



17 November 2009

The Hon Peter Garrett AM MP
Minister for the Environment, Heritage and the Arts
Indigenous Heritage Law Reform, Heritage Division
Department of the Environment, Water, Heritage and the Arts
GPO Box 787
CANBERRA ACT 2601

Dear Minister Garrett,

Re: Response to Discussion Paper - Indigenous heritage law reform

This submission is made by the Minerals Council of Australia (MCA) in response to the Minister for Environment Heritage and the Arts' Discussion Paper - *Indigenous heritage law reform*. The MCA welcomes the opportunity to respond to the Discussion Paper and provide comment on the proposed amendments to the Aboriginal and Torres Strait Islander Heritage Protection (ATSHP) Act.

The MCA is the peak national industry association representing exploration, mining and minerals processing companies in Australia. MCA members account for more than 85% of annual minerals production in Australia and a slightly higher proportion of mineral exports.

Members of the MCA recognise that Industry's engagement with Indigenous peoples needs to be founded in mutual respect and in the recognition of Indigenous Australians' rights in law, interests and special connections to land and waters. This point is made even more acute by the fact that more than 60% of minerals operations in Australia have neighbouring Indigenous communities.

The MCA's vision is a thriving minerals industry working in partnership with Indigenous communities for the present and future development of mineral resources and the establishment of vibrant, diversified and sustainable regional economies. Industry recognises that its operations are inextricably linked to building and enhancing our relationships with Indigenous communities, and to meeting the needs of this generation without compromising the ability of future generations to meet their own needs. Industry is further committed to working with Indigenous communities to ensure that they share in the benefits of resource development.

The Minerals Council of Australia concurs that Indigenous Australian's must have a central role in decisions about the need to protect and manage the areas and objects that are part of their traditional heritage. The Minerals Council's response to the proposed amendments to the Aboriginal and Torres Strait Islander Heritage Protection Act, as outlined in the Discussion Paper are attached, and follow the order of the Discussion Paper proposals.

If you have any questions or require any further information, please do not hesitate to contact Ms Sarah Fuller, who has carriage of this matter in the MCA Secretariat on: 02 6233 0631.

Yours sincerely

A handwritten signature in blue ink, appearing to read "Melanie Stutsel".

Ms Melanie Stutsel
Director – Health, Safety, Environment and Community Policy
Minerals Council of Australia

Overview Minerals Industry Position on the Current Aboriginal and Torres Strait Islander Heritage Protection Act

The maintenance of Indigenous culture and heritage is critical to the development of vibrant, diversified and sustainable Indigenous communities. Australia's Indigenous heritage is an issue of significant importance to be taken into account in Australia's land management systems. Such arrangements should provide not only for the comprehensive identification and protection of both fixed and movable cultural heritage, but should also provide opportunities for the direct involvement of Indigenous communities, including resourcing for their participation in the ongoing management of cultural heritage sites, artefacts and intangible heritage.

The regulation of Indigenous heritage protection is duplicative across a number of Acts. The MCA considers that the current cultural heritage regimes are unnecessarily complicated, often leading to substantial delays in the project assessment and approval processes for mining exploration and development. The key issues faced by industry under the current system include:

- The overlap between State and Commonwealth heritage processes and State and Commonwealth environmental processes; dual layers of heritage legislation mean that 'forum shopping' can occur: where a group is dissatisfied with the outcomes of a state based cultural heritage approval process, and may then move to utilise the Aboriginal and Torres Strait Islander Heritage Protection Act to overturn the State decision. Forum shopping is an ongoing challenge for industry, causes significant uncertainty and is unnecessarily resource intensive.
- There is an inconsistent approach to Indigenous heritage matters, with heritage issues covered in a number of Commonwealth Acts in addition to State heritage requirements. To avoid duplication and overlap between legislative instruments and requirements, it is recommended that where two processes are identical across relevant Federal Acts, that consideration be given to mutual recognition.
- Where current State processes are ineffective, high transactional costs are imposed, both in terms of direct costs and time imposts on project approval timelines. For example, where the self-nomination of Aboriginal parties with interests in an area is permitted, and there is a lack of recognition of the specific rights of Traditional Owners, negotiation with multiple parties, and parties without traditional ownership escalates cost.

Further, the historic under resourcing of Indigenous representative organisations and the lack of appropriate, government funded social and physical infrastructure in Indigenous communities continues to provide systemic barriers to participation, limiting effective engagement by Indigenous people in decision making and management of their traditional lands and cultural heritage. The widespread disadvantage suffered by Indigenous Australians is an issue that requires urgent attention by Government for the development of long term sustainable solutions that facilitate Indigenous led approaches to management of their communities, lands and cultural heritage.

Detailed comments on the specific proposals in the discussion paper follow.

