

**Submission to the Department of the Environment, Water, Heritage and the Arts  
Discussion Paper (August 2009)**

***Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)***

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**1. Introduction**

This submission responds to the Discussion Paper from the Department of the Environment, Water, Heritage and the Arts (August 2009) (**Discussion Paper**), on potential reforms to the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)* (**ATSIHP Act**).

We provide our response to those areas of potential reform outlined in the Discussion Paper, with particular emphasis on the following key policy issues in relation to the Act and its proposed reform:

- critical comment on the proposed narrow designation of heritage as ‘traditional’, and a recommendation to attribute a broader and more dynamic meaning to Indigenous cultural heritage;
- critical comment on and comparison with existing State legislation (particularly in Victoria and Queensland), including consideration of the strength and scope of State legislation with respect to the continuance of the Act as legislation of ‘last resort’;
- consideration of the proposed model of accreditation and appropriate benchmarks for accreditation;
- consideration of overlap and integration with existing native title processes; and
- consideration of overlap and integration with existing Commonwealth environmental legislation, specifically the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (**EPBC Act**).

The following State and Territory Acts have been considered:

- *Aboriginal Heritage Act 2006* (Vic) (**Victorian Act**);
- *Aboriginal Cultural Heritage Act 2003* (Qld) and *Torres Strait Islander Cultural Heritage Act 2003* (Qld) (**Queensland Acts**);
- *Aboriginal Heritage Act 1988* (SA) (**South Australian Act**); and
- *Aboriginal Heritage Act 1972* (WA) (**Western Australian Act**).

## 2. General Recommendations

While we acknowledge the importance of existing protections for Indigenous cultural heritage under other legislative regimes, such as the EPBC Act, we consider that a specific and integrated legislative regime for protection is vital. This legislation should

- establish fundamental principles for the protection of Indigenous cultural heritage;
- provide clear standards for State and Territory legislation, adhering to those fundamental principles for protection; and
- provide for Commonwealth intervention in cases of national and international interest or significance.

We have adopted and extended the submission of Native Title Services Victoria on the *Aboriginal Heritage Bill 2006* (Vic) (19 December 2005) (**NTSV Report**), to include affected Indigenous persons (see recommended definition at Question 5.1) who are not legally recognised traditional custodians (see recommendations at Question Proposal 5).

We recommend that the terms of legislation governing Indigenous cultural heritage be developed by Indigenous persons and negotiated with the States, in circumstances where Indigenous persons possess the requisite knowledge of their country and may possess legally enforceable native title rights and interests over the area. This would, at the very least, entail meaningful consultation with Indigenous persons as to appropriate language to be used in defining terms such as ‘Indigenous person’, ‘Indigenous personal remains’, ‘secret sacred object’, ‘traditional area’, ‘traditional custodian’, ‘traditional laws and customs’ and ‘traditional object’ if these terms are to be used. Where the ATSIHP Act also lacks a definition of ‘Indigenous cultural heritage’, we recommend that this be

included, and devised in meaningful consultation with a range of Indigenous groups and/or individuals.

Following the recommendations of the Review by Hon Elizabeth Evatt (22 August 1996) (**Evatt Review**), we also recommend that legislative regimes for the protection of cultural heritage be for the benefit all Indigenous people, irrespective of whether they are living a ‘traditional’, urban, rural or remote lifestyle. As recommended in the Evatt Review, “[t]he objective should be to protect living culture/tradition as Aboriginal people see it now.” (xv). Accordingly, we recommend that the aforementioned definitions contained within the ATSIHP Act be devised in consultation with Indigenous groups, so as to most accurately reflect contemporary Indigenous meanings (see proposed application of this principle at Question 2.1, Proposal 2).

Further, we support the recommendation and advocate the principle that State, Territory and Commonwealth cultural heritage laws should be for the benefit of Aboriginal people and society (Evatt Review, 77). We recommend that this be included as a guiding principle to the ATSIHP Act (discussed at Proposal 1, Question 1.1), and that the Act be interpreted in the context of this principle.

We further recommend that, in place of the existing limited purposes of the Act (s 4), the Act should include a comprehensive and clear set of cultural heritage principles. Our recommendations for the content of these principles are detailed below. Further, we recommend that the Act provide a process by which achievement of these principles might be assessed. This may be in the monitoring, assessment and reporting of measurable targets, drafted in accordance with the higher level statement of principles, and clearly stipulated in the Act. This section may also include measures to be taken and avenues for redress in the event that targets are not met.

We also recommend that this type of monitoring process be applied to the State and Territory accreditation process. Specific proposals are discussed below, at Proposals 3 and 4.

Finally, we are concerned with the reliance on native title and native title concepts, such as the use of the word ‘traditional’. We consider that the strength of heritage legislation is that it frees up the meanings to be given to the concept of Indigenous cultural heritage

from the strictures imposed on native title as a result of the High Court's decision in *Members of the Yorta Yorta Aboriginal Community v State of Victoria*.<sup>1</sup>

### **3. Response to Reform Proposals**

In this section, we provide our response to reform proposals contained within the Discussion Paper. Some of our responses draw upon our broader concerns in relation to overall policy and procedural clarity, as previously outlined.

#### **3.1 Part I: Clarifying Responsibilities**

##### ***Proposal 1 Clarifying the Purposes of the Legislation***

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

We are generally in support of these points, though we recommend some clarification and elaboration to more fully express the purposes of the legislation.

Proposal 1 provides that a purpose of the ATSIHP Act would be to “ensure that all governments consider the potential impacts of their decisions on traditional areas and objects in full, including by specifying standards for the State and Territory laws that protect Indigenous heritage”. Further clarification is required here, via the provision of guidance in determining whether a State or Territory's laws meet the standards specified.

While Proposal 1 of the Discussion Paper details a proposed clarification of the purposes or objects of the legislation, it does not provide for the inclusion of a set of guiding cultural heritage principles, upon which the legislation is to be founded. Both the Victorian and Queensland Acts do so provide, and are instructive in this respect. We recommend a more comprehensive set of principles be included, alongside or as a part of the proposed purposes.

Principles contained within both the Victorian Act and the Queensland Act that may be usefully adopted in Commonwealth legislation include the following:

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<sup>1</sup> (2002) 214 CLR 422 (*Yorta Yorta*).

- recognition, protection and conservation of Indigenous cultural heritage based on respect for Indigenous knowledge, culture and traditional practices;
- recognition of Indigenous people as the primary guardians, keepers and knowledge holders of Indigenous cultural heritage, as well as of Indigenous laws and customs;
- promotion of public awareness and understanding of Indigenous cultural heritage; and
- acknowledgment of the need to establish timely and efficient processes for the management of activities that may harm Indigenous cultural heritage.

The Victorian and Queensland Acts also provide for recognition of Indigenous ownership of Indigenous human remains and secret or sacred objects, including those held by the State.

