



National  
Native Title  
Council

ABN 32 122 833 158

*spirit  
of  
Change*

Level 1  
63 Adelaide Terrace  
East Perth WA 6004  
PO Box 3058  
Perth WA 6832

Tel: +618 9263 8700  
Fax: +618 9218 9449

6 November 2009

Indigenous Heritage Law Reform  
Heritage Division  
Department of the Environment, Water, Heritage and the Arts  
PO Box 787  
CANBERRA ACT 2601

## RESPONSE TO THE INDIGENOUS HERITAGE LAW REFORM

Thank you for the opportunity to provide comments to the proposals for reforming the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* ("ATSIHP Act").

The National Native Title Council (NNTC) is the peak body of Native Title Representative Bodies and Native Title Service Providers from around Australia being formally incorporated in November 2006. The objects of the NNTC are, amongst other things, to provide a national voice for NTRBs and NTSs on matters of national significance affecting the native title rights of Aboriginal and Torres Strait Islander people.

Attached is the submission in response from the Yamatji Marlpa Aboriginal Corporation. This should be read in conjunction with the joint response provided by Central Land Council and Northern Land Council. (Submitted separately by these NTRBs.) Both responses are broadly consistent and supported by the NNTC.

The NNTC would be deeply disappointed with a proposal that doesn't maintain the Commonwealth as an option of last resort for heritage protection. We also seek a commitment to negotiating any changes to the ATSIHP Act with the NNTC.

I trust these comments are useful for your purposes, however if you have any queries or require any further information please do not hesitate to contact me at your convenience.

Yours sincerely,

Brian Wyatt  
Chairperson



**Yamatji Marlpa**  
ABORIGINAL CORPORATION

## **Yamatji Marlpa Aboriginal Corporation Submission to the Indigenous Heritage Law Reform**

### **About Yamatji Marlpa Aboriginal Corporation**

Yamatji Marlpa Aboriginal Corporation (YMAC) is the native title representative body for the Traditional Owners of the Pilbara, Murchison and Gascoyne regions of Western Australia.

We are run by an Aboriginal Board of Directors and represent 24 different groups, all with their own culture, language, and traditions. Our representative area covers over 1 million square kilometres with offices in Geraldton, South Hedland, Karratha, Tom Price and Perth.

In response to the discussion paper "Possible Reforms to the Legislative Arrangements for Protecting Traditional Areas and Objects", YMAC makes the submission below, using the questions set out in the Government's submission form.



---

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

Many of the problems with the current legislation have been identified in the report by Elizabeth Evatt in her 1996 review of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* ("ATSHPA"), which we will not need to expand on here. These issues have included the lack of any legal requirement to provide protection for Indigenous heritage, the problems with preserving confidentiality and cultural restrictions, the lack of requirement for Indigenous involvement in decision-making over their own heritage, lack of clear procedures, delays in obtaining declarations and other concerns.

---

### **Proposal 1: Purposes of the legislation**

The new legislation could set out its overall aims. This could be done using the points set out on page 11 of the discussion paper.

### ***Question 1.1: Do these points adequately express the purposes of the legislation?***

These are a distinct improvement, but we would suggest amendments as set out below.

### **Beneficial legislation**

It would be useful to have an explicit statement in a purpose or added to one to make it clear that the legislation is intended to be for the benefit of Indigenous peoples and to provide them with better protection for *their* heritage.

While protection of Indigenous heritage is often for the benefit of the Indigenous peoples and the wider community, there is sometimes potential for conflict between their respective aims and attitudes to Indigenous heritage. For example there may be conflicts between the aims of public education and preservation of a "museum collection" on the one hand and Indigenous religious and cultural concerns on the other. It is important to have explicit statements of the aim of benefiting Indigenous people and recognition that their attitudes to their heritage and the best method of treating and protecting it are what is of primary importance. This would make a clear contrast to the situation under early archaeological heritage legislation, where, for example, a number of justices of the High Court could comment in *Onus v Alcoa* (1981) 149 CLR 27 that the Victorian *Archaeological and Aboriginal Relics Preservation Act* was not passed for the benefit of Aboriginal people but to preserve archaeological and Aboriginal relics for the benefit of all Australians, or at least the general Victorian community.<sup>1</sup>

The explicit aim of benefiting Indigenous peoples would also assist in interpreting questions of standing and natural justice as well as the interest to be protected and the weight to be given in the balancing of competing interests.

