of protection that is provided for Aboriginal and Torres Strait Islander heritage at the state and territory level.

#### **(4) Specifying the standards for effective protection**

Provided the standards give sufficient protection for Aboriginal and Torres Strait Islander heritage it is the view of the IAC that they should be established and implemented. Standards can be particularly useful where they lead to consistency in the state and territory legal and policy regimes for Aboriginal and Torres Strait Islander heritage protection.

The ‘requirements’<sup>12</sup> of the proposed standards at face value provide a sound basis for the system, albeit with the need for some technical adjustments, particularly with respect to “consultation”. With respect to the proposed standards starting on page 18 of the Discussion Paper, it is the IAC’s view that:

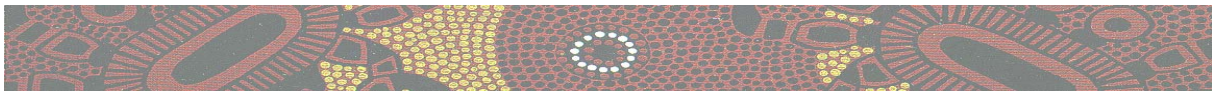
1. “Comprehensive protection” being provided on the basis that “adverse impacts ... must be avoided” is not likely to deliver beneficial outcomes for Aboriginal peoples and Torres Strait Islanders. States and Territories have in place existing legislation that enables many developments that are deemed critically important<sup>13</sup>. The potential to achieve a greater level of national consistency is desirable, but not if it does not deliver better assurances to prevent damage and harm to objects and places.

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<sup>12</sup> Australian Government, Department of Environment, Water, Heritage and the Arts, Indigenous Heritage Law Reform, For Discussion, August 2009, p. 17

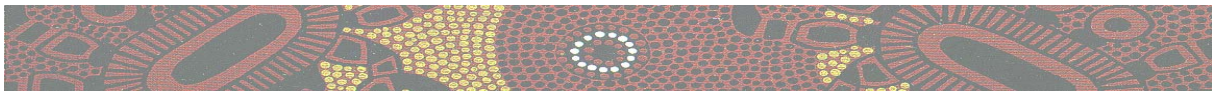
<sup>13</sup> See Part 3 A, Environmental Planning and Assessment Act 1979 (NSW)





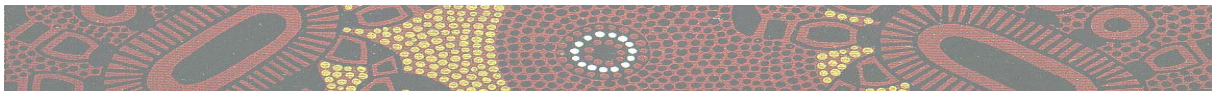
2. The IAC accepts that in some cases there will be a requirement to destroy certain heritage objects and places. It is however, the obligation of the State to ensure adequate protection of Aboriginal and Torres Strait Islander heritage objects and places, given that it is the government (State and Federal) who holds their ownership in the name of the Crown. Any decisions to destroy Aboriginal and Torres Strait Islander heritage places and objects must be made with the prior informed consent of the 'traditional owners'.
3. The use of conditions – particularly where they can be conciliated rather than arbitrated – is a useful means of mitigating any damage or destruction that might be done to an Aboriginal or Torres Strait Islander heritage place or object. Engagement with Aboriginal and Torres Strait Islander peoples by other stakeholders needs to be up front and a part of the overall decision making process.
4. The power to 'call in' currently exists in some jurisdictions. While it can provide for good mutual outcomes, generally achieved through negotiation, many development activities still fall through the cracks. A Minister can only "call in" a proponent where a matter is brought to their attention. By then damage or complete destruction has already occurred.
5. Where personal remains are discovered it should be standard practice that this finding is reported immediately to the police. It is then that the police should engage with the appropriate Indigenous authority after they have determined that the remains are not a crime scene. It is then for an Indigenous authority to engage the other relevant authorities and experts.
6. The IAC endorses the view that State and Territory regulators must have the authority to stop unapproved activity. The handing down of significant penalties and requiring that some form of restitution be paid are also useful strategies to ensure a fair degree of compliance. The best means of ensuring compliance, however, is to encourage the earliest possible contact between the proponent and the Indigenous custodians.
7. Without a strategic direction towards agreement making as opposed to arbitration it is the view of the IAC that the proposed reforms to the ATSIHP Act will ever be realised. Notwithstanding the need to ensure that Aboriginal and Torres Strait Islander custodians are suitably resourced to participate in the required negotiations.