The aforementioned principles, as contained within the Victorian and Queensland Acts, have also received support in the review of the South Australian Act, in the Government of South Australia Review of the South Australian Act (Scoping Paper, December 2008),<sup>2</sup> and an associated discussion paper (“**South Australian Discussion Paper**”).<sup>3</sup> This latter paper identified ten founding principles for heritage protection in South Australia. We emphasise the following five principles:

- Heritage is more than just sites, objects and remains and it should be managed as a whole;
- Aboriginal people must be in control of their Aboriginal Heritage;
- Heritage and Native Title groups must work together;
- Aboriginal Heritage Management Plans need to be made for protection before development begins; and
- Aboriginal Heritage protection needs to be a part of other laws too, such as water, land and natural resources.

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<sup>2</sup> See <http://www.aboriginalaffairs.sa.gov.au/ahaReview/ss1.html> at 6 November 2009.

<sup>3</sup> Aboriginal Heritage Discussion Paper for the Review of the South Australian *Aboriginal Heritage Act 1988*, Prepared by the Joint Aboriginal Heritage Committees on behalf of the State Aboriginal Heritage Committee and the Aboriginal Congress of South Australia Inc, March 2009, at [http://www.aboriginalaffairs.sa.gov.au/ahaReview/ss\\_home.html](http://www.aboriginalaffairs.sa.gov.au/ahaReview/ss_home.html) at 6 November 2009.

These principles relate to several issues addressed in this submission, to which we will return.

Further, we recommend that the following principle in the Queensland Act be considered for inclusion in the ATSIHP Act:

- to ensure Aboriginal people are involved in processes for managing the recognition, protection and conservation of Aboriginal cultural heritage.

We also recommend the inclusion of an additional general principle, following the Evatt Review recommendation that legislative regimes for the protection of cultural heritage benefit all Indigenous people, irrespective of whether they are living a ‘traditional’, urban, rural or remote lifestyle. Where Indigenous peoples are engaged in and/or committed to a contemporary living culture, this culture should be protected. This principle should be in similar terms to that proposed in the Evatt Review – that is, “[t]he objective should be to protect living culture/tradition as Aboriginal people see it now.” (xv).

Where the ATSIHP Act is intended as legislation of ‘last resort’ – as a Commonwealth mechanism for protection of Indigenous cultural heritage where State or Territory legislation does adequately so provide – the inclusion of a clear and comprehensive set of guiding principles would provide an overall standard for State and Territory legislative regimes. This would be particularly applicable where States and Territories aspire to accreditation under Proposal 3 of the Discussion Paper, and may indeed provide a clear set of requirements for proposed State and Territory Indigenous cultural heritage legislative regimes.

Such a set of principles should, alongside the abovementioned principles shared by Victorian and Queensland legislation, include those additional principles set out in the Queensland Act. In the ATSIHP Act, these should include an acknowledgment that

- it is important to respect, preserve and maintain knowledge, innovations and practices of Indigenous communities and to promote understanding of Indigenous cultural heritage; and
- activities involved in recognition, protection and conservation of Indigenous cultural heritage are important because they allow Indigenous people to reaffirm their obligations to ‘law and country’.

We will return to this latter principle at Proposal 5, Question 5.1.

## **Proposal 2 Making Terminology Consistent with the Purposes**

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

Proposal 2 details various definitional reforms, defining ‘traditional area’, ‘traditional object’, ‘traditional laws and customs’ and ‘Indigenous persons’. We are in support of a revision of terminology consistent with purposes and the resolution of ambiguities associated with the previous use of ‘particular significance’. Nonetheless, we recommend some amendment to the proposed definitions.

In particular, we emphasise the need to move away from site and object specific definitions of cultural heritage toward those that embrace the dynamic reality of living Indigenous cultures. This may include, for example

- cultural practices that have changed over time and in differing circumstances; or
- the attachment of cultural significance by Indigenous groups or individuals to areas, places or practices of historical significance to those people, such as historical Mission station sites.

We further suggest that use of the term ‘traditional’ presents significant ambiguity and difficulty. We particularly emphasise the need to move away from an attachment to static notions of ‘tradition’, as in the decision in *Yorta Yorta*.<sup>4</sup> Those individuals and groups most affected by non-Indigenous settlement may encounter the greatest difficulty establishing that areas and objects of significance are ‘traditional’, as this term is commonly understood.<sup>5</sup> While the proposed definitions are relatively broad, we recommend the inclusion of more inclusive terminology. In accordance with the aforementioned recommendations of the Evatt Review, we propose that the definition of ‘traditional laws and customs’ be amended to ‘Indigenous laws and customs’, defined as ‘traditions, customary laws, customs, observances, practices, knowledge and beliefs of the group, including historical and contemporary adaptations.’ This definitional extension incorporates areas and objects of historical significance to Indigenous peoples, which

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<sup>4</sup> (2002) 214 CLR 422. See discussion in Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (2008) 308.

<sup>5</sup> See Yin C. Paradies, “Beyond Black and White: Essentialism, Hybridity and Indigeneity” (2006) 42 *Journal of Sociology* 355, 356; 358. In terms of principal language spoken, identification with a particular clan, tribal or language group, and familial arrangements, Paradies cites statistics that “suggest that many Indigenous Australians fail to conform to the fantasy of cultural alterity”.

may not be considered ‘traditional’, and also overcomes any potential for a narrow *Yorta Yorta* reading of the word ‘traditional’.<sup>6</sup>

We endorse the definition provided for “cultural heritage significance” in the Victorian Act, which includes “archaeological, anthropological, contemporary, historical, scientific, social or spiritual significance” (s 4).

We recommend that this definition be broadened and extended, to apply Indigenous ownership to ‘Indigenous cultural heritage’ as a whole;<sup>7</sup> and that ‘Indigenous cultural heritage’ be defined to include:

- Indigenous human remains;
- secret sacred objects;
- Indigenous knowledge;
- Indigenous land and waters;
- areas, structures or objects with historical meaning and/or significance to Indigenous people; and
- the living culture in which all these things are embedded.

We fully support the adoption of the term ‘Indigenous person’ to encompass both Aboriginal and Torres Strait Islander persons. Nonetheless, we recommend a broader definition of ‘Indigenous person’, to accord with the three part ‘working definition’, as articulated in other legislation<sup>8</sup> and accepted by the High Court of Australia.<sup>9</sup> According to this definition, an Aboriginal or Torres Strait Islander is

a person of Aboriginal or Torres Strait Islander descent who identifies as Aboriginal or Torres Strait Islander and is accepted as such by the community in which he or she lives.<sup>10</sup>

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<sup>6</sup> (2002) 214 CLR 422.

<sup>7</sup> See also Native Title Services Victoria Submission on the *Aboriginal Heritage Bill 2005* (Vic) (19 December 2005).