#### Traditional

Our concerns with the use of the word "traditional" are set out in response to Proposal 2 below.

---

#### **Proposal 2: Terminology – new definitions**

New definitions could be put in the legislation. The definitions clarify the basis on which areas and objects can be protected under the legislation. The new definitions could use the concept of 'traditional laws and customs'. This would match the Evidence Act 1995. The definitions would no longer need to rely on the concept of 'particular significance', which is vague. Possible definitions appear on page 14 of the discussion paper.

#### ***Question 2.1: Overall, what do you think about this proposal?***

There are conceptual problems with a heritage model that is focused on specific areas and objects, particularly as these inevitably give rise to calls for identification of and disputes over precise locations and boundaries, concepts which are not culturally appropriate and do not accord with many Indigenous conceptions. A better model will need to be the subject of much consultation. It could be along the lines of environmental legislative concepts which look at the adverse impacts of activities rather than pinpointing areas and objects. However, in the meantime, we make the following comments on the proposals under the existing standard heritage model.

#### Particular significance

YMAC agrees that the definition of "particular significance" is ambiguous and has been subject to differing interpretations. These problems have mainly been caused by the use of the term "particular" and whether it refers to significance particular to Indigenous peoples or

---

<sup>1</sup> (1981) 149 CLR 27, per Gibbs CJ at 34-35, Stephen J at 39-40, Aickin J at 48-49, Wilson J at 59-60.

whether it connotes any requirement to be more significant than other areas or objects of significance (implying some kind of ranking) or just more significant than the land generally.

The problem lies more with the term "particular" than in the concept of significance per se which is usually sufficiently broad. It may be that the concept of significance is still less fraught than the proposed references to traditional laws and customs for reasons set out below. This is particularly as changes to very different statutory terms, especially terms which could be narrower, may encourage these to be tested in litigation or at least give rise to extensive disputation.

### Traditional

YMAC is concerned about the use of the terms "traditional" or "traditional laws and customs" given the interpretation in a native title context in the decision in *Yorta Yorta*,<sup>2</sup> which has resulted in requirements to prove continuity back to sovereignty. The danger is that the use of the same terms will be likely to be treated in a similar way unless there are explicit statements rejecting this interpretation or avoidance of the word "traditional," which term is unnecessary. The aim should be to include protection what is of significance to Indigenous people today. Even if the interpretation of the full effect of *Yorta Yorta* is not adopted, there is still a danger of reification and requirement of longevity from the use of the word "traditional" and there may be arguments raised about whether normal elaborations and adaptations of traditional religious beliefs are covered. While the proposed definition should not be read as narrowly as in native title law, it is still best, given the recent history, to avoid the use of such terms.

If the government decides that it wishes to use the term "traditional" it is important that it at least be specifically defined to ensure that current traditions and beliefs, including those which have been elaborated or are captured.<sup>3</sup> This could be achieved by adding to the end of the definition of "Traditional laws and customs" words along the following lines: "whether of long standing or originating in beliefs or customs pre-dating European colonisation or not."

### Laws and Customs

For similar reasons stemming from *Yorta Yorta* and other native title decisions, there may be dangers in any interpretation that interposes requirements of normativity or a society united in acknowledgement or observance of the laws and customs. We note that the proposed definition of traditional laws and customs is sufficiently broad to not give rise to such requirements, but again given the recent history, it is best to make that explicit or else to avoid using terms like "laws and customs" and perhaps using terms like "beliefs or customs." If the phrase "laws and customs" is used, the definition should include a statement to the effect that nothing in the definition requires any proof of these as normative or binding on the group or having the force of law or that the group are united in acknowledgment or observance of them.

### Traditional area and Traditional Object

Given that the definitions have to satisfy both limbs ie 1. that they have a use or function under traditional laws and customs or are subject of a narrative that is part of traditional laws and

---

<sup>2</sup> *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 522

<sup>3</sup> While we would not recommend the precise wording of this and in particular do not approve of the use of terms like "evolve", we note that the South Australian *Aboriginal Heritage Act* 1988 defines Aboriginal tradition in section 3 as meaning "traditions, observances, customs or beliefs of the people who inhabited Australia before European colonisation and includes traditions, observances, customs or beliefs that have evolved or developed from that tradition since European colonisation".

customs AND 2. they are to be protected or regulated under traditional laws and customs, the definition is inadequate to protect all the places and objects that need protection.

