

# INDIGENOUS HERITAGE LAW REFORM

## *Central Desert Native Title Services Ltd - Comments*

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## **PART 1 - CLARIFYING RESPONSIBILITIES**

### **Proposal 1: Purpose of the Legislation**

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

Although the points express the purposes of the legislation in terms of the ideal situation it might also be useful to include in the purpose reference to penalties for failure to uphold these purposes. For example, 'to impose significant penalties or deterrents on person/s who disregard the law for protection of indigenous Traditional Areas or Traditional Objects'.

### **Proposal 2: Terminology - New Definitions**

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

The new definitions are useful as they contextualise the significance of an area or object in the domain of traditional laws and customs, and emphasise the importance of the level of responsibility of the indigenous person and the requirement to protect or regulate the area or object.

The new definitions make it clear what Traditional Areas or Objects are, however, they do not completely negate the need to determine the significance of that area or object to Aboriginal people, as proof of a 'use or function under traditional laws and customs' is still required.

The definition of 'indigenous person' is helpful in encompassing both 'Aboriginal' and 'Torres Strait Islander' persons, however the actual definition appears outdated. The phrase 'Aboriginal race' is no longer an appropriate reference for Aboriginal persons and 'descendant of an indigenous inhabitant of Australia' or 'person who identifies with an Aboriginal group, and is identified by the group as part of that group' may be more appropriate definitions.

#### **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'? (see also proposal 8)**

No comment

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

No comment

### **Proposal 3: Accreditation**

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

The Australian Government should only grant accreditation on states or territories if their laws meet the standards of heritage protection as set by the Australian Government. The standards set need to meet the purpose of the Act, that is, to preserve and protect Indigenous Traditional Areas and Objects from injury or destruction and should be in line with Australian Government processes for protecting Traditional Areas and Objects, and only then should the accreditation be granted.

Importantly, accreditation of laws would ensure that Indigenous heritage laws are uniform all throughout Australia, for a more consistent and effective process for protection and preservation of Indigenous Traditional Areas or Objects.

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

With the new heritage laws it is proposed that once a state or territory heritage law is accredited the Australian Government cannot comment on a declaration made on the protection of Indigenous Traditional Areas or Objects. With the current laws the Commonwealth remains as an appeal option of last resort. The option of appeal is generally invoked when the state or territory laws are ineffective for protecting Indigenous Traditional Areas or Objects. Under the proposed legislation this back up would no longer exist, however, a declaration can be reviewed by seeking legal review. The law reform would need to ensure that the standards states and territories have to meet are at a level that promotes effective and efficient legal processes for protecting and preserving Indigenous Traditional Areas or Objects.

Proposal 3 does not say when state or territory Indigenous heritage laws will be assessed for a grant of accreditation. It appears that a state or territory would have to request that the Commonwealth Government Minister assess the Indigenous heritage laws of the state or territory to have accreditation granted. The only incentive of accreditation is that the Australian Government can no longer intervene, however the state or territory's heritage laws would have to be of a particular standard to obtain accreditation, meaning that similar decisions should result. The overall process would be quicker due to a lack of Commonwealth Government involvement.

If no accreditation is granted the state or territory Indigenous heritage laws continue unchanged and the Commonwealth Heritage Act would still have an overarching effect. Proposal 3 needs to clarify when the states and territories Indigenous heritage laws will be assessed for grant of accreditation, and how their continued compliance would be monitored, allowing them to maintain accreditation. Would third parties have to bring notice of breaches to the attention of the Commonwealth Government or would all changes to state and territory heritage laws have to be approved by the Commonwealth Government? Either of those options appears onerous – on all parties.

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

When would the Australian Government Minister be aware that he would need to provide advice? The Australian Government Minister option to provide should be set out clearly.

If the Commonwealth Government Minister was to provide generic advice on decision making this would assist states and territories, however each decision is unique and this advice may not be appropriate, leading to misinformed decisions. For the Minister to provide advice on individual cases seems to revert to the current approach, although this may be effective if used in tandem with basic overall advice.

**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?**

If the Australian Government adds to the standards over time, it needs to be clear as to what would happen in states or territories where accreditation has been granted. That is do the states or territories that are already accredited have to either be reassessed or are they required to amend their laws to meet the new additional standards. The preferred approach would be to ensure that the standards are at the highest level to begin with, to avoid doubt in the future.

Reviews of decisions by states and territories would be essential to ensuring that standards are being maintained, in accordance with the heritage laws in each state or territory.