<sup>8</sup> *Aboriginal Land Rights Act 1983* (NSW).

<sup>9</sup> This definition has been judicially interpreted and accepted by the High Court: *Commonwealth v Tasmania* 158 (1983) CLR 1, 273-4 (Deane J). See also *Gibbs v Capewell* (1995) 128 ALR 577; *Shaw v Wolf* (1998) 163 ALR 205; *Re Watson (No 2)* [2001] TASSC 105; *Mabo and Others v Queensland (No. 2)* (1992) 175 CLR 1, 70 (Brennan J). See also extended judicial consideration and application of this definition in *Shaw v Wolf* (1998) 163 ALR 205.

<sup>10</sup> *Report on a Review of the Administration of the Working Definition of Aboriginal and Torres Strait Islanders* (1981). See further discussion in Research Note 18, John Gardiner-Garden (Social Policy Group), “The Definition of Aboriginality” (5 December 2000) at <http://www.aph.gov.au/library/pubs/RN/2000-01/01RN18.htm> at 6 November 2009.

Where the term ‘Indigenous person’ is adopted, this must be applied consistently throughout the Act.

*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’?

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

We are of the opinion that the proposed definitions, while broader than those currently within the ATSIHP Act, are still insufficiently broad. The current Act, and proposed definitional reforms, presently lack an overall definition of ‘Indigenous cultural heritage’. The inclusion of such a definition may provide a guiding principle for other definitions, including the above proposed definition of ‘Indigenous laws and customs’. This definition may include areas, objects and human remains, but should also extend to an acknowledgment of the dynamic relationships between areas and objects and, indeed, to an acknowledgment of more holistic notions of culture, which are not confined to geography or surface topography, or to other material phenomena. This broader notion would include, alongside ‘Dreaming places’, ‘Dream tracks’ or ‘Songlines’, which may embrace more complete conceptions of culture and are integral to Indigenous law and living culture.

This definition may be understood to incorporate aspects of intangible cultural heritage, as at an international level. The South Australian Discussion Paper provides support for this proposition, in the inclusion of a proposed founding principle that “Heritage is more than just sites, objects and remains and it should be managed as a whole.”<sup>11</sup>

Internationally, the World Heritage Convention<sup>12</sup> contains three categories of “cultural landscapes”,<sup>13</sup> representing the “combined works of nature and man”, as designated in Article 1.<sup>14</sup> The dynamism of such relations is also partially acknowledged in the

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<sup>11</sup> South Australian Discussion Paper, above n 3.

<sup>12</sup> The United Nations *Convention Concerning the Protection of the World Cultural and Natural Heritage*, adopted by the General Conference at its 17<sup>th</sup> Session, Paris, 16 November 1972, at <http://whc.unesco.org/archive/convention-en.pdf> at 6 November 2009 (*World Heritage Convention*).

<sup>13</sup> See *Operational Guidelines for the Implementation of the World Heritage Convention*, UN Doc WHC. 08/01 January 2008, 85, at <http://whc.unesco.org/archive/opguide08-en.pdf> at 5 November 2009.

<sup>14</sup> See Guideline 47, *Operational Guidelines for the Implementation of the World Heritage Convention*, UN Doc WHC. 08/01 January 2008 at <http://whc.unesco.org/archive/opguide08-en.pdf> at 5 November 2009, which defines “cultural landscapes”:

Convention for the Safeguarding of the Intangible Cultural Heritage,<sup>15</sup> adopted in 2003. The purposes of this Convention include the protection of the “practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage”.<sup>16</sup> Such heritage is not confined to areas and objects of significance, but extends to intergenerationally transmitted cultural heritage. Further, it is acknowledged as dynamic and contextually dependent, providing “a sense of identity and continuity ... thus promoting respect for cultural diversity and human creativity”.<sup>17</sup> Under this Convention, intangible cultural heritage includes oral traditions, expressions and languages; performing arts; social practices, rituals and festive events; knowledge and “practices concerning nature and the universe”; and traditional craftsmanship.<sup>18</sup> Such acknowledgment is of particular significance to Indigenous communities, for whom cultural knowledge and practices are an integral part of a living cultural heritage.

We recommend that a broad definition of ‘Indigenous cultural heritage’ be included in the ATSIHP Act, extending beyond areas and objects to include intangible cultural heritage, as a standard for accreditation of legislation in States and Territories. This may be achieved via an extension of the proposed definition of ‘Indigenous laws and customs’ to include those elements listed in the Convention, and via the inclusion of a prefacing definition of ‘Indigenous cultural heritage’. This definition should include those elements listed above.

***Proposal 3: Promoting Effective Laws through Accreditation***

***Proposal 4: Specifying Standards for Effective Protection***

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

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Cultural landscapes are cultural properties and represent the “combined works of nature and of man” designated in Article 1 of the *Convention*. They are illustrative of the evolution of human society and settlement over time, under the influence of the physical constraints and/or opportunities presented by their natural environment and of successive social, economic and cultural forces, both external and internal.

<sup>15</sup> The United Nations Educational, Scientific and Cultural Organization (UNESCO) *Convention for the Safeguarding of the Intangible Cultural Heritage*, adopted at its 32<sup>nd</sup> Session, Paris, 17 October 2003, at <http://www.unesco.org/culture/ich/index.php?pg=00006> at 5 November 2009.

<sup>16</sup> *Ibid*, art 2(1).

<sup>17</sup> Art 2(1), the United Nations *Convention for the Safeguarding of the Intangible Cultural Heritage*, adopted at its 32<sup>nd</sup> Session, Paris, 17 October 2003, at <http://www.unesco.org/culture/ich/index.php?pg=00006> at 6 November 2009.

<sup>18</sup> *Ibid*, art 2(2).

The Discussion Paper, at Proposals 3 and 4, outlines a system of accreditation of States and Territories, for effective protection of Indigenous cultural heritage. This model would ensure that the ATSIHP Act would remain legislation of ‘last resort’, or as a supplement to State and Territory legislation. The Discussion Paper indicates that, subject to the compliance of State and Territory laws with the proposed standards to be set out in the ATSIHP Act (Proposal 4), the “Minister accepts that the state or territory has procedures that achieve the purposes of the Australian Government’s legislation” (Proposal 3).

Overall, we are most concerned by the loss of appropriate Commonwealth oversight that an accreditation scheme would introduce. While we appreciate the merit of integration of Indigenous heritage issues with other legislative processes, we maintain that some circumstances should remain in which the Commonwealth Minister is not merely to be consulted or ‘called in’, but retains ultimate decision making capacity in the protection of Indigenous cultural heritage. Retention of Commonwealth jurisdiction in specified circumstances may contribute to ameliorating the effects of cumulative impacts; for example, in circumstances in which several proposals for development are approved, the cumulative effect of which is to deny interested Indigenous parties the capacity to exercise or protect culture.