The range of areas and objects of significance and what makes them significant naturally would vary substantially across Australia depending on the particular traditions. It is necessary to ensure that the definitions used cover all such places and objects. The proposed definition may work for some areas, but not all. If the definition were to include areas or objects that satisfied *either* limb then this could give the required coverage. If the government wishes to require satisfaction of both limbs in each proposed definition, then the first limb needs to be expanded, perhaps to include also areas that "have significance to Indigenous peoples" ie not restricted to places or objects that have a use or function or that are subject to a narrative. In this regard, it can be noted that significance is a commonly used term in heritage legislation and the recent Victorian *Aboriginal Heritage Act 2006* uses the term "significance" without requiring "particular" significance. If the term "significance" is considered too wide, perhaps this could be limited to "cultural, spiritual, anthropological or historical significance".

For example, the discussion paper suggests that burial grounds should be covered, but it is not clear that such an area itself has a use or function under traditional laws and customs nor that it would be the subject of any narrative. An area may have to be protected under traditional laws and customs because it happens to contain ancestral remains (ie that was just a convenient place for burial at the time), but there may be no traditional use or function for that area as such. Also there may be features that are regarded as sacred but not be an area with a use or function and yet not subject to what may be called a "narrative." Further, there may be a place, as is common, where the narrative cannot be disclosed or the narrative is no longer known, but the place is still recognised as sacred and to be protected. These areas would be protected under the expanded definition set out above or by providing that either limb of each definition could be satisfied (subject to comments about the use of a phrase like "traditional law and customs" discussed above.)

***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'?***

Yes. See response under 2.1 above.

In addition, if a narrow view is taken of the term "traditional laws and customs", then this may exclude many areas or objects of significance which may not be found to satisfy the additional requirement of traditional laws and customs.

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

They may depending on how narrowly one interprets the term "particular" significance," that is, if interpreted as requiring some top level of significance compared with others. Generally, this has not been the interpretation of the existing ATSIHPA provisions, so the net effect of the proposed definitional changes may well be to reduce protection.

---

### **Proposal 3: Accreditation**

**Accreditation is a method for promoting national standards for Indigenous heritage protection laws in the states and territories. The new legislation could allow the Australian Government to accredit individual states and territories if their laws are effective. Accreditation would mean the Australian Government would not intervene in a decision of an accredited state or territory. This would give the states and territories**

**an incentive to meet the standards and have effective legislation. Details of how this could work are set out on page 15 of the discussion paper.**

**Note that the content of possible national standards is covered separately under Proposal 4.**

***Question 3.1: Overall, what do you think about this proposal?***

The principle of minimum national standards and requirement of accreditation of legislation to satisfy that standard is a good one. However YMAC believes that it is essential the Commonwealth government still retains the important function to provide a remedy of the last resort and does not support the proposal not to intervene in decisions of accredited state or territory authorities. This is particularly as decisions may be made by state or territory bodies for short term political or economic motivations with little concern for the wider national interest in protecting the heritage. Also, just because the states or territories may have schemes that appear to be satisfactory does not mean they will be adhered to or enforced. The recourse to the Commonwealth for protection should not be restricted to areas or objects which meet national, commonwealth or world heritage standards.

What YMAC would support instead is for the legislation to enact a blanket offence of desecrating, damaging or altering the areas or objects covered by the legislation without any need for declarations or listing of such areas or objects. States or territories can be empowered to grant approvals to allow damage or alteration but only if they do so under the processes set out in an accredited system that complies with minimum standards outlined in the Commonwealth legislation. The accreditation should be in an instrument subject to disallowance by either house of Parliament as proposed. There should also be a power to revoke accreditation. The Commonwealth government should retain the right to override such an approval upon an application for a protection order, especially in relation to decisions that have been made by state and territory governments or ministers in relation to projects approved by those governments. The potential for conflicts of interests in such situations are extensive given that the state or territory governments will often be both proponent and "judge". It is vital for the Commonwealth Minister to be able to step in to protect heritage in those circumstances.

One important reason why comprehensive protection is required to be imposed in the legislation itself is to give an incentive to states and territories to have accredited systems for approvals. If not, they could choose to have no protection at all and put the onus on the Indigenous groups to seek Commonwealth government protective orders for all areas and objects to be protected. This would leave Indigenous groups within such states or territories with less direct protection than if there was an accredited system.

If any state or territory does not have an accredited system, there should be no method of seeking approvals to damage the area or object. This will give such states and territories some real incentives to seek accreditation.