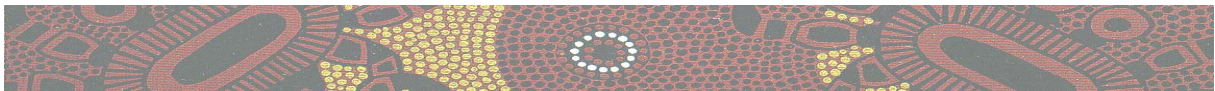
8. It will be important to insure that Aboriginal and Torres Strait Islander custodians are duly informed about the nature of the agreements that they are negotiating. It will also be essential to ensure that plans of management are directly linked to agreements which clearly identify the objects and places that are subject to damage or destruction.
9. It is accepted that at some point there has to be an arbiter where agreements cannot be reached. This does not mean, however, that the arbiter should be the Minister. It is the view of the IAC that the point of arbitration must include one or more Indigenous representatives who operate alongside other independent assessors. Such an assessment body can then either have the option of ratifying their own decisions or forwarding them onto the Minister.
10. The best means of creating efficiencies for proponents is to require the engagement of Aboriginal and Torres Strait Islander custodians at the earliest stages of the development application process. This can either be directly through the proponents or indirectly through the relevant regulatory authority. It is important to note that many “inefficiencies” arise out of proponents disregard for Aboriginal and Torres Strait Islander heritage values and interests in the areas they are planning to develop.
11. Subject to possible changes to terminology the IAC is generally satisfied with the ‘requirement to consider impacts on traditional areas and objects. This should actually provide for the 1<sup>st</sup> standard given the tone that it sets for the process that then follows.
12. The principle and practice of having an independent review process is certainly appropriate and should be applied to an Aboriginal and Torres Strait Islander heritage protection regime. Concern arises for the IAC, however, with respect to the “details about the traditional laws and customs that apply to the area or object” required through any assessment process. At the very least, clear ethical guidelines will be required to ensure the due protection of any ‘details’ provided.





13. It is the view of the IAC that 'traditional custodians' have the right to negotiate over any proposed activities that will impact on their lands, heritage places and objects. While the need to consult may give rise to an expectation that Aboriginal and Torres Strait Islander people will have input into a decision making process that is rarely the case. Establishing a requirement to negotiate places Aboriginal and Torres Strait Islander traditional custodians rightfully at the same table as the proponents.
14. The IAC endorses the requirement for 'respect for traditions of secrecy' and understands that in certain instances it is a requirement for there to be some limited disclosure of culturally sensitive information. In all instances cultural sensitivities must be observed and where ever possible offending Aboriginal and Torres Strait Islander laws and customs must be avoided.
15. The 'requirement to consider other matters' is in the view of the IAC consistent with standard governance principles and practices taking into consideration the context in which they are being applied. Clarification on how some matters will be considered will be necessary, but they otherwise provide a sound general basis to matters to be considered.
16. The 'requirement to consider Australian Government views' does give rise to some concerns for the IAC and is something that needs to be carefully facilitated through the ATSIHP Act. Ideally, the views of the Australian Government should be made available through a statement of government policy prior to the receipt of any applications. Where the Australian Government presents a view after an application has been received it should be required that any stakeholder who has lobbied the government on the application should be publicly identified. If this cannot be facilitated the Australian Government's views should be disregarded or the relevant Minister(s) should be completely removed from the decision making or any review or appeals processes that might be established.



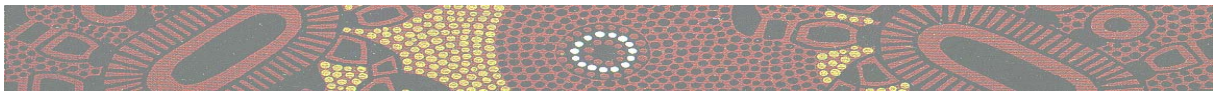


This matter importantly raises the question as to how ‘significance’ in relation to any application for protection of an Indigenous heritage place and/or object is to be assessed. It is the view of the IAC that this is an assessment that the Minister cannot make in isolation and we therefore propose that an expert body be established to formally advise the Minister regarding the significance attached to any application for protection. Such an expert body should include among its membership at least two members of the IAC and one Indigenous member of the Australian Heritage Commission.

