



NEW SOUTH WALES GOVERNMENT SUBMISSION

TO

**AUSTRALIAN GOVERNMENT
INDIGENOUS HERITAGE LAW REFORM**

November 2009

Introduction

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* [Commonwealth] (the “ATSIHP Act”) was enacted by the Commonwealth under its indigenous affairs power, initially as a short term measure, to provide a safety net in the case of potential destruction of Aboriginal Heritage. It gave the Australian Government Minister the power to intervene where State or Territory laws were insufficient to protect significant indigenous sites and objects.

Since then many state jurisdictions have reformed the ways in which they protect Aboriginal cultural heritage. NSW is currently pursuing amendments to the *National Parks and Wildlife Act 1979* to strengthen the measures in place to prevent the harm of Aboriginal objects and places.

To date, the use of the federal legislation in NSW in relation to the approval decisions made in regards to the *Heritage Act 1977* and Part 3A of the *Environmental Planning and Assessments Act 1979* has been limited.

Accreditation model

Central to the proposed Aboriginal heritage law reform is the establishment of an accreditation system under which States might exempt themselves from the operation of the ATSIHP Act if they meet certain minimum standards.

The discussion paper puts forward proposed standards which are potentially problematic for NSW. As a result NSW may not be in a position to seek accreditation, and as such the intended benefits of the reform, including reducing duplication and red tape, will not be achieved. Key areas of concern are as follows:

- The Discussion Paper does not recognise that within NSW there is no one state Aboriginal Heritage Act that protects and regulates heritage, rather there is a heritage regime that is made up of aspects of several intersecting Acts (the *National Parks and Wildlife Act 1974*, the *Heritage Act 1977*, the *Aboriginal Land Rights Act 1983*, and the *Environmental Planning and Assessment Act 1979*).

This means that the proposed standards would need to apply to several legislative regimes, which may be complex under the proposed accreditation arrangements. It is not clear from the discussion paper how the proposed heritage reforms would accommodate NSW’s integrated planning approval process.

- In NSW, certain activities are exempt from requirements to protect Aboriginal heritage (e.g. bushfire fighting and other emergency actions under the respective acts), and other activities are given special standing as “defences against prosecution”. These sorts of special exemptions do not appear to have been considered in the discussion paper.

Further discussion regarding each specific proposal is provided below.

Proposal 1 – Clarifying the Purposes of the Legislation

NSW supports the general objects of the Commonwealth’s reform proposal including ensuring effective protection of Aboriginal heritage, encouraging early agreement between Aboriginal custodians and developers, extending protection to sacred objects and providing for protection of secret traditions, and providing a clear division of responsibilities between the Commonwealth and States and Territories.

Any process should ensure that Aboriginal people are effectively engaged and consulted in the development of a new scheme.

Proposal 2 – Making Terminology Consistent with the Purposes

Traditional objects and traditional areas

The NSW Aboriginal community is diverse and complex, and as such, “traditional laws and customs” is not an easily applied term. Protection of areas and objects on the basis of importance to “traditional law and custom” does not recognise post-contact Aboriginal heritage, and excludes the protection of historic Aboriginal cultural heritage such as massacre sites, missions, reserves, historic graves and burial grounds, historically acknowledged ceremonial grounds, ‘first contact’ sites and buildings and meeting places associated with many land right struggles. These sites all have the potential to contribute significantly to both the individual and group identity of Aboriginal people in NSW. To narrowly define Aboriginal heritage as “traditional” would create a gap between the Federal and State legislative regimes, and would likely prevent NSW from obtaining accreditation under the proposed scheme.

Additionally, the review could provide an opportunity for the Commonwealth to consider the protection of a broader range of cultural heritage, by using a definition that encompasses practices, expressions, knowledge and skills as well as connections to landscapes. This would be beyond the protection afforded by State legislation, and would give the Commonwealth a legitimate new space in which to consider heritage protection.

Aboriginal versus indigenous

The term ‘Indigenous’ is problematic in NSW. Aboriginal people have cultural association with the lands of NSW, and are recognised as such under NSW laws.

Furthermore, the definition of ‘Aboriginal’, as being descent only (that is ‘person of Aboriginal race of Australia’) does not align with the currently accepted three limb test of Aboriginality, as defined in the *Aboriginal Land Rights Act*, which is that an Aboriginal person means a person who:

- (a) is a member of the Aboriginal race of Australia, and
- (b) identifies as an Aboriginal person, and
- (c) is accepted by the Aboriginal community as an Aboriginal person.