**Proposal 4: Standards**

**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?**

No comment

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

In standard 9 it states that if an agreement cannot be reached the proponent (developer or person proposing to do activity) can request for approval from the Minister. The approval to disturb or destroy a Traditional Area or Object could affect the native title rights and interests of traditional custodians and the process to approve should be considered in a way that would not undermine these recognised native title rights and interests. There also seems to be an inherent bias toward the outcome that an act can be done, rather than acknowledging that, sometimes, under no circumstances or conditions is it acceptable for an act to be done that impacts on a Traditional Area or Object.

This problem appears to be addressed to a certain extent in standard 11, which requires the Minister to consider the impacts on traditional areas and object. This standard should be emphasised, as it is of the highest importance to ensure that accredited states and territories conform to Australian Government standards.

In standard 15 there is a list of considerations that the Minister should consider when deciding whether to approve an activity? The standard is broken down into 2 stages of consideration, first the views of parties and second the effect of approval. The Minister has to consider the proponents and traditional custodians views on options to avoid or minimise the likely impact, but when considering the likely effect of giving or not giving approval the Minister is not required to consider the interests of the traditional custodians. This would need to be changed so that the effect on the interests of traditional custodians is considered.

With standard 16 it requires considered input from the Australian Government Minister when making a decision to approve. This standard needs to clarify how the Australian Government Minister would know when input is needed, that is, the law would need to include a process of advising Australian Government Minister of approvals. This would tie in with the proposal to provide Australia Government advice for decisions made by the states and territories.

Standard 17 requires the laws to state that when an approval for an activity that could have an adverse impact on a Traditional Area or Object can be granted, the following must be considered:

- a) whether there are practical options to avoid or minimise the possible impact and, if there are no practical options
- b) that the cultural, social, economic and environmental welfare of the community outweighs the imperative to avoid adverse impacts on the Traditional Area or Object.

This can be, and often is, incompatible with the wishes of the traditional owners. Legislation that, in practice, preferences the benefits to the wider community, rather than those directly affected by the decision, ultimately ends up having the opposite effect to the stated intention of the Act (ie – the protection of Aboriginal Heritage). Although this standard requires an extensive review of the effects on the general community and the impact on the traditional are or object, it leaves a large discretion for states and territories to avoid strict adherence to the Australian standards of heritage protection.

## **Proposal 5: Traditional custodians**

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

We agree with proposal 5 in ensuring that legally ‘recognised traditional custodians’ can seek protection and to use established land rights and native title processes in identifying the ‘recognised traditional custodians’, as it is vital to ensure that the ‘recognised traditional custodians’ of a particular area are consulted when a proposal is likely to affect their area of responsibility. Prescribed Bodies Corporate, where native title has been determined to exist and Native Title Representative Bodies, where native title is yet to be determined can assist in representing the interests of ‘recognised traditional custodians’.

One issue with this proposal is whether registered native title claimants would be included as 'recognised traditional custodians', as these persons are entitled to make decisions about traditional areas and objects, but have not legally been recognised.

The proposal would be effective when dealing with land but when dealing with objects may not be as clear on who can seek protection, as native title is only a legal recognition over land.

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

Yes

**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'?**

Yes, however it should be noted that under some traditional laws and customs, the 'recognised traditional custodians' might wish to involve others from their wider society. In some areas it is not only the people located in that area that need to speak about protection over a site, they may be required by laws and customs to discuss any impacts or protection with other senior members of other recognised areas.

If these members are not allowed to apply for protection on their own behalf, and must apply through the 'legally recognised traditional custodians', problems could arise.

The changes would, at the least, need to acknowledge this potential outside involvement, so as to avoid complete exclusion of those other than traditional custodians whose opinion and advice on an area would be essential to an application for protection.

**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?**

No

**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

**Proposal 6: Protection would not interfere with ILUAs**

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

We do not support proposal 6. There may be a large number of wide ranging effects that are not considered at the time of entering into an ILUA that only become

apparent in subsequent years. A safeguard against unforeseen consequences of an ILUA is the fact that the State and Commonwealth Heritage Acts can protect against the destruction or injury of sites. To introduce legislative arrangements which ensure that activities permitted under an ILUA could not be prevented would remove this safeguard.

**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?**

No it would not be fair remove the ability of native title parties to seek protection over a Traditional Area. The aim of an ILUA is to allow particular activities that are considered, at the time of making the ILUA, to not impact on traditional areas and objects. However these are generally created in reliance on the fallback option of the heritage legislation.

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

No comment

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

No comment

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

It may unnecessarily impact on the complexity of negotiations if every possible action that could be contemplated by the ILUA must be set out and agreed due to the fact that no Heritage Acts will apply to the content of the ILUA.

This proposal would strengthen the confidence of proponents when making an ILUA, however native title groups would be more reluctant to negotiate and agree without the extra support of the heritage legislation.