17. The ‘requirements for giving approval’ cannot be endorsed by the IAC in their current form. Environment and planning legislation as it exists in some States and Territories already deems that “the cultural, social, economic and environmental welfare of the community outweighs the imperative to avoid adverse impacts. As a result approval processes for activities that generally cause most damage to places and objects have been fine tuned to the point of completely disregarding any heritage values.
18. The IAC fully endorses the requirement that records be appropriately maintained. This will require the development of strict rules that should not preclude suitable Aboriginal and Torres Strait Islander organisations from being a repository for the records, subject to meeting certain requirements.
19. There is no concern with the requirement to make records available for certain purposes. There do, however, have to be strict rules regarding how any records can be accessed and used.
20. The IAC accepts the requirement for all stakeholders to have the right to seek legal review on all decisions that are made. It has to be the aim of the system to minimise the occurrence of the courts being used to resolve matters concerning the protection of Aboriginal and Torres Strait Islander heritage. Access to the courts is, however, a fundamental right of citizenship that must be respected.

#### **(5) Traditional Custodians**





The proposal to restrict applicants who are not “legally recognised traditional custodians” from applying for Commonwealth heritage protection is more consistent with the requirements of traditional law and custom. It is appropriate for the parliament to amend the ATSIHP Act so that it places restrictions on the people who can apply for heritage protection. Given current circumstances regarding the legal identification and recognition of ‘traditional custodians’ in a number of jurisdictions it is imperative that the processes whereby such decisions are made are incorporated into the proposed standards for accreditation.

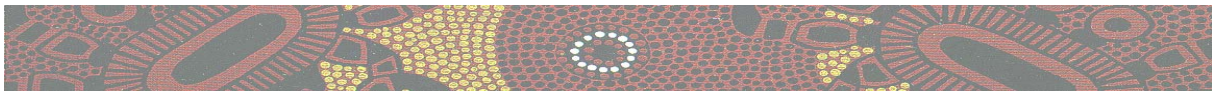
The processes for the identification and recognition of ‘traditional custodians’ by Aboriginal and Torres Strait Islander peoples ourselves varies across the entire continent. In many parts some groups have been able to retain a very strong, ongoing connection to their country and culture that is the source of identifying ‘traditional custodians’ before there is any requirement for administrative ratification. For many other groups ‘traditional custodians’ are identified and recognised through the administrative process. If the ATSIHP Act reforms are to succeed they need to address this anomaly to ensure that all groups meet their responsibility to identify their ‘traditional custodians’ and future representatives.

Following on from the need to bring about more consistency in the way in which Indigenous groups identify their traditional custodians, the ATSIHP Act reforms must also address the problems with the legal and administrative processes that recognise traditional custodians. Put simply, existing legal processes for recognising ‘traditional custodians’ are inefficient, ineffective and often provide for a very limited recognition of rights and responsibilities.

Critically, the ATSIHP Act must ensure that there are appropriate mechanisms to resolve disputes between Aboriginal and Torres Strait Islander peoples regarding ‘traditional custodianship’. In many situations this can simply involve a means of ratifying and utilising the customary laws that are in place and practiced today. In other situations some form of conciliation and arbitration will be required.

It is important in the view of the IAC that this review, when considering the matter of ‘traditional custodianship’, take into account the historical circumstances that have had a devastating impact on the capacity of many groups to practice their culture to the same extent as other groups. While the IAC does not advocate people who are not recognised ‘traditional custodians’ claiming to have the right to speak for country there should be a means of giving limited recognition and rights to people who can respectfully speak about country.





Rather than necessarily restricting who can apply for heritage protection it may be more appropriate and effective to require that the application has the full endorsement of the traditional custodians. This will provide a more effective means of building capacity both within traditional owner groups and their representative or partner bodies.

The question arises as to how the system can still provide a source of protection for Aboriginal and Torres Strait Islander heritage places and objects where the traditional custodians can not be easily identified or there is dispute. This not an uncommon occurrence across the continent and in most, if not all situations, there are significant places and objects that could qualify for protection.

In such situations it may be worth considering the use of ‘a competent Indigenous authority’ to take on a limited custodianship role. Given the extent to which such a concept operates outside of traditional Aboriginal and Torres Strait Islander law and custom, this is an idea that will require considerable discussion and thought.