Powers should be given for the Commonwealth government to obtain injunctions or other orders to prevent activities in breach of the legislation. The legislation should also make it clear that the relevant Indigenous groups have standing to also seek such injunctions or other orders.

***Question 3.2: Could the proposed method of accreditation be improved?***

Yes - see proposal set out above under 3.1.

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

Yes.

**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?**

Yes. This is essential. It is important that not only do schemes appear satisfactory but actually work that way in practice and are regularly adhered to and enforced.

---

#### **Proposal 4: Standards**

The new legislation could specify standards for the states and territories to meet before they could be accredited. Possible standards are set out on pages 18–22 of the discussion paper. The proposed standards aim to identify the positive outcomes that good legislation can achieve, including strong protection for traditional areas and objects, a central role for traditional custodians in decision-making, and efficient, fair and transparent decision-making processes.

**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?**

Yes, but with some additional matters to be addressed as set out below. In relation to the requirement to provide comprehensive protection, this should be dealt with in the Commonwealth legislation itself as set out at point 3.1 above. If not it should at very least be dealt with as a minimum standard.

**Question 4.2: Do the standards need to be specified differently, or in more detail?**

Yes - some additional details are required. These include:

A definition should be included for an "adverse impact" on areas or objects. This definition should be broad and include at least physical damage, spiritual damage or desecration and any impact that would be in contrary to the Indigenous beliefs and customs about the manner in which the areas or objects should be treated. These impacts should also all be considered in the approval process as well, such as under the requirements outlined at point 11 on page 20.

In point 6 at page 19, the requirement proposed is for the law to enable the state or territory to stop an unapproved activity that could cause adverse impacts. These laws should also specifically provide that the relevant Indigenous groups also have standing and powers to seek orders to stop adverse impacts as well.

In point 7 at page 19, the proposal is for the laws to enable the proponent to meet traditional custodians. There should be a further requirement on the proponent to use all reasonable efforts to negotiate in good faith with the traditional custodians to reach an agreement for the activity to proceed.

At point 11 on page 20 listing some of the matters to be considered, there should also be consideration of the beliefs about the adverse spiritual and other impacts on the Indigenous people themselves.

At point 14 on page 21 dealing with respect for secrecy, we would suggest the use of the terms "restrictions on disclosure of information" rather than secrecy. We are concerned too with the wide exceptions to the non-disclosure which could defeat the purpose of the provisions. These exceptions include natural justice, review of decisions and effectiveness of accreditation. These exceptions should be removed. Most of the cases where restrictions have been overridden on the grounds of alleged natural justice requirements. The legislation should specifically provide that rules of natural justice or other common law or statutory rules relating to disclosure shall not apply to the extent that they may contravene the restrictions under the Indigenous beliefs and customs. Natural justice rules are always subject to being overridden by statutes and there is no reason why they can't in this legislation as well. Legislation designed to protect areas and objects from desecration of course should not be the means by which such desecration occurs and people should not be expected to contravene their religious beliefs in order to protect them. Our proposal would still permit some disclosure of perhaps general non-restricted information to the extent required for the principles of natural justice. There is a real question as to why any specific restricted detail needs to be known.

On the topic of restrictions, the accreditation of schemes should require strict protection of such restrictions in conditions relating to access to registers.

At point 20 on page 22, the traditional custodians should not only be able to seek judicial review but also appeal to a court or tribunal for a review on the merits. The issue of traditional custodians is dealt with below.

Another important requirement for accreditation should be that under the schemes, any new developments should require full ethnographic and archaeological heritage surveys, unless otherwise agreed with the traditional custodians. This should in particular be a condition of the grant of any consent to damage or disturb areas or objects of significance. The schemes should require any consents to disturbance of areas and objects of significance to be strictly related to each particular areas and objects identified and only after a consideration of the necessity of each such disturbance. The schemes should not allow general consents for whole projects, especially not in areas which have not been the subject of heritage surveys and independent assessments.

---

## **Proposal 5: Traditional custodians**

**The new legislation could recognise that many traditional custodians have achieved legal entitlements to their heritage, for example native title rights. Other people should not be able to apply to protect that heritage. Details of how this could work are set out on page 23 of the discussion paper.**

### ***Question 5.1: Overall, what do you think about this proposal?***

People who are responsible for protecting heritage under Indigenous law and custom may extend beyond holders of native title or land rights. Whether these are covered by the term "traditional custodians" is unclear and such an ambiguity should not be left in the legislation. Sometimes areas are of key significance to many groups even though they may not be the traditional owners for the area and even though their traditional areas may be some distance away. People who are not traditional owners may own or know certain narratives that are

different from those held by traditional owners. This is particularly so if there are areas or objects which the relevant native title holders are not yet equipped to deal with or know about in sufficient depth. In such circumstances, the key people with the knowledge and responsibility to protect the area may not be the traditional owners but others. The right to apply for protection therefore should not be limited to traditional owners or native title holders but to all people for whom the area or object is of significance.