Circumstances in which we consider it would be appropriate to allow Commonwealth Ministerial intervention include those cases that concern:

- Australia’s international obligations, such as those under the World Heritage Convention, the Convention on the Elimination of All Forms of Racial Discrimination;<sup>19</sup> the International Covenant on Civil and Political Rights;<sup>20</sup> and the International Covenant on Economic, Social and Cultural Rights;<sup>21</sup>

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<sup>19</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 (entry into force 4 January 1969, in accordance with Article 19) at <http://www2.ohchr.org/english/law/cerd.htm> at 6 November 2009.

<sup>20</sup> *International Covenant on Civil and Political Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 (entry into force 23 March 1976, in accordance with Article 49) at <http://www2.ohchr.org/english/law/ccpr.htm> at 6 November 2009.

<sup>21</sup> *International Covenant on Economic, Social and Cultural Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 (entry into force 3 January 1976, in accordance with article 27) at <http://www2.ohchr.org/english/law/cescr.htm> at 6 November 2009.

- ‘best practice’ benchmarks, as described in the United Nations Declaration on the Rights of Indigenous Peoples;<sup>22</sup>
- matters of national Indigenous cultural heritage interest; and
- matters of national interest.

Intervention by the Commonwealth Minister in these circumstances should be triggered by the Commonwealth Minister him/herself, or by an Indigenous person (as defined at Question 2.1) who would be affected by the proposed activity.

The model of accreditation proposed in the Discussion Paper mirrors, in many respects, the accreditation mechanisms of the EPBC Act. Accordingly, various issues related to the latter scheme, including those relating to devolution of Commonwealth power, should be emphasised.

Under the policy of cooperative federalism, which led to the institution of the *Intergovernmental Agreement on the Environment* (2002) (IGAE),<sup>23</sup> the Commonwealth facilitates the cooperative development of national environmental standards and guidelines.<sup>24</sup> Under the EPBC Act, States and Territories may be accredited for general, ongoing measures, or on a case-by-case basis.<sup>25</sup> Bilateral agreements between the Commonwealth and States and Territories, made in accordance with the EPBC Act (Ch 3), provide more permanent accreditation for State and Territory assessment and approval processes, provided these processes meet “‘best practice’ criteria”.<sup>26</sup> Provisions detailing requirements for entry into bilateral agreements include consideration of the role and interests of Indigenous peoples in promoting the conservation and ecologically sustainable use of natural resources in the context of the proposed agreement, taking into account Australia’s relevant obligations under the Biodiversity Convention.

Similar aspirations to “best practice” are reflected in the proposed accreditation process for Indigenous heritage protection under the ATSIHP Act. Accreditation under bilateral agreements under the EPBC Act has been recognised as providing opportunities for a reduction in the duplication of environmental assessment and approval, provided high standards can be maintained, and for the pursuit and achievement of “best practice

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<sup>22</sup> The United Nations Declaration on the Rights of Indigenous Peoples, Adopted by General Assembly Resolution 61/295 on 13 September 2007 at <http://www.un.org/esa/socdev/unpfii/en/drip.html>

<sup>23</sup> See <http://www.environment.gov.au/esd/national/igae/index.html> at 6 November 2009.

<sup>24</sup> Lee Godden and Jacqueline Peel, *Environmental Law: Scientific, Policy and Regulatory Dimensions* (2010) 74; see further discussion at 74-79.

<sup>25</sup> *Ibid*, 75.

<sup>26</sup> See <http://www.environment.gov.au/epbc/assessments/bilateral/index.html> at 6 November 2009.

benchmarks for environmental impact assessment that can incorporate more strategic and technically sophisticated processes”.<sup>27</sup> This model of accreditation, however, has also been criticised, on the grounds that existing Commonwealth protections should not be at risk of compromise. Where the Commonwealth retains ultimate responsibility for matters of national environmental significance under the terms of the IGAE, it must ensure that devolved processes accord with national and international environmental obligations, which should not be subordinated to State or Territory interests, or to the pursuit of a viable model of cooperative federalism.<sup>28</sup> This may be of particular concern where review and monitoring processes for State and Territory processes are lacking.

Broader criticism of use of an accreditation model in environmental legislative regimes arises in the context of a move toward integrated environmental management, which is intended to “reduce fragmentation whereby different ecological components are dealt with by different legal regimes that are separately administered.”<sup>29</sup> In the Australian context, this would require “‘vertical’ integration” of Commonwealth, State and Territory environmental laws and policies.<sup>30</sup> Given differing funding agendas and management priorities, integrative models introduce significant complexity into governance, which must be addressed.<sup>31</sup>

Overall, we are generally in support of the continued decentralisation of governance in the context of Indigenous cultural heritage protection, provided that the accreditation system is one of the highest standard – in standards set for protection, implementation, monitoring and review. Furthermore, we recommend that the capacity for Commonwealth Ministerial intervention be retained in some circumstances, including those listed above.

We also note that while Proposal 3 provides that the Minister could revoke accreditation if the accredited State or Territory government changes its laws in a way that affects compliance with the standards, we recommend that States and Territories should not be permitted to change legislation without re-accreditation.

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<sup>27</sup> Godden and Peel, above n 24, 76.

<sup>28</sup> *Ibid*, 79.

<sup>29</sup> *Ibid*, 275.

<sup>30</sup> *Ibid*, 278.

<sup>31</sup> *Ibid*, 279.

*Question 3.2* Could the proposed model of accreditation be improved?

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

We suggest that the standards for accreditation presently lack clarity, and should be detailed in the ATSIHP Act.

Accordingly, we recommend that the following be **clearly** set out in the ATSIHP Act:

- a process for accreditation of States and Territories;
- a process for the cessation of accreditation of States and Territories;
- a process for monitoring implementation of Indigenous cultural heritage legislation in accredited States and Territories;
- a process for dispute resolution in the event of inter-Indigenous group disputes; and
- a process for judicial review of State and Territory assessments and approvals.

We will not address the proposed standards for accreditation, detailed at Proposal 4.

Overall, we reiterate our recommendation that the term ‘traditional’ not be used, and that it be replaced with the broader definition of Indigenous cultural heritage, given at Question 2.1.

Where the proposed Standard 1 provides that accredited States and Territories should consult with Indigenous people to identify areas and objects that could be affected by an activity, a structured consultation process with identified persons and representative bodies must be established. This should include a procedure for consultation where overlapping bodies exist. This issue is highlighted in the case law example examined below.

Proposal 4 also provides for arbitration, where agreement is not possible. This requirement should be clarified, where the arbitration body is not specified. This point is of particular significance where, in the case of Indigenous cultural heritage, the arbitrator must have some expertise. For example, in Victoria, if arbitration is to be undertaken by the Victorian Civil and Administrative Tribunal, a specialist list should be implemented, at the very least.