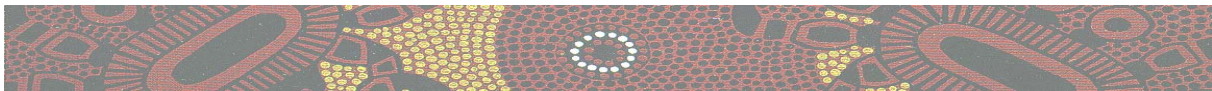
It is also important to note that if the ATSIHP Act is incapable of providing protection for all Aboriginal and Torres Strait Islander heritage places and objects its reforms will be considered to have failed. This is a critical opportunity to address a vitally important issue to many Indigenous communities across the continent.

#### **(6) Indigenous Land Use Agreements**

ILUA’s provide an invaluable framework through which recognised groups are able to undertake a range of activities that might or might not include the protection of heritage places and objects. Ideally, the negotiations of the ILUA would result in a clear understanding as to what areas of the subject land are going to be set aside for heritage protection and any required applications would be addressed at the appropriate time.

As a matter of principle applying for heritage protection over areas that are subject to a recognised ILUA should not be permitted unless it is applied for by the ‘traditional custodians’ or their authorised representative or partner body. To enable people who are not recognised traditional owners to apply for heritage protection over areas that are subject to an ILUA only serves to undermine the integrity of ILUAs by making ‘traditional custodians’ rights potentially subservient to the views of others.





Where Aboriginal or Torres Strait Islander group's attachment to country has been recognised to the extent that they qualify to enter into negotiations over an ILUA, it should be required that all other stakeholders negotiate directly with that group. People should not be prevented from making representations to the traditional custodians and ILUA representative body to seek heritage protection. Such matters must, however, remain at the discretion of the traditional custodians.

Representations for heritage protection for areas that are subject to an ILUA should be enabled either during or after the negotiations have been completed. It must be a requirement, however, that at all times representations for heritage protection must be made to the traditional custodians who then determine whether to seek protection or not.

### **(7) Secret sacred objects and remains**

The IAC has provided its general view on this matter in the discussion provided under Standard 5 in Proposal 4. Further to our previously stated view on this matter the IAC believes that it is important to consider the competence of people who discover remains to determine that they are Indigenous. Hence, we restate our view that in the first instance it should be the police who people are encouraged to contact in the advent of discovering human remains.

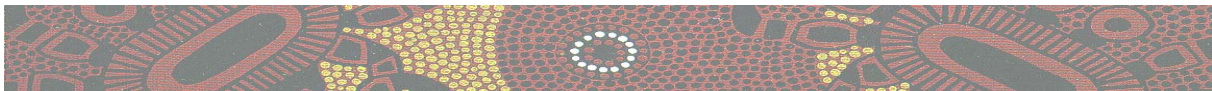
The processes for the reporting of human remains across most states and territories remains inadequate because of the disincentives associated with undertaking such action. The moral and legal obligation to report is too often overlooked largely because delays and costs that will result for developers and/or their contractors. The provision of stricter sanctions should provide for more caution, but many will still be prepared to take the risk that no one will find out about the damage destruction.

The requirement to report must remain as a fundamental aspect of providing protection for secret sacred objects and remains. It must operate, however, more as an incentive based system that incorporates strong sanctions for violations. There should be some form of recognition that leads to practical benefits for those operators who upon discovering Indigenous remains immediately take action to prevent damage and report to the appropriate authorities.

As part of this approach it would be advisable that some type of hotline service be established, whereby witnesses of certain activities can call in to anonymously report where objects and places have been discovered and/or damaged.

### **(8) Treatment of secret sacred objects and remains**





The IAC fully endorses the proposal to “prohibit the public display of Indigenous personal remains and ‘secret sacred objects’”. It is also appropriate that this proposal be qualified to enable the public display of cultural items and remains provided it is undertaken in accordance with traditional laws and customs.

In so far as it is feasible the Commonwealth should also legislate to prohibit the sale of cultural and movable heritage items to be sold where they have not been produced for that purpose. While it is a matter that many States and Territories have or are putting in place legislation to prohibit such activities it is one that the IAC believes is morally the responsibility of the Commonwealth.