There are also practical difficulties that may be caused by PBCs set up for native title holders not being sufficiently funded or in a position to respond or to consult. It may be that key political office holders are the people with the best political and negotiation skills but not the people with the most traditional knowledge and not the people best placed to deal with heritage matters. Protection of heritage may require others who themselves are not native title holders, or other representative bodies, to make applications for protection of heritage. The scope of who can apply therefore should not be so limited.

We realise that this may leave open the danger of applications by others who may be acting against the interest or wishes of the traditional owners. However, that may be the lesser evil than leaving areas unprotected. The views of the traditional owners should of course be given significant weight in any discretionary decision about protection.

The scenarios mentioned will be less important if the government accepts the model proposed by YMAC above, namely for blanket protection and for applications to be made by those seeking to damage or disturb heritage to apply for permission to do so. The issue of applications will then only relate to people who apply for protection when permission to disturb heritage areas or objects has been given under accredited state/territory schemes.

***Question 5.2: Does it make sense to rely on existing legal processes like native title processes to identify traditional custodians?***

Native title holders should obviously be accepted as being amongst the traditional custodians but they cannot be assumed to be the only potential custodians or only people with responsibility for or the only holders of key cultural knowledge of an area or object. See the comments in 5.1 above.

***Question 5.3: Is it fair to allow only recognised traditional custodians, using their representative bodies and processes, to apply to protect traditional areas and objects, if there are recognised traditional custodians?***

See answer for 5.1 above.

***Question 5.4: Should Indigenous persons who are not native title parties be able to apply for Commonwealth heritage protection over areas where native title rights and interests have already been recognised?***

Yes for reasons set out in 5.1 above.

***Question 5.5: Are prescribed bodies corporate the appropriate organisations to apply for Commonwealth heritage protection over areas where native title rights or interests have been recognised?***

Yes, they are appropriate applicants, but for reasons in 5.1 above, should not be the only possible applicants.

## **Proposal 6: Indigenous land use agreements (ILUAs)**

**The new legislation could support native title holders by not overriding a registered ILUA. Details of how this could work are set out on page 25 of the discussion paper.**

### ***Question 6.1: Overall, what do you think about this proposal?***

YMAC is opposed to this proposal. Most future act agreements and ILUAs may agree to future acts (eg the grant of a tenement or licence) but do not consent to the destruction of heritage places or items. Most ILUAs and future act agreements assume that rights to protect heritage under the relevant pieces of state or Commonwealth legislation will still be available in the event that the other parties to the ILUA or future act agreement seek to exercise their future act rights in a manner that damages heritage. Often the detailed impacts of the grant are not known at the stage of the ILUA negotiation, often because the developer does not know the precise locations where they intend to carry out their works for the life of the project nor whether there will be flexibility to avoid heritage disturbance.

If this submission is not accepted, then ILUAs should only be able to prevent applications to the Minister to protect heritage where this effect is explicitly provided for in the ILUA. However YMAC is still concerned that this might result in undue pressure being put on native title holders to agree to such terms in an ILUA. Indigenous people should not be pressured to act against their beliefs and culture nor should this be encouraged by the legislative scheme. There would be much scope to place unconscionable pressure on native title holders if abandoning statutory heritage protection was tied in to promises of future act benefits or to avoid the risk of an unconditional grant of a future act. It would also prolong ILUA negotiations as the parties would need to insert very detailed heritage protection provisions and remedies into the ILUAs at the outset to make up for the loss of statutory rights.

In relation to other Indigenous peoples applying for protection, we refer to the answers in relation to question 5.1 above.

### ***Question 6.2: Is it fair to stop applications to protect traditional areas and objects from an activity if the activity is allowed under a registered ILUA?***

Yes, for the reasons set out above under 6.1.

### ***Question 6.3: If not, is some other reform needed to prevent applications from impacting on ILUAs?***

No. The existence of such ILUAs and the desire of the native title holders could be important considerations to be taken into account when the Minister or other body exercises discretion on whether to grant an application.