In developing the procedure, consideration should be given to the establishment of a formal mediation process.

Standard 14 provides for respect for traditions of secrecy, and that information provided to the parties to a decision not be retained or passed on to another person, except in limited circumstances. We recommend that this stipulation be subject to specific confidentiality provisions, as in native title proceedings.

Standard 17 provides that approval for an activity that could cause adverse impact on a traditional area or object be granted only if the State or Territory considers, inter alia, “that the cultural, social, economic and environmental welfare of the community outweighs the imperative to avoid adverse impacts on the traditional area or object”. In respect of this standard, and others containing the terms ‘traditional area or object’, we recommend that this be broadened, as previously discussed, to extend to impacts on Indigenous cultural heritage as we have defined it at Question 2.1.

Standard 11 requires consideration of impacts on traditional areas and objects, including the impact of activities on the ability of Indigenous people to “use and enjoy the area or object under their traditional laws and customs”, and to “maintain their traditional laws and customs about the area or object”. We again recommend a broader definition of Indigenous cultural heritage, as above. We also consider that the extent to which an activity may so impede Indigenous capacity in this respect must be identified. For instance, whether destruction of the area is required to trigger this provision (see also discussion at Question 13.3). Triggers for this provision should be clarified. We recommend that the trigger be prospective, not retrospective, such that destruction is not required.

The requirements in relation to transparency and accountability (at Standards 18-20) should also not infringe secrecy provisions.

Standard 8 briefly considers the use of a cultural heritage management plan (**CHMP**) regime, as a possible means of reaching agreement between the proponent of an activity and traditional custodians of any Indigenous cultural heritage. It does not propose the adoption of a CHMP regime as a standard for accreditation. We recommend the inclusion of this model as a standard for State and Territory accreditation.

A review of the Queensland Act, including a consideration of CHMPs, is presently being undertaken. In South Australia, the cultural heritage principles articulated in the aforementioned discussion paper (as a part of the review of the South Australian Act) propose the incorporation of planning processes to enhance the upfront protection of Aboriginal heritage. This includes the requirement for an Aboriginal Heritage

Management Plan, to be negotiated and submitted prior to the commencement of development or works.

A review of the Victorian Act is not due until 2011, but a review of the Regulations was completed in November 2008. The *Aboriginal Heritage Regulations 2007* (Vic) set out the circumstances in which a CHMP is required, and establish standards for its preparation. The review of the Regulations reported the following results (at 13):

- “a significant reduction in developments occurring without assessment or approvals compared to the previous system”;
- a correlation between CHMPs prepared and developments potentially impacting heritage;
- an indication that “those local government areas that should have more CHMPs generally do have more”; and
- “a greater reduction in the number of unnecessary assessments than was estimated”.

The review also generally reports greater clarity around obligations for the protection of Indigenous cultural heritage. In light of these positive indications, we recommend that a CHMP model be considered as a standard for State and Territory accreditation. This would be an addition to those standards specified in Proposal 4.

Accreditation, alongside appropriate monitoring and review, would also address problems of inconsistency in national protection of Indigenous cultural heritage. Case law highlighting inconsistencies between States, and the ongoing need for monitoring of State and Territory implementation of legislative protection, is evident in the recent Western Australian Supreme Court decision of *Re Minister for Indigenous Affairs; Ex Parte Woodley [No 2]* [2009] WASC 296 (***Ex Parte Woodley***). In this decision, Martin CJ refused an application for a writ of *certiorari* against the Minister for Indigenous Affairs under the Western Australian Act, notwithstanding procedural failure in contravention of the requirements of s 18 of the Act. The case concerned a decision by the Minister for Indigenous Affairs relating to development works affecting an area of Indigenous cultural heritage significance. Ultimately, the decision to refuse relief was made on the grounds that

- the procedural failure was a matter of form only;

- the grant of relief would be futile insofar as the Minister would arrive at the same conclusion given a further opportunity for decision; and
- the grant of relief would cause undue hardship to the second respondent.

This decision draws attention to differences in State and Territory schemes for protection of Indigenous cultural heritage, and the need for rigorous standards of accreditation. In *Ex Parte Woodley*, the function and capacity of the Indigenous cultural heritage advisory body to the government was at issue. The Western Australian Act establishes an Aboriginal Cultural Material Committee, the members of which are selected and appointed by the Minister on the basis of “special knowledge, experience or responsibility”, irrespective of Aboriginality, traditional or familial links (s 28). The Victorian Act, in contrast, establishes an Aboriginal Heritage Council comprised of Aboriginal persons who, inter alia, have and can demonstrate “traditional, or familial links to an area in Victoria” (s 131). The functions of these bodies reflect their different composition, with the Victorian body granted the capacity to advise the Minister “at the Minister’s request or on its own initiative” (s 132 (1)(a)). This body is generally granted a more autonomous and expansive role, including advising the Minister as to “measures for the effective protection and management of Aboriginal cultural heritage in Victoria, including the management of culturally sensitive information relating to that heritage”, and “measures to promote the role of Aboriginal people in the protection and management of Aboriginal cultural heritage and in the administration of [the] Act” (s 132 (1)(a)). The Discussion Paper does not provide an analogous standard for accreditation. Rather, at Proposal 4 (Standard 12), it provides for an independent assessment of impacts by “a person or body with appropriate expertise, background or qualifications”, before a decision is made as to whether to approve an activity. This standard should be clarified, to clearly determine the meaning of “appropriate expertise”. We recommend that the aforementioned Victorian Act be used as a model for this standard, subject to recommendations relating to the integration of Indigenous cultural heritage and native title legislative regimes, as detailed below (Proposals 5 and 6).

The aforementioned differences between State mechanisms for protection highlight the need for ‘best practice’ standards for accreditation, in addition to ongoing monitoring of implementation of State and Territory legislation, where it has been accredited, to ensure consistency of protection and robust protection of Indigenous cultural heritage.

*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?*

This proposal requires further clarification, as to the nature of advice to be provided – specifically, whether the advice would be on a particular decision, or whether on the mode of compliance. We recommend, however, that the ATSIHP Act and accredited State and Territory Acts should include a prioritised list of criteria for the Minister in assessing decisions. This list should include the following:

- the impact of the activity on enjoyment of culture by affected Indigenous persons;
- the impact of the activity on enjoyment of native title rights and interests, including registered rights and interests and determined rights and interests (as provided in s 39 of the Native Title Act;
- the likely interference, whether direct or indirect, on cultural activities of affected Indigenous persons;
- the interests, opinions and wishes of affected Indigenous persons; and
- the history of the proponent.

The latter requirement should be analogous to that contained within the EPBC Act (s 136(4)), which provides that “[i]n deciding whether or not to approve the taking of an action by a person, and what conditions to attach to an approval, the Minister may consider whether the person is a suitable person to be granted an approval”. Regard must be had to the history of the proponent in relation to environmental matters.