PART 1 – CLARIFYING RESPONSIBILITIES

Proposal 1 – to use the reforms to define the purposes of the legislation

The MCA agrees that the eight points outlined in the Discussion Paper reflect the purpose of the legislation. Industry is eager to see legislation that provides a framework to acknowledge Indigenous Australians as the primary source of knowledge of their traditional laws and customs and encourages engagement with Indigenous Australians to agree at the earliest available opportunity on practical ways to protect traditional areas and objects, and to manage and appropriately compensate for any impacts on this heritage.

The MCA further considers that in addition to promoting fair, transparent and timely decisions that do not impose unnecessary costs on those involved, that the purpose of the legislation should reflect its intention to provide a complementary process to existing state regimes. In line with the proposed implementation of an 'accreditation' scheme, there may be value in highlighting this in the purpose of the legislation.

Proposal 2 – to make terminology consistent with purposes

In looking to make terminology consistent with the purpose of the Act; the MCA does not support the proposal to remove reference to "of particular significance" in relation to Ministerial declaration on an object's significance. The minerals industry considers the retention of "of particular significance" important as there is already a body of case law established in reference to its interpretation and application.

While the minerals industry does not have an issue in principle with the inclusion of reference to a 'traditional area' based on the recommended definition of "traditional laws and customs" as used in the *Commonwealth Evidence Act 1995*, the definition used in the Act is very broad. Without the test of particular significance, this change in definition has the potential to enable very large areas of problematic significance to be protected, as in Indigenous culture all country is of potential traditional and customary significance. If the revised definition of a traditional area is included as proposed, the retention of the test of particular significance is essential; this is of particular importance in relation to archaeological sites of low significance.

Based on the definition under the *Commonwealth Evidence Act 1995*, it is considered necessary to provide greater clarity on the criteria to be used by a regulator to: a) determine whether certain activities will impact upon a Traditional Area, Traditional Object or Traditional Laws and Customs; and b) identify areas or objects "protected or regulated under traditional laws and customs".

It is important to reiterate, that the proposed definition of "traditional laws and customs" as defined under the Commonwealth Evidence Act 1995, would enable very large areas of significance to be protected on the basis that all Indigenous Country is of potential traditional and customary significance; this should be further considered in refining the application of this definition so as not to include areas not currently covered under the Act.

Proposal 3 – promoting effective laws through accreditation

In looking to promote effective laws for the protection of Aboriginal and Torres Strait Islander heritage, and to enable national consistency the MCA is supportive of proposed standards for accreditation. Under an accreditation framework, the ATSIHP Act would continue to provide a complementary avenue for absent or weak state legislation and an opportunity for higher authority/appeal where it is deemed the State has made a decision in error. Importantly, however, the bilateral arrangements would provide all parties with certainty that the ATSIHP Act was not intended to run in parallel, nor seek to undermine or supplant State legislation.

The introduction of an accreditation scheme, under which States and Territories would be required to meet certain standards, and disallowing application for a protection order under the Commonwealth regime, is considered a positive and necessary measure that would work towards the prevention of forum shopping. With multiple layers of legislation available at both the Commonwealth and State levels, the provision that applicants can currently pick and choose which legislation to use is a significant issue for the minerals industry. It is further an issue that under the current process, the same Federal Minister that has approved a proposed development under the EPBC Act could be invited at a subsequent stage to effectively constrain the approved development through a protection order under the ATSIHPA.

We note that under the proposed amendments that where States adopt the accreditation scheme, the Commonwealth can further request that a State Minister "call in" an activity to direct a proponent to apply to the Government for approval, and further consider any representations from the Minister responsible for administering the Australian Government's legislation. While it is understood that this provision aims only to provide the Federal Minister with an advisory role in the State's decision making process, it is important that it is made clear that this is not an intervention that will undermine the accreditation scheme and subsequently limit State's willingness to opt in to accreditation.

The likely extent to which States will seek accreditation, and therefore the nature of the procedures for unaccredited States, is a critical issue. It is understood that it is unlikely that any of the existing State legislation would pass the proposed accreditation standards. Due to the number of States that have recently reviewed or are in the process of reviewing heritage legislation, it is anticipated there may be limited take up of the proposed accreditation scheme as an opt-in initiative.

This being the case, the minerals industry strongly advocates that for non-accredited States; an inclusion be made in the ATSIHP Act that requires State and Territory Indigenous cultural heritage management processes be provably exhausted before an application can be made under the ASTIHP Act. Such a provision would contribute to the reduction of forum shopping, and the ability to run applications concurrently in State and Commonwealth jurisdictions. To further strengthen this proposal, consideration should be given to the inclusion of a requirement that where an application is brought to the Commonwealth following a State process, that the Commonwealth must give due consideration to any findings or outcomes from the State process including consultation undertaken with traditional custodians, before reaching a decision about whether to issue a protection order.