**Proposal 7: Discovered Remains**

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

**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?**

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

No comment to provide on Proposal 7.

### **Proposal 8: Secret Sacred Objects & Remains**

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

We support the need for legislation to prohibit display of secret sacred objects and remains.

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

No comment

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

No affect is anticipated.

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

The definition seems appropriate.

## **PART 2 - IMPROVING PROCEDURES**

### **Proposal 9: Applications**

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

Proposal 9 sets out information for the acceptance of an application, but does not set out what will happen after this acceptance. Will the information provided be enough to stop or control the impact on the Traditional Area or Object? Or are there further steps to take before a declaration of what protection will be afforded to the effected Traditional Area or Object?

As an aside, it was suggested in proposal 5 that native title decisions were to be used as the way to define a traditional custodian – will this mean that other areas of the native title act will be considered when creating this new legislation, i.e. future acts process?

The dismissal of an application due to an application being considered frivolous or vexatious should only be used sparingly and reasons for this decision must be communicated to the applicant. Provision of reasons would give rise to the right for the applicant to apply for judicial review of the decision. It is also important to state what kind of evidence would be considered as enough information when completing

the application. Is it essential that every single requirement be fulfilled or will a surplus of information in one area supplement a lack of information in another area?

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

The legislation should include section addressed to the applicants to provide information on how issues should be dealt with (though they are required to do this at conference stage), and what particular information should be included. The section should state how the information in the applications would be used, i.e. gender-restricted material should be kept in a certain way, and some information may need to be confidential and provided only for the purpose of arbitrator making a decision.

**Proposal 10: Conferences**

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

There is no mention of what would happen if parties have not come to a resolution, or how the Minister would make a decision if this was to happen. Proposal should provide information on how the Minister would make decision in the case where a resolution has not been made. The Minister should be required to provide comment to parties once decision has been made.

Senior officers who are delegated with Ministers power can decide when a conference is not needed, when would this happen? Should give information on when a conference may not be needed.

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

The list appears fairly extensive, covering the main people who should be consulted.

**Proposal 11: Sensitive Information**

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

The protection of culturally sensitive information should be a direction made to parties. Parties should be deterred from sharing sensitive information perhaps by signing confidentiality or privacy agreements. The Department must also have processes in place to ensure that they are adequately able to store sensitive and gender restricted information.

**Proposal 12: Interim Protection**

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

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The 48 hour protection order appears to be similar to an injunction – will this be that case in practice? Once a 48 hour protection order is declared over a Traditional Area or Object, what is the process?

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

It is possible that 48 hours would not be enough time to complete the application with the details required in Proposal 9, given the additional detail required for the applications. When completing an application it may require talking to a number of people who can speak for that area, which may take longer depending on availability. Accessibility of the right people is something the Minister may need to consider when deciding to provide interim protection.

**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?**

This longer period would provide more time for the right people to be located, and their evidence obtained. Therefore the application could be completed correctly, and a decision could be made as soon as possible.

**Proposal 13: Longer-Term Protection**

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

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

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

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

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

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

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

No comment to provide on Proposal 13.

## **PART 3 - MAKING SURE THAT PROTECTION WORKS**

### **Proposal 14: Penalties & Enforcement**

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

Proposal 14 should be implemented and perhaps amended further as there needs to be recognition that once damaged it may not be possible to repair or remediate damage. There needs to be a substantial threat or consequence for damaging a Traditional Area or Object, including a jail term for the offender.

### **Proposal 15: Reviews**

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

Probably better to review legislation every 5 years. These reviews can look at adding further best practice that may have emerged and ensuring that those States and territories that have gained accreditation continue to maintain high levels/standards in terms of protection of indigenous heritage. There needs to be some review to ensure that the states and territories who achieve accreditation, thus removing the Commonwealth protection don't then fail to maintain their standards at the highest accredited level.

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

The option for Indigenous Australians, state and territory governments, business and the public to comment is a necessary part of reviewing the effectiveness of this law. It needs to be made clearer in Proposal 15 that this will be possible, as the option to comment at the stage when state and territory laws are being assessed for accreditation would have a positive effect on accreditation.

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

1. Whether the information provided in the applications as prescribed was enough information for Minister or Ministers Delegate to make an informed decision.
2. Look at actual declarations that have been made in regards to an activity being allowed – were there conditions attached and if so did this lessen or avoid the impact or damage on the Traditional Area or Object?
3. The reasons on why a Minister may have approved an activity where agreement could not be reached.
4. How many times it was necessary for parties to apply for legal review – this may give an indication of what needs to be adjusted in the accredited state or territory laws.
5. As mentioned in 15.1, assessing the compliance of states and territories with the Australian Government standards.