In the proposed case of protection of Indigenous cultural heritage, we recommend that regard be had to the history of the proponent in relation to Indigenous cultural heritage matters.

Consideration should also be given to establishing criteria for assessing the balance of interests. We draw attention to two examples: the current ATSIHP Act and s 39 of the Native Title Act.

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

We agree that a mechanism for periodic review would provide a more effective system of accreditation. While the proposed accreditation model may provide for more local and immediate protection, it does not provide for effective monitoring of implementation. The only mechanisms for monitoring detailed in the Discussion Paper (Proposal 3) appear to be

- the capacity of the Minister to advise an accredited State or Territory to **consider** ‘calling in’ an activity for approval, and an accreditation standard to ensure that in the event of a ‘call in’, the State or Territory government would be required take the Minister’s advice into account; and
- the capacity of the Minister to revoke accreditation where s/he is satisfied that a State or Territory is **not** complying with the standards for accreditation.

We recommend that a clear process be set out in the ATSIHP Act detailing the steps to be taken in the case of a non-compliant accredited State or Territory, and for the cessation of accreditation.

We also recommend that, where there is no mandatory requirement for States and Territories to ‘call in’ activities for approval, that a clear procedure for ongoing monitoring and reported review of accredited States and Territories be established, and set out in the ATSIHP Act. A provision of this kind appears in the Victorian Act, which stipulates that a report be prepared on the operation of the Act, including “information on the exercise and performance by inspectors of their powers, functions and duties”; and “non-identifying information on any complaints received in relation to inspectors and the action taken to address those complaints” (s 192).

*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?*

This would depend upon the effective review and monitoring of implementation of such standards, as discussed above.

**Proposal 5    Only legally recognised traditional custodians, where existing, to seek Commonwealth Protection**

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

We consider that the limitation of Commonwealth protection to legally recognised traditional custodians would unreasonably limit applications for protection, where Indigenous individuals or groups may not be legally recognised traditional custodians, yet retain an interest on the basis of cultural heritage that would be affected by an activity.

We recommend that applications for protection should not be limited to legally recognised traditional custodians, but that the applicants that are not ‘legally recognised traditional custodians’ be required to set out their interest in the application, as a hurdle requirement. This requirement would be applied to all applications, excepting applications for an interim order, in which case the applicant need only assert an interest without extensive evidence.

We recommend that the ATSIHP Act include a provision defining those persons who may apply for protection under the Act, termed “affected Indigenous person”, as

“an Indigenous person or persons who would be affected by the activity that may have an impact on Indigenous cultural significance, which includes archaeological, anthropological, contemporary, historical, scientific, social or spiritual significance”.

With this broad definition in mind, we do recommend as a starting point that reforms to the ATSIHP Act provide for integration with the native title system, which already occurs in the Victorian and Queensland Acts. Where legally recognised traditional owners of land and waters hold native title rights and interests in relation to an area that is the subject of an application for declaration, those rights and interests should be considered.

Furthermore, we endorse the proposed founding principle contained within the South Australian Discussion Paper, that “Heritage and Native Title groups must work together”; and further, that “Aboriginal Heritage protection needs to be a part of other laws too, such as water, land and natural resources.”

The NTSV Report also makes the following recommendation:

[T]o the extent that traditional owners have native title rights and interests in relation to Aboriginal cultural heritage, they have legally enforceable interests

which are required to be protected. The early involvement of traditional owners will assist in avoiding duplicitous processes which may arise as a result of the concurrent operation of the *Aboriginal Heritage Bill* and the *Native Title Act*.

This approach would allow incorporated bodies of Traditional Owners to control and administer Indigenous cultural heritage in their country (NTSV Report, Recommendation 4.2).

This approach has already been implemented in the Victorian and Queensland Acts.

The objectives of the Victorian Act include the promotion of management of Aboriginal cultural heritage as “an integral part of land and natural resource management” (s 3).

This legislation followed a consultation process from 2004, the key message of this process being recognition of the land management role of traditional owners (Explanatory Memorandum).

More broadly, the Queensland Act provides that activities involved in recognition, protection and conservation of Aboriginal cultural heritage are important because they allow Aboriginal people to reaffirm their obligations to ‘law and country’ (s 5(d)).

We endorse these aspirations and objectives, where integration of these legislative systems would potentially provide for more efficient, comprehensive, time and cost effective protections, particularly in the reduction of competing claims.

Nevertheless, we emphasise that protection should extend beyond legally recognised traditional custodians, to allow Indigenous persons affected by an activity who are not legally recognised traditional custodians to apply for protection.

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

Generally, this proposal does make sense. It does, however, fail to address the following:

- circumstances in which native title may not be established; for example where there are sites of cultural heritage that are of historical, rather than ‘traditional’, significance to Indigenous people;

- areas where native title has been extinguished, either by Crown action or by application of the strict *Yorta Yorta* test;<sup>32</sup>
- differing levels of traditional entitlement; and
- circumstances in which there exist potential conflicts of interest for legally recognised custodians (such as where legally recognised custodians are also the proponents of an activity).

These issues should be addressed and clearly detailed in the ATSIHP Act, if this proposal is to be implemented.

These issues should also be included in standards for accreditation. As previously mentioned, the Victorian Act, for instance, provides that “cultural heritage significance” includes “archaeological, anthropological, contemporary, historical, scientific, social or spiritual significance” (s 4). In this instance, heritage is defined as incorporating areas of historical significance to Indigenous people. We recommend the definition of Indigenous cultural heritage provided in this submission, at Question 2.1.

*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?*

As discussed, this proposal should be implemented cautiously, considering instances in which traditional custodians exist, but are not recognised under native title law; and where there may be inter-Indigenous group disputes as to traditional custodianship.

*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?*

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<sup>32</sup> (2002) 214 CLR 422. In this case, the court adhered to a strict interpretation of s 223 of the Native Title Act, and of ‘tradition’; and held that native title exists only where pre-sovereignty tradition and custom ‘intersects’ with the common law. At paragraph 46, their Honours held that in the context of the Native Title Act, ‘traditional’ ... conveys an understanding of the age of the traditions: the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. It is only those normative rules that are ‘traditional’ laws and customs.

We agree with this proposition, provided those Indigenous persons applying for protection are able to demonstrate that they are affected persons, in accordance with the parts of the proposed definition above (Question 5.1) that do not reflect native title rights and interests. These might include contemporary, historical, scientific or social significance.

A process for resolution of disputes in the case of competing Indigenous applicants should also be established.

*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?*

We agree that prescribed bodies corporate are **one** appropriate organisation to apply for protection. It is possible that a prescribed body corporate is not immediately determined by the Court after a determination of native title is made. Further, they are often inadequately funded. For this reason, standing to apply for protection should not be limited to prescribed bodies corporate (see Question 5.1).