Further the minerals industry also considers that in implementing an accreditation scheme, it is critical that the Commonwealth work closely with the States to encourage and support a transition to accreditation and to jointly ensure processes are not duplicative in nature, and are together actively perusing a harmonised heritage protection system.

In consideration of the proposal to periodically review the accreditation, industry considers there would be merit in periodic review of accreditation standards, as long as the review process is not too frequent. Of importance is that any changes as a result of these reviews do not affect existing cultural heritage approvals from accredited regimes or provide a basis to bring any further applications under the ATSIHP Act that have been the subject of a previous application. In particular, if as a result of a review the accreditation of a State or Territory is removed, any existing cultural heritage approvals in place should remain unaffected.

Proposal 4 – specifying standards for effective protection

The MCA considers proposed standards could improve the extent to which Indigenous heritage is protected. It should be noted however, that standards included in the legislation should not be overly prescriptive; but high level guidance that is consistent with requirements under other existing legislation that refers to the protection of Indigenous heritage.

The minerals industry sees particular value in appropriate consultation and opportunities to reach agreements, and has been at the forefront of leading practice approaches toward engagement with Indigenous peoples and their communities.

The MCA is supportive of the suggested provision to ensure traditional custodians have a central role in the consultation and decision making process, and considers it necessary in order to establish a foundation for mutual respect and recognition of Indigenous Australians rights, interests, and special connection to land and waters. The minerals industry sees this as a practical amendment, as currently any one can bring forward applications for a protection order, irrespective of whether they have the support of traditional custodians or know the traditional laws and customs relevant to the area. Further, the minerals industry concurs that consultation and engagement with key stakeholders, including Traditional Owners should begin early in the process to ensure that relevant parties are identified, informed and engaged in order to establish and maintain certainty.

The proposed definition of traditional custodian, is however very broad and could include any Indigenous person who *may* know the traditional laws and customs of the area concerned. The definition of traditional custodian should be restricted to Indigenous people that have traditional responsibilities for the area. This is particularly important for ethnographic sites which may have no apparent physical manifestation to people other than the traditional custodians.

In relation to 8) Reaching agreement, we note that while it is the aim of project proponents to ensure that they avoid impacts on Indigenous cultural heritage and otherwise minimise or mitigate impacts, there are circumstances in which the development of a project will involve an impact which cannot be either avoided or mitigated. Agreements and approvals must be able to address this circumstance by agreement of key stakeholders.

In relation to 18) *Requirement to maintain records*, the minerals industry considers that this may be problematic in instances where Indigenous groups do not wish the state to have details of their heritage places. The legislation should not allow the state to require an Indigenous party, or another party against the wishes of the traditional custodians, to provide this information to the state.

In relation to 20) *Opportunity for legal review*, the reference under this standard to "interested parties" should be restricted to those with clear rights or interests. This should further specify that "interested parties" does not refer to Indigenous groups or individuals outside of the traditional custodians.

The minerals industry further sees merit in inclusion under the proposed standards that where protection of an area has been determined under the State process, that a provision is made for resourcing to support traditional custodians to manage the maintenance, care and protection of that site or objects. As previously noted, the historic under resourcing of Indigenous representative organisations and the lack of appropriate, government funded social and physical infrastructure in Indigenous

communities, continue to provide systemic barriers to participation and decision making in the first instance, and further in management of traditional lands.

While the minerals industry considers the proposed standards could improve the extent to which Indigenous heritage is protected and is broadly supportive of standards for effective protection under the proposed accreditation scheme; it should be noted that provisions must be in place to ensure that these standards do not add any further complexity, requiring significant additional time or have open ended processes or timeframes; and should further be supported by a clear, accessible register of protection orders and any attached conditions.

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

As outlined under Proposal 4, the minerals industry is supportive of the suggested provision to ensure traditional custodians have the central role in the consultation and decision making process regarding their cultural heritage. This is necessary both in order to establish a foundation for mutual respect and recognition of Indigenous Australian's rights and interests, and as a practical amendment to exclude the interest of those not directly associated with the traditional custodians or familiar with the traditional laws and customs relevant to the area.

In supporting the recognition of traditional entitlements for traditional custodians on their lands in line with native title and land rights laws, it is reiterated, that the proposed definition of traditional custodian is very broad and could include any Indigenous person who *may* know the traditional laws and customs of the area concerned. The definition of traditional custodian should be restricted to Indigenous people that have traditional responsibilities for the area. This is particularly important for ethnographic sites which may have no apparent physical manifestation to people other than the traditional custodians.

It is also noted that where there is not an identified traditional owner group, it is important that cultural heritage remains protected; it is proposed that identification of traditional owners for the purpose of cultural heritage protection follows the process outlined under the Native Title Act. This may occur in instances where there is no Native Title claim, there are overlapping Native Title claims, or the Native Title claim has been withdrawn, dismissed, or resulted in a determination of no Native Title.