### ***Question 6.4: Would this proposal complicate ILUA negotiations by encouraging people who are not native title parties to become involved in negotiations?***

No. If the ILUAs do not deal with or affect heritage protection, there would be no need for Indigenous people who are not native title parties to get involved at all. If the activities under the ILUA do not disturb heritage, then the issues just do not arise for any other parties who might otherwise have an interest in such heritage protection but not in the ILUA.

On the other hand, the government proposal will significantly complicate ILUA negotiations if the ILUA will mean that the benefits of heritage protection statutes are irrevocably relinquished and prevented, as anyone with an interest in protecting the heritage will need to get involved at that stage of the ILUA notification and possibly make objections to the registration of the ILUA. This will cause delay and frustrate the aims of quick resolution to native title processes.

***Question 6.5: (a) Would ILUA negotiations be more difficult if native title parties could not ask the Minister to protect traditional areas and objects from activities permitted under an ILUA?***

Yes for reasons set out above in response to 6.1 and 6.4.

***(b) Or would the ILUA be a stronger agreement as a result?***

Not for the native title parties or people with responsibility for protecting heritage, for reasons also set out above.

---

**Proposal 7: Discovered remains**

**To reduce duplication of state and territory laws, the requirement to report all discoveries of Indigenous personal remains to the Australian Government could be removed, except for discoveries on land that is managed by the Australian Government. Details are set out on page 26 of the discussion paper.**

***Question 7.1: Overall, what do you think about this proposal?***

In principle it is more immediately practical for reporting to be to state and territory authorities rather than the Australian government where the land does not belong to a Commonwealth entity. However the reporting should still be to the Commonwealth government where there the state or territory is not accredited. The reporting requirement should exempt Indigenous people from any requirement to report if they believe that is contrary to their laws and customs to do so or if they believe, on reasonable grounds, that it is not in the interests of protection of the heritage to do so.

***Question 7.2: Do the states and territories have adequate processes for reporting discovered human remains that are suspected to be those of Indigenous people and to ensure that discovered Indigenous personal remains are treated in a culturally sensitive manner?***

No.

***Question 7.3: If not, how could Commonwealth legislation be used to encourage improvements without always overlapping state and territory responsibilities?***

This could be done through minimum standards in the accreditation process. There should be requirements for stopping all activity that might disturb such remains and for negotiating in good faith with at least the native title holders of the area as to how the remains should be

dealt with. There needs to also be some recognition that ownership of any Indigenous remains should in principle lie with the relevant Indigenous peoples.

---

**Proposal 8: Secret sacred objects and remains**

The new legislation could address key Indigenous concerns about some traditional objects by making it an offence to display these objects in public. Probably this would require new definitions such as 'secret sacred object' and 'Indigenous personal remains'. Details are set out on page 27 of the discussion paper, including examples of situations where it might be necessary to prohibit or allow display.

***Question 8.1: Overall, what do you think about this proposal?***

The proposal is supported in principle.

However the inclusion of objects that are not human remains is too limited if restricted to "secret sacred" objects. It should be expanded to include "restricted objects" and the first dot point of the definition should be removed.

***Question 8.2: Are there other situations where it might be necessary to prohibit or allow display?***

Yes, for restricted objects that may not be ceremonial objects, see answer to question 8.1 above.

In relation to there being no offence to display remains donated under Commonwealth, state or territory law, this should be qualified by the requirement that such voluntary donation was by Indigenous people and that the human remains were not otherwise caught by the definition of restricted objects.

***Question 8.3: How would prohibiting the public display of these objects affect your business?***

Not applicable. People should not be engaged in businesses which cause such offence.

***Question 8.4: Would the proposed definitions exclude any objects that might need to be protected from public display because they have a special meaning in Indigenous traditions?***

Yes - see answer to 8.1 above.

---

**Proposal 9: Applications**

In states and territories that are not accredited Indigenous Australians could apply to the Australian Government to protect traditional areas and objects from activities that are not already dealt with in a registered ILUA. The new legislation could set out what

information to include in applications and say when applications could not be accepted. Details are on page 30 of the discussion paper.

***Question 9.1: Overall, what do you think about this proposal?***

As set out above, YMAC's proposal would see such areas and objects being protected automatically regardless of accreditation so the applications set out above would not be required, unless and until approvals to disturb the heritage had been given under accredited schemes and an application had to be made to the Federal Minister as a last resort.