Should the Commonwealth be reluctant to legislate further in this area it should at the very least establish an appropriate set of standards for State and Territory protection regimes. Meeting such standards should then be a requirement for accreditation.

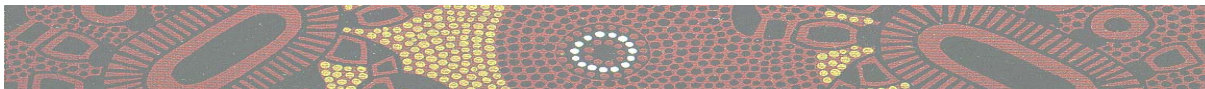
#### **(9) Application Processes**

It is absolutely critical that a reformed ATSIHP Act establish in detail or provides the basis for good policy that will result in appropriate, effective and efficient application processes for the protection of heritage places and objects. The standards arising out of these processes must then set the benchmark for the States and Territories in order for them to receive accreditation.

The proposed content for the ‘application’ requires a sufficient level of detail in the first instance without being too onerous for applicants to complete. The content of the applications needs to be specified at the very least through policy that is enabled by the ATSIHP Act.

No further information is necessarily required within the overall proposed application framework, however, applicants must be well informed about the type and extent of information that is required to assist with making a decision. Applicants should be entitled to submit further information to substantiate their application, however, that information can only be used where it is consistent with the criteria that are established for the decision making processes.





The circumstances where applications might not proceed are reasonable, in so far as a state or territory can not be accredited for a system whereby the standards are lower than is required if an applicant were able to submit directly to the Commonwealth. The threshold for accrediting state and territory systems has to be based on how those systems will actually perform, not on the basis of how they intend to perform.

#### **(10) Use of Conferences**

The proposal to use conferences as a means of providing information about the handling of applications and seeking to resolve contested issues and interests is in principle a sound means of providing for fairness in the application process. It is the view of the IAC that such conferences should be afforded to all stakeholders at the earliest practical opportunity within the application process. This list of stakeholders identified who need to be consulted through conference provides the appropriate balance of interest groups who have “legal rights and interests”.

With respect to the “process for setting up and running conferences” the range of administrative and procedural functions that arise justifies the establishment of a dedicated agency to handle a coordinate a range of matters. Be it an “Aboriginal Heritage Protection Agency”<sup>14</sup> or operate under the name of some other body, the reforms to the ATSIHP Act must also facilitate the establishment of an appropriate competent authority to handle the range of administrative matters that arise out of the operation of the Act.

It would be a lost opportunity to not revisit the possible value and disadvantages to establishing a dedicated competent Aboriginal and Torres Strait Islander authority to facilitate the operation of the ATSIHP Act and related commonwealth, state and territory legal and policy regimes. While this matter may be somewhat outside of the brief of this review it gives rise to the matter of fairness being provided through the participation of Aboriginal and Torres Strait Islander peoples in the design of the administrative structures that will underpin the operation of the ATSIHP Act.

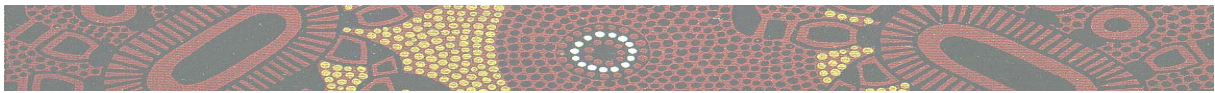
#### **(11) Protecting sensitive information**

The provisions for protecting sensitive information proposed in the discussion paper at face value provide an acceptable approach to managing the competing rights and interests that arise in the recording and use of that information. The challenges in addressing this complex issue can only be overcome if the Minister has in place a well designed and

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<sup>14</sup> Evatt, Chapter 11, p. 206

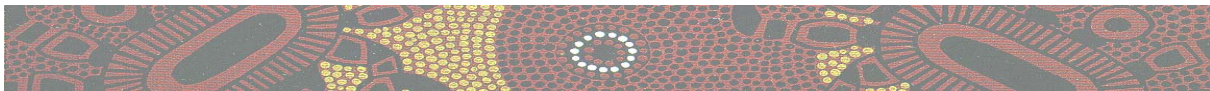




implemented set of ethical guidelines regarding the access and use of information collected through the application process.