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

The MCA is strongly supportive of a provision that enables certainty that future acts permitted under a registered ILUA could not be prevented by the Minister. Industry considers such a provision should further be extended to other agreements entered into under Commonwealth laws that deal with cultural heritage, such as: the Right to Negotiate and other future act processes/agreements under the Native Title Act, Heritage Agreements and cultural heritage management plans and exploration and mining agreements under the Aboriginal Land Rights (Northern Territory) Act.

It is considered that where an activity has been agreed under an Indigenous Land Use Agreement, that parties have negotiated the appropriate processes and commitments to protect areas of significance as agreed with the Traditional Owners.

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

In relation to the removal of duplication in the reporting requirements of the discoveries of Indigenous personal remains, industry is supportive of the removal of this duplication where discoveries would only be reported to the Australian Government Minister where those remains have been discovered in an area that is managed by the Australian Government, and where State and Territory laws do not apply.

It is suggested that provisions for the reporting of discoveries of Indigenous personal remains could be outlined in the proposed accreditation standards.

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

The MCA does not have a formal position on this proposal.

PART 2 – IMPROVING PROCEDURES

Proposal 9 – specifying the information needed for applications for protection

The MCA is supportive of the introduction of a requirement that applications for protection specify minimum application requirements, and are made on a prescribed form and checked for completeness by a delegated departmental officer before they are accepted in order to improve the success rate of applications. Other information that should be included are the details of any heritage assessment processes undertaken or underway, either by the proponent or other parties.

It should be noted that in order for the application process to be inclusive and encourage the participation of Traditional Owners, that this information should be clear, comprehensive and accessible to all interested parties. It may further be useful to include a support or referral system for those who require further information and assistance.

Proposal 10 - using conferences to consider how best to deal with the issues

The MCA is actively supportive of approaches that encourage negotiation and mediation in determining agreed outcomes with traditional custodians. In addition, the minerals industry is broadly supportive of the proposal to use conferences of the parties to plan how to handle an application in order to help resolve issues with less delay.

As specified under Proposal 4, it is important to ensure that any additional administrative procedures aimed to expedite the application and agreement process are structured in a way that they do not in fact cause added complexity, time or cost.

Proposal 11 – protecting sensitive information

The MCA is supportive of the introduction of powers to direct parties to protect culturally and commercially sensitive information, to ensure disclosure only to relevant parties.

Proposal 12 – clarifying the reasons for providing and revoking interim protection

The MCA notes that the proposed timeframes outlined in relation to amending the process for short interim protection orders is reasonable in avoiding excessive delays.

Proposal 13 – clarifying the reasons for providing and revoking longer-term protection

The MCA is broadly supportive of the proposed clarification of the rules for providing and revoking longer-term protection orders in order to strengthen the basis for the Minister's decision. It is considered there is value in establishing clearer rules for the provision of a longer-term protection order, in consideration of the site significance, including: specification of the period, and building in a review/revocation mechanism.

The minerals industry agrees that there is merit in permitting an agreed statement of facts, on which the Minister could make a decision for protection. The MCA would specify however, that the agreed statement of facts should only be used as the basis for a decision where it is clear that there is no disagreement between the parties about the facts.

In relation to the nomination of a person – an assessor – to provide a statement of facts for the purpose of making a decision, it is important that the person assessing the facts is independent of the Minister. There should further be a requirement that that person have an appropriate level of expertise to determine the facts for the content set out in points 2-4 of the Proposal.

The minerals industry is broadly comfortable with the proposed method for preparing the statement of facts as a fair way to assess facts about the situation.

As above, the MCA agrees that provisions should be made to establish a clearer process for revoking protection when it is no longer needed, and that a test for necessity of the protection order could be considered against the purpose for which it was made, in consultation with the traditional custodians by agreement.

In addition to this, the MCA sees that other relevant parties affected by protection orders should also have the ability to request a revocation of a protection order under certain circumstances. Revocation should also be permissible where an Indigenous Land Use Agreement has been reached over the relevant area. It is further noted that there would be value in Protection Orders being subject to periodic review.

PART THREE – MAKING SURE THAT PROTECTION WORKS

Proposal 14 – Updating the penalties and improving the enforcement powers

The Minerals Council of Australia does not have a formal position on this issue.

Proposal 15 – Reviewing the effectiveness of the legislation at regular intervals

The MCA considers there would be merit in the periodic review of the legislation, with the first review after seven years. Industry is further supportive of the review process being aligned with the proposed process for the review of the operation of the EPBC Act; and to require an independent person or body to produce a report to the Minister, and for the report to be tabled in the Parliament. As outlined under Proposal 3, it would not be effective to include a review process that was too frequent.