**Proposal 6: Integration of Commonwealth Indigenous Heritage Protection and ILUAs**

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

As a matter of overall principle, we do not support a legislated capacity to contract out of obligations to protect Indigenous cultural heritage. We support the current situation where heritage laws continue to operate alongside ILUAs. We consider this provides the best balance between the desire for certainty provided by ILUAs and the need to provide broad protection for Indigenous cultural heritage.

If there were to be a proposal to integrate Indigenous cultural heritage protection and ILUAs, provided adequate provisions for review of ILUAs are inserted into the ATSIHP Act or there are benchmarks against which ILUAs can be assessed before signing and registration, then such integration might be possible.

This may entail the provision of standards for ILUAs, such as

- a requirement for compliance with underlying principles of protection of Indigenous cultural heritage (such as those outlined at Proposal 1, Question 1.1); and
- a requirement for periodic review of the terms and implementation of ILUAs.

These provisions may be contrary to the aspirations to certainty for parties to ILUAs; nevertheless, a process of this kind must be inserted at a Commonwealth level to ensure ILUAs are adequately negotiated in respect of Indigenous cultural heritage.

Such provisions in the ATSHIP Act might also ensure that the non-native title cultural heritage agreements process is fair and transparent, and should also provide for enforcement of agreements. CHMPs may provide a vehicle for this (discussed at Question 4.2).

*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?*

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

Once again, provisions for review must be inserted into the ATSHIP Act where issues are inadequately addressed in ILUAs. Such provisions should also ensure the maintenance of a balance between

- affected Indigenous persons who may be in disagreement; and
- native title parties and non-native title Indigenous parties.

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

This proposal may indeed complicate ILUA negotiations, where non-native title Indigenous parties may wish to ensure the future protection of cultural heritage. Rather than complicating ILUA negotiations, this issue may be dealt with more effectively by, as discussed at Question 5.1, opening application for protection under the ATSHIP Act to include non-native title Indigenous parties who would be affected by an activity. We consider that the current situation provides the best balance.

*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?*

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

As indicated above (at Question 6.1), the removal of protection under heritage legislation from ILUAs may well increase difficulties in negotiating ILUAs as the strength of heritage protection in ILUAs would assume greater significance. The decision in *Parker v State of Western Australia*<sup>33</sup> suggests the significance of the residual cultural heritage protection in future act dealings generally.

We would consider the ILUA to be stronger as a result in these circumstances.

**Proposal 7    *Removal of Duplicate State and Territory Protection for Indigenous Remains***

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

We support the removal of duplication of reporting of Indigenous human remains, and recommend that the requirement to report discoveries to the relevant Commonwealth Minister be included in the standards for accreditation.

This does not affect Commonwealth responsibility regarding international repatriation of Indigenous human remains.

*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?*

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

State and Territory processes for reporting discovered Indigenous human remains are variable, and should be standardised via accreditation standards in the ATSIHP Act.

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<sup>33</sup> [2008] FCAFC 23.

**Proposal 8 Addressing Gaps in State and Territory Legislation for Protection of Indigenous Sacred Objects and Remains**

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

We support the prohibition of public display of Indigenous personal remains and ‘secret sacred objects’, and recommend that this prohibition also be standardised via accreditation standards in the ATSIHP Act.

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

The proposed confinement of prohibition on display to “objects that are the subject of strict rules and sanctions and to Indigenous personal remains” would require careful drafting to ensure adequate protection. For instance, the provision should protect objects and remains, even where these are not known to be the subject of strict rules and sanctions.

Accordingly, the question of onus must be considered and clearly identified in the legislation, and the offence identified as one of strict or absolute liability.

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

Not applicable.

*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?*

The proposed definitions for prohibition of public display, specifically the definition of “secret sacred object”, exclude objects imported into Australia for exhibition by a public museum or gallery. We consider this to be an unnecessary exclusion.

### **3.2 Part 2: Improving Procedures**

**Proposal 9 Specifying Information for Applications for Protection**

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

Generally, we are in favour of this proposal, but highlight the need to avoid excessive procedural delay. We recommend the inclusion of a mechanism for immediate/urgent protection (per our recommendations on Proposal 12), in order to retain a balance between the need for comprehensive and detailed applications, in accordance with a prescribed form, and efficiency of governmental response to imminent threats to Indigenous cultural heritage.

Reasonable efforts should also be made to ensure the inclusion of other affected Indigenous persons as possible applicants.

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

The legislation should, to some degree, specify the content of applications, but this requirement should not be too onerous; that is, it should not operate as a *de facto* ‘registration test’.

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

The application may include, in “description of activity”, some detail as to the urgency of the application, and the likely or potential impact on the enjoyment of cultural heritage. The application should focus on substance rather than form.

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

We can identify only one other reason why the government might not be able to accept an application: where an applicant has failed to establish that s/he is recognised as having standing. That is, the applicant cannot be considered an affected Indigenous person in accordance with the definition set out at Question 5.1.

## **Proposal 10 Conferences**

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

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

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

Overall, we are in favour of the proposal to convene conferences as a means of consultation and resolution of disputes arising from an application (see Question 4.2). The persons listed in the Proposal are appropriate, but any other affected Indigenous parties should also be advised. We support the proposition that parties be required to participate in good faith and to avoid unreasonable delays. Consideration should be given to the meaning of ‘good faith’, particularly following the decision in *Cox & Ors v FMG Pilbara Pty Ltd & Ors*.<sup>34</sup> The ATSIHP Act should include clear procedures for conferences, including the process by which relevant participants are selected and called to attend. The powers of the conference participants’ recommendations should be stipulated in the Act. We agree with the proposal that the Chair advise the Minister on the need for any interim protection to be made or continue.

*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?*

In practice, conferences may provide for greater efficiency and fairness, provided such conferences provide a forum for meaningful dialogue. We recommend that the ATSIHP Act stipulate that

- conferences are in a form that is sensitive to and accommodating of cultural difference;
- parties to conferences are adequately resourced with professional advice and assistance; and
- reasonable efforts are made to involve affected Indigenous parties, aside from the parties to the application.

### **Proposal 11 Sensitive Information**

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

We are generally in favour of this proposal, including using court procedures as a model, allowing the Minister to issue directions about protecting information from disclosure, to

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<sup>34</sup> FCAFC 49 (30 April 2009).

protect both culturally and commercially sensitive information; and that information potentially be limited to persons of a specified gender or age.

Where the proposal suggests that in the event that court proceedings were commenced, the court would determine the question of access to confidential material, we recommend that the ATSIHP Act impose limitations on this access. The Evatt Review proposes (at 7.5) a limitation on the disclosure of information by the provision of a claim to a public interest immunity. This proposal should be considered. We also recommend consideration of proposal 7.1 of the Evatt Review, which recommends that the Act

- include “a provision which protects information provided for the purposes of the Act from unauthorised disclosure contrary to customary law restrictions” and gender restrictions; and
- should be drafted “to ensure that it does not operate to interfere with the cultural and spiritual beliefs of Indigenous people”.