In addition to requiring a set of guidelines the Minister will also require a dedicated advisory body made up of Aboriginal and Torres Strait Islander experts who can assist with matters relating to the use of sensitive information. The option of building a relationship with the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) should also be explored in light of their well developed and regarded competence as the peak national Indigenous entity that manages sensitive information.





### **(12) Interim protection**

The IAC is again of the view that at face value the proposed rules for providing and revoking emergency or interim protection are reasonable. It should not, however, be a requirement that an applicant has to specifically apply for emergency or interim protection. Ideally, a set of criteria and threshold will be established within the application process that will enable an assessing officer to determine whether emergency or interim protection may be an appropriate course of action. This should not of course preclude appropriate people from applying directly for emergency or interim protection.

Given the potential implications of any decision to authorise an emergency or interim protection order the IAC respects that these are decisions that can not be made lightly, yet their very nature requires the quickest possible reasonable assessments. It is therefore appropriate that an officer of the status of Secretary of the Minister's department have the delegated authority to make such decision. Taking into consideration the need to process such applications quickly it is also appropriate that the Secretary have the capacity to delegate the decision making authority to another officer or entity.

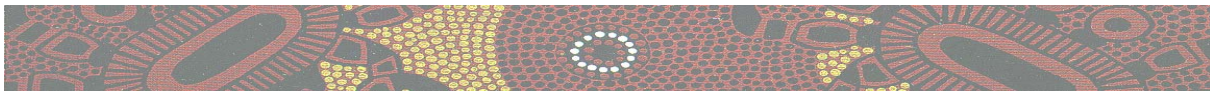
The criteria for providing short term protection are sound and give reasonable scope upon which a decision has to be made as are the criteria for providing temporary protection. The timeframes provided under both protection orders are also reasonable, albeit with a need for reassurance that the protection status does not subside in the process of moving from short-term protection to applying for "temporary protection".

The IAC is satisfied with the proposed consultation and notification requirements.

### **(13) Longer-term protection**

The issues raised in this proposal give rise to some potentially concerning developments arising out of the reforms to the ATSIHP Act. Rather than consider the implications of providing long-term protection against the backdrop of other stakeholders competing demands it should be required that the Minister consider the value of long-term protection in accordance with the 'national interest'. Simply basing decisions to provide long-term protection on the "consequences for other persons and the community" is offensive to Aboriginal and Torres Strait Islander peoples.





For the ATSIHP Act to have any meaningful benefit for Aboriginal and Torres Strait Islander peoples it must facilitate the provision of access to ‘country’ as well as heritage places and objects on a long-term basis. It is therefore appropriate that as matter of principle guiding the decision making process the long-term protection of an Aboriginal and Torres Islander heritage place and/or object is still in the national interest in spite of the consequences for others.

The use of an independent assessor to draft the “statement of facts” relating to a long-term application can provide considerable value to the decision making process particularly if legitimate stakeholders have the capacity to comment on a draft statement. Similarly the possible content for a statement of facts is appropriate, albeit mindful of the potential implications of changes to terminology arising out of the review.

The criteria for the Minister in making a long-term protection order is also sound, albeit taking into account the position of the IAC on the principle of recognising the value of Aboriginal and Torres Strait Islander heritage protection to the national interest.

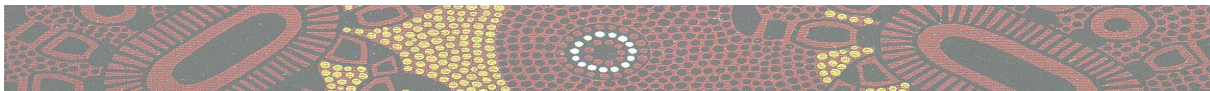
Providing the Minister with the authority to revoke a long-term protection order presents threats to the capacity of the ATSIHP Act to provide a level of certainty that would be expected by Aboriginal and Torres Strait Islander peoples. Notwithstanding the safeguard established through guiding criteria in exercising such a decision it still provides a very big stick that can be used contrary to the purposes of the Act.

The IAC understands, however, that providing the Minister with the capacity to revoke a long-term protection order may be required to assist in making the ATSIHP Act operate more effectively. If such a provision is to be incorporated into the ATSIHP Act the revoking of a long-term protection order should only be allowed following the approval of the traditional custodians or a competent registered Indigenous organisation. Other factors which should guide the potential revoking of long-term protection orders include:

- Establishing a category of protection for those exceptional circumstances where the heritage values are of such significance and importance that they justify permanent protection that can only be revoked by an act of parliament;
- Having in place a competent Indigenous authority that is responsible for advising the Minister about revoking long-term protection orders.