If the government requires such an application at the outset for protection or in the event of an approval to disturb the area or object, then the proposal is supported in principle, subject to the comments already made about "traditional" laws and customs, discussed above in relation to question 2.1.

***Question 9.2: Does the legislation need to specify the content of applications?***

This would be helpful, as long as it is not worded in a manner that where applications could be invalidated if there were some deficiencies. The requirements outlined should not be mandatory nor stated to be a condition precedent to acceptance of the application and this should be made explicit.

***Question 9.3: What other information might need to be included in an application?***

The information set out above should cover all the information required.

***Question 9.4: Are there other reasons why the government might not be able to accept an application?***

No.

---

**Proposal 10: Conferences**

The new legislation could set out the procedures for responding to applications. The procedures could include specifying which people the government would need to contact, because their legal rights might be affected. Following this contact the government could hold conferences to try to resolve problems. Details are on page 33 of the discussion paper, including details of the process for setting up and running the conferences.

***Question 10.1: Overall, what do you think about this proposal?***

The principle of conferences is supported. These should operate in a "without prejudice" way to enable free exchanges and genuine attempts to reach agreements.

As set out in answer to 4.2 above, there should be a requirement to negotiate in good faith to reach an agreement on ways to protect the heritage.

***Question 10.2: Are there other people whose legal rights and interests could be affected by a decision on the application?***

The native title representative body ("NTRB") for the relevant area should be included as well. Such NTRBs can also assist in ensuring that the relevant Indigenous people are informed and can assist from its accumulated experience at suggesting resolutions.

***Question 10.3: Are conferences a good way to begin to resolve the issues raised by an application?***

Yes. There should however be interim protections put in place in the meantime so that the heritage is not damaged while people are waiting for the conference to be called or while engaging in discussions.

***Question 10.4: In practice would the process for setting up and running conferences be an efficient and fair way to decide how to respond to the issues raised by an application?***

Yes, as long as it is handled in a culturally sensitive way. People convening the conference should be trained and experienced in cultural awareness.

It is important that funding be available to assist Indigenous peoples to attend such conferences and the location of the conference should as far as possible be organised close to the relevant place or object concerned, or if not reasonably practicable, then where most of the relevant Indigenous people live.

---

**Proposal 11: Sensitive information**

**To address Indigenous concerns about traditional knowledge, the Australian Government could have a power to direct the people involved in an application to protect culturally sensitive information. This would also apply to commercially sensitive information. Details are on page 36 of the discussion paper.**

***Question 11.1: Would this new power provide adequate protection for sensitive information?***

No, for reasons set out above in answer to 4.2, the rules of natural justice should be modified to the extent necessary to ensure that they do not require the disclosure of restricted or sensitive information. Where the information is not restricted but should be treated sensitively, then the power set out above should be available.

---

**Proposal 12: Interim protection**

**There could be more clarity around the rules for providing protection on a short-term basis in an emergency. For example there could be more clarity around the reasons for providing and revoking this form of protection, the timing, and who would need to be informed. Details are on page 37 of the discussion paper.**

***Question 12.1: Overall, what do you think about this proposal?***

The proposal is supported, except that the Secretary or delegate should be empowered to make a longer interim period order to enable an application to be made, perhaps for up to 96 hours, with scope to make more short term interim orders of up to 96 hours each. Applicants may be in remote locations with no transport or facilities and may not be literate. They may need time to enlist the assistance of others to make a written application.

Similarly the Minister may require the power to make orders for longer than 28 days at a time if it is obvious that the matter cannot be resolved in that time. A power to make orders of up to 60 days each would be preferable.

***Question 12.2: Considering proposal 9, is 48 hours sufficient time to lodge an application for protection?***

No - see above under the answer to 12.1.

***Question 12.3: Would having up to 6 days (i.e. 48 + 96 hours) of short-term protection provide a reasonable balance between the need to ensure that heritage can be protected while the application is being lodged and the need for businesses to avoid excessive delays?***

It would assist, but there should be scope to allow more short term protection orders to deal with the precise situation that arises. Officers do not need to make orders for the full extent of their powers if this is seen as unnecessary or would cause too much delay. However, the power to do so needs to be given if such orders are justified.

***Question 12.4: Would the Secretary need to consider other factors before deciding whether to provide short-term protection?***

The Secretary should not be required to consider any other specific factors other than the need for protection. This does not mean that the secretary cannot do so, but it would be inappropriate and too onerous to prescribe these given the emergency situation. It should however be explicitly stated that matters relating to policy decisions to refuse protection however are not relevant considerations, as they are matters that should only be determined by the Minister who is accountable to Parliament and the wider public for such decisions.