### ***Proposal 12 Reasons for Providing and Revoking Interim Protection***

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

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

We support the proposal that interim protection be provided, but suggest that 48 hours is insufficient time to lodge an application for protection – for example, for a prescribed body corporate to meet and come to a decision. We recommend that the process allow for

- applications to be made **subject to** later ratification; and
- the time limit for applications be extended to 4 working days.

We also recommend that a capacity to extend protection beyond 28 days be included.

Further, we recommend that interim protection be stipulated as a standard for accreditation of States and Territories.

A power for interim protection should also be provided for Indigenous cultural heritage in areas that are covered by ILUAs, and in the case of a claim that protection of heritage is not covered by an ILUA. This power may be a last resort, if standards for protection

were applied to ILUAs (see also recommendations at Question 9.1). We also recommend that it be an offence to proceed with works or activities while an application is under consideration, and the interim protection is in place.

We also recommend that, following the Evatt Review (7.6), an interim protection should include “provisions concerning access to a site for the purposes of inspection, protection and preservation of an area for traditional purposes”.

Further, we recommend that accredited States and Territories be encouraged to appoint Indigenous inspectors, as were used in Part IIA of the ATSIHP Act 1984 prior to amendments in 2006. . Such inspectors should have the capacity to make short term interim protection applications and to initiate prosecutions.

*Question 12.3 Would having up to 6 days (ie, 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?*

We recommend that a minimum of four working days of short-term protection be provided, and further recommend that the ATSIHP Act clarify whether the six days stipulated will be exclusive of weekends.

We recommend that the criteria for providing short-term protection be amended in the following respects:

- the proviso that the Minister believe that “there is no other law that could ensure protection in the circumstances” be removed.
- that some injunctive relief be available in the ATSIHP Act; and
- the requirements relating to the submission of an application to the Secretary for protection be considered in the context of our recommendation that the application process not be too onerous (see Question 9.2).

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

The Secretary would need to consider the following factors:

- any specific difficulties encountered by the applicant in compiling the application;

- resources available to the applicant in compiling the application;
- the capacity of the applicant to submit the application in time; and
- the resources and capacity of the applicant to take any other action.

*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?*

We recommend an initial period of up to three months be available to the Minister; and possible extensions of 28 days thereafter. This timeframe would assist in providing certainty to all parties, and would avoid onerous administration.

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

Before providing or revoking temporary protection, the Minister may need to consider some of those factors required to be included in the application, such as other available protection and likely damage.

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

We do not recommend any wide consultation before an interim protection order is made, or immediately thereafter, given the urgent nature of such orders.

### **Proposal 13: Reasons for Providing and Revoking Longer Term Protection**

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

We support this proposal, provided that a process is clearly stipulated in the ATSIHP Act for the establishment of an agreed ‘statement of facts’, before any discretionary decision is made. While the proposed content of the statement includes the procedure by which the assessor or department produced the facts, including the opportunity for parties to comment on it, we recommend that this procedure be stipulated in the Act.

We support the proposal that the Minister have the option of nominating ‘an assessor’ to provide a statement of facts, similar to the current process for deciding long term protection under the ATSIHP Act. Provision should be made for ensuring adequate Indigenous participation in this process.

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

We agree that an independent ‘assessor’ is important.

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

We agree with the proposed method, but draw attention to the need for clarification of point 3, where it remains uncertain as to what impact would “reduce or impede ... the ability of Indigenous persons to use or enjoy the area or object under their traditional laws and customs” and to “maintain their traditional laws and customs”. We refer back to our earlier discussion on the use of the term ‘traditional’ (at Question 2.1), and recommend that more expansive terminology also be adopted here, as detailed in Questions 1.1 and 2.1.

Furthermore, the impact required to meet this criterion must be clear – for instance, whether an area must be damaged, and to what extent (see also previous discussion, at Questions 3.2/4.2).

We also recommend that the ATSIHP Act require that the statement of facts be agreed by the parties.

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

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

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

Once again, we reiterate our previous recommendations in respect of use of the term ‘traditional’ (at Question 2.1), and recommend that the broader definition of Indigenous

cultural heritage defined in Question 2.1 (in accordance with the Victorian Act) also be adopted here.

Inclusion of the word “substantial” in “substantial impact” is unnecessary, where the decision as to impact is at the discretion of the Minister.

We otherwise agree with the proposed considerations for the Minister in deciding whether to make a final protection order, subject to our recommended issues for consideration, set out at Question 3.1.

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

The proposal that, in the absence of a traditional custodian, “an Indigenous person” may request that the protection order be revoked should be clarified. The person making the request must be able to demonstrate that s/he is an affected Indigenous person, as we have defined at Question 5.1.

We agree that the final protection orders be exempt from sunset provisions of the Legislative Instruments Act.

We also agree that notice of the final protection order be published as indicated.

### **3.3 Part 3: Making Sure Protection Works**

#### **Proposal 14: Penalties and Enforcement Powers**

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

We support the proposed ways to promote compliance and enforce protection. Nevertheless, we emphasise that a lack of knowledge of the existence of specific Indigenous cultural heritage should not be a defence to a prosecution. Rather, the Act must impose a positive obligation on proponents to ensure the protection of Indigenous cultural heritage. This obligation would include, for example, making enquiries of any Indigenous body, prescribed body corporate, registered native title owner or representative body. A CHMP may achieve these purposes; otherwise, a serious and sustained effort on the part of the proponent to inform him/herself of possible effects on Indigenous cultural heritage must be made in order to satisfy this obligation.

The Victorian and Queensland Acts may be usefully compared and contrasted in their approach to enforcement. Where the Victorian Act provides for appropriate powers of protection, investigation and enforcement for the protection of Indigenous cultural heritage, the Queensland Act establishes a duty of care for activities that may harm Aboriginal cultural heritage, akin to the positive obligation recommended above.

Consideration should be given to which of these approaches most effectively achieves the objective of protection of Indigenous cultural heritage, and the preferred approach should be detailed in the standards for State and Territory accreditation. An imposed duty of care is preferable where it would clearly provide protection for heritage even where it is not listed in a database or register. The option of criminal proceedings for breaches as a last resort should be included.

The fact that no offence has been committed under the ATSIHP Act should not affect the availability of other remedies.

### ***Proposal 15: Review of Legislation***

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

We recommend intervals for legislative review of 7 years (initial review and subsequent reviews). We agree with the proposed mode of review.

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

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

As previously indicated, we recommend continuous monitoring and review of accreditation, to ensure State and Territory laws are compliant with standards set down in the ATSIHP Act.

Those aspects of accreditation detailed and discussed above should be subject to rigorous review.

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