#### **(14) Penalties and enforcement**





The IAC is generally satisfied with the strategies being considered in the review to update the penalties and sanctions associated with offences committed under the ATSIHP Act. Sanctions need to be updated to provide a strong deterrent to those who may consider committing offences as well as provide a range of practical measures to compensate for the loss and damage as well as assist with remediation and rehabilitation.

The updating of sanctions and penalties must be reinforced, however, by guiding principles that encourage and reward early engagement with Aboriginal and Torres Strait Islander stakeholders. This needs to be supported by a monitoring strategy that enables inspectors to undertake assessments on the ground while allowing members of the public to call in and report on alleged activities that are illegal under the ATSIHP Act.

Advice received by the IAC indicates that for many years the operation of Part IIA of the ATSIHP Act worked effectively in Victoria for the protection of Aboriginal heritage. Part IIA provided for inspectors with authority appointed by the Minister who could make emergency declarations under s.21C. Aboriginal communities were also provided the capacity to appoint honorary keepers or wardens to record and maintain Aboriginal cultural property on behalf of the community. This was in place and proven to work in protecting Aboriginal heritage in Victoria. A similar process could also work in states and territories if such a system was included in the revised legislation.

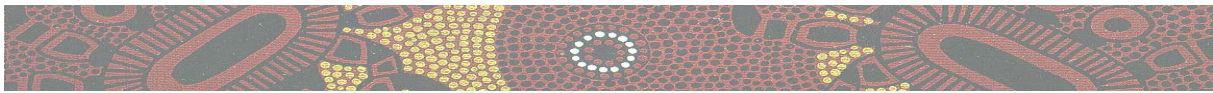
Penalties also provide a useful means of paying restitution to traditional owners for the illegal damage or destruction that may be caused to Aboriginal and Torres Strait Islander heritage places and objects.

#### **(15) Reviewing the effectiveness of the Act**

The IAC fully endorses the proposal to require formal reviews of the effectiveness of the ATSIHP Act. In so far as is possible it would be desirable for such reviews to be undertaken in association with the Overcoming Indigenous Disadvantage framework that has been developed and maintained by the Productivity Commission. It would be possible for formal reviews of the effectiveness of the ATSIHP Act to take place at longer intervals, while still feeding into the Productivity Commission framework.

Reviews relating to the effectiveness of accreditation need to be undertaken every three years from the time that a State or Territory regime has received accreditation. Critically, the review of accreditation must assess not only the effectiveness of the operation of the standards. Such reviews must also provide the basis for the development of better data collection systems to assess states and territories performance against a framework of desired targets and key performance indicators.





## 4 Key Aspects for an Appropriate and Sustainable Framework

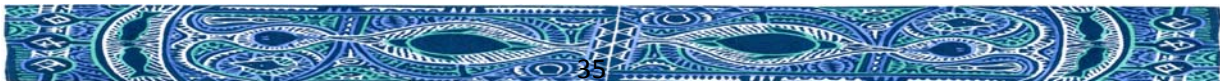
### 4.1 Incorporation with Indigenous land management practices

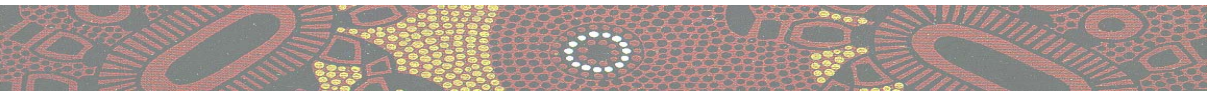
If the review of the ATSIHP Act is to have any meaningful effect the changes that arise must focus on incorporating Indigenous land management practices with those related to the protection and management of heritage places and objects. Further to this future assessments of heritage significance must also incorporate (where relevant) the applicant group's contemporary relationship with the area. This is culturally appropriate, but equally important it provides a more substantial basis upon which plans of management can be designed and implemented. Rather than be undertaken as a one-off measure the protection and management of protected areas should be conducted in accordance with a range of, and as part of other land management strategies.