***Question 12.5: Would temporary protection in the form of ministerial orders that last up to 28 days at a time provide a reasonable balance between the need to ensure that heritage can be protected while the application is being processed and the need for businesses to avoid excessive delays?***

No. See above under answer to 12.1

***Question 12.6: Would the Minister need to consider other factors before deciding whether to provide or revoke temporary protection?***

The Minister should not be required to consider any other specific factors other than the need for protection. This does not mean that the Minister cannot do so but it would be inappropriate and too onerous to prescribe these given the emergency situation.

***Question 12.7: Would any other people need to be consulted before a protection order is made, or notified after the order is made?***

See above. There should be no prescriptions for this but that does not mean that people cannot be consulted.

The statute should also make it explicit that there is no requirement to consult any particular people and that the failure to do so would not invalidate the order.

---

### **Proposal 13: Longer-term protection**

**The rules for providing and revoking longer term protection could be clarified to strengthen the basis for the Australian Government Minister’s final decision. □ or example there could be more clarity around the reasons for providing and revoking this form of protection, including the factual basis of the decision. Details are on page 41 of the discussion paper.**

#### ***Question 13.1: Overall, what do you think about this proposal?***

The proposal is acceptable subject to the following matters.

There should be a requirement, in the event that the Minister does not simply accept the evidence provided by the applicant of significance, to obtain the independent advice to ensure that the assessment of significance and damage is not subject to political factors. There have been many recommendations about the necessity for the process of assessment of significance and threat to be separate from the process of making an ultimate decision on protection. This was also recommended by the 1996 Evatt report referred to above.

In relation to the statement of facts proposed item (3), see the comments made above in response to question 4.2 about the expanded considerations for impact.

The applicant for protection should be provided with a copy of a draft of the statement of facts and given the opportunity to comment or point out corrections that need to be made.

The Minister should only revoke the order if satisfied that the area or object will actually be adequately and effectively protected under state or territory laws, not simply that there is legislation under which it can be protected. As mentioned previously, there is often a large scope for consents to damage places and objects or to simply take no action to enforce protection.

There should be a requirement to consult at least the relevant Indigenous people on any decision to revoke the final protection order.

#### ***Question 13.2: Is it important to have a person who is independent from the Minister assess the facts?***

Yes, for reasons set out above.

#### ***Question 13.3: Is the proposed method for preparing the statement of facts a fair way to assess the facts about the situation?***

Yes, provided the safeguards set out in answer to 13.1 are included.

**Question 13.4: Would the Minister need to consider other factors before deciding whether to make a final protection order?**

Not that we can think of at this stage.

**Question 13.5: Would the Minister need to consider any information that could not be included in the statement of facts?**

There should be provision that the applicant may meet with the Minister and make direct representation to the Minister if the applicant so elects within a set period of time from when the statement of facts is completed.

**Question 13.6: If so how could this be done fairly and without undue delay?**

This could be done within specified time limits from when notification is given.

**Question 13.7: Would the Minister need to consider other factors before deciding whether to revoke a final protection order?**

The Minister needs to consult the applicant and give them a reasonable opportunity to put submissions and these need to be taken into account.

---

**Proposal 14: Penalties and enforcement**

The discussion paper includes a range of suggestions for how to ensure that the new legislation is enforced adequately. Details are on page 46 of the discussion paper.

**Question 14.1: Are there other, better ways to promote compliance and enforce protection?**

Not that we can think of at this stage. However reviews are needed to ensure that such enforcement powers are actually properly funded and carried out in practice.

---

**Proposal 15: Reviews**

The effectiveness of the legislation, especially the accreditation scheme, could be reviewed at regular intervals to ensure it is achieving its aims. Details are on page 59 of the discussion paper.

**Question 15.1: What would be the best intervals for reviewing the legislation?**

The first review could be after 5 years with intervals of 7 years thereafter. This should not prevent ongoing review at an earlier stage.

**Question 15.2: What would be the best way to review the effectiveness of accreditation?**

A report with scope for Indigenous groups and others to make submissions is appropriate. This could be conducted by the Australian Human Rights Commission.

**Question 15.3: What specific aspects of accreditation would need to be reviewed?**

The main points would be to ensure that the systems are operating to protect heritage and not as a mechanism by which disturbance and destruction of heritage can be officially sanctioned.