The adoption of such an approach can be enhanced through the undertaking of substantial landscape assessments. Such assessments enable the early identification and incorporation of areas that are sensitive due to the Indigenous heritage significance which can then be referred onto the relevant planning agencies. As a result those sensitive areas can be zoned appropriately in the first instance thus avoiding situations where developers are informed about such sensitivities only after having designed their project proposals.

### 4.2 Principles and Standards

The operation of the ATSIHP Act to date provides a critical example of the importance of having a sound basis of principles to underpin the development of appropriate standards for the protection of Aboriginal and Torres Strait Islander people's heritage. Without the clear articulation of such principles by the Parliament the ATSIHP Act suffers as a result of providing too much flexibility in the rationale for Ministerial decisions. As a result Minister's can then be subject to intense lobbying by a range of stakeholders, which then leads to inertia arising in the decision making process.





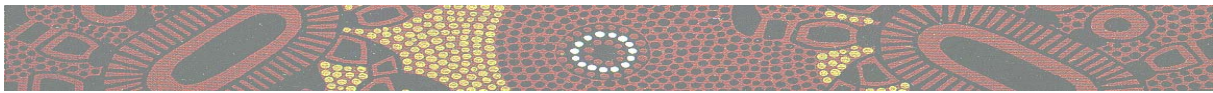
Through this review it is critical that the question be put to the current government as to what value they see in providing a federal protection mechanism for Aboriginal heritage. Simply establishing a regime on the basis that it may provide a protection mechanism of last resort is simply insufficient. The ATSIHIP Act needs to clearly reference in its purpose or objects how Aboriginal and Torres Strait Islander heritage adds value to the national interest as well as provide substantial benefit to the socio-economic well-being of the Indigenous peoples of Australia.

#### **4.2.1 Utilising the Evolving International Standards**

While reviewing the ATSIHP Act the IAC considers that it is both valuable and important that an analysis be undertaken of the evolving standards that apply to the rights and interests of Indigenous peoples to protect and manage their heritage. Recently, the Australian government became a signatory to the Declaration on the Rights of Indigenous Peoples which provides a substantial body of minimal standards, many of which relate to the protection and management of heritage and associated traditional knowledge.

In addition to the Declaration substantial work is also being undertaken through the Convention on Biological Diversity with respect to the use and protection of traditional knowledge and the establishment of an international regime for access and benefits sharing as it relates to biological resources. Significantly, in recent statements on these matters the Australian Government has demonstrated its willingness to recognise the right of Indigenous peoples to prior and informed consent as it relates to the protection and management of traditional knowledge. This not only needs to be reflected in the outcomes of this review it also needs to be incorporated into the operation of the ATSIHP Act.





### 4.3 Supporting the National Interest

Over recent years government policy has focussed on ‘closing the gap’ of disadvantage that affects so many Aboriginal and Torres Strait Islander peoples. The strategies being applied to achieve this policy objective are generally of a mainstream nature. That is, an emphasis on health, education and employment as a means of lifting Aboriginal and Torres Strait Islander peoples out of their current poverty traps.

While such strategies are critically important there is a vital component that governments too often and too easily overlook. The protection and management of culture and heritage is one such aspect of policy. Where Aboriginal and Torres Strait Islander peoples see value and an important contribution to our lives and well-being many, both within and outside of the Parliament, view Aboriginal culture and heritage as being irrelevant and a burden to economic progress and development.

The irony of this view is that through many Government initiatives such as Caring for Country and Working on Country the provision of environmental services is one of the key growth areas for employment for Aboriginal and Torres Strait Islander peoples. The value of such programs is not simply that it gives people a job. The true value is in the fact that Aboriginal and Torres Strait Islander peoples get to remain on country and undertake work that provides a diverse range of short and long-term benefits.

The review of the ATSIHP Act presents a valuable opportunity to once and for all provide a national standard for the protection of Aboriginal culture and heritage that is applied consistently across the country. In doing so, industry can benefit from having Aboriginal heritage incorporated up front in the planning systems and from being able to negotiate directly with Indigenous groups with the aim of achieving outcomes that limit the involvement of third party decision making bodies. Where such decision making bodies are required clear and unambiguous guidelines can inform participants of the process and timelines in which decisions will be made.

Most importantly for Aboriginal and Torres Strait Islander peoples the protection and management of our heritage continues to provide a critically important aspect to our lives and well-being.