Proposal 3 – Promoting Effective Laws through Accreditation

As discussed above, the proposed accreditation model does not appear to provide the flexibility required to allow for the multiple pieces of legislation used in NSW to protect Aboriginal heritage.

Proposal 4 – Specifying Standards for Effective Protection

1. *Protecting all traditional areas and objects: the laws must provide comprehensive protection for traditional areas or objects by providing that adverse impacts on traditional areas and objects, including traditional areas and objects that have not been identified or recorded by the state or territory, must be avoided.*

This standard means that to be accredited, the state or territory would need to ensure that its laws protect at least the same kinds of areas and objects that are covered by the Australian Government's definitions.

Currently, the *National Parks and Wildlife Act 1974* protects all Aboriginal objects in NSW regardless of their significance. However, only places that have been identified as significant and gazetted as Aboriginal Places are protected under the Act. As such NSW would not meet this standard under current legislative arrangements.

Additionally, both 'traditional' objects and areas and more contemporary objects and places are protected in NSW. As mentioned previously, the term 'traditional' is too removed from the reality of many Aboriginal communities in NSW, as cultural significance is attached to more recent associations, for example Aboriginal reserves, Stolen Generations and the land rights struggles.

4. *Call in power: The laws must allow the state or territory to direct a proponent to apply to the government for approval. The laws must also require the state or territory to consider any representations from the Minister responsible for administering the Australian Government's legislation in deciding whether to direct a proponent to apply for approval.*

In an accredited state or territory this standard would mean that the relevant state or territory minister could instruct any ... person who is planning an activity that might affect a traditional area to seek government approval...This would help to avoid situations where a proponent is unaware that their activity could affect a traditional area. The relevant Australian Government minister could ask his or her counterpart in the state or territory government to take additional information into account when making the decision about whether to call in the activity.

The extent and implications of the Commonwealth Minister's intervention powers into State Aboriginal heritage protection decision making are not apparent in the Discussion Paper, and it is not clear from the language of the Discussion Paper whether the Commonwealth's place is to be more directive (i.e. "influence key decisions") or discretionary (i.e. "consider" and "ask").

10. *Efficient applications process: The laws must require the government to provide the application to the traditional custodians within 21 days of receiving it, unless the proponent agrees to delay the handling of the application.*

Note: The government must respond to applications as quickly as possible to ensure that decisions about protection can be made at the earliest stage. However proponents may agree to delays if projects are large and complex.

The proposed standard is that laws require the government to provide the application to the traditional custodians within 21 days of receiving it, unless the proponent agrees to delay the handling of the application. This provision may sit in tension with the stated objective of protecting *all* traditional areas and objects, whether or not an interest or custodian is known and recorded. In areas where there is no recorded custodian or interest, locating all relevant interested parties may require longer than 21 days.

The standards do not discuss what the reasonable expectations will be of Aboriginal persons and organisations with regards to reaching agreement and dealing with applications. In NSW, there can be a substantial burden placed on Aboriginal communities to be involved in all Aboriginal heritage assessments in their area.

12. *Independent assessment of impacts: The laws must require that, before a decision is made as to whether to approve an activity, advice about any impact an activity could have on a traditional area or object is to be obtained and considered. The advice must be a written assessment that has been prepared by a person or body with appropriate expertise, background or qualifications who is independent of the person who makes a decision on approval. If the assessment concludes that an activity could have an adverse impact on a traditional area or object the assessment must provide details about the traditional laws and customs that apply to the area or object.*

This standard requires that before any decision is made the impacts must be reviewed by a person or persons totally independent of the decision maker. This appears to be an overly onerous provision, and it is unclear who the independent advisor would be, or who would contract the advisor.

18. *Requirement to maintain records: The laws must require the state or territory to maintain records of:*
- a. the locations and physical description of traditional areas and objects in standard 1, where known*
 - b. assessments of whether an area or object is a traditional area or traditional object*
 - c. agreements between a proponent and the traditional custodians in the terms set out in standard 8*
 - d. reasons for decisions about whether to approve an activity.*

Government registers, while informative about “known” heritage objects and areas and possible Aboriginal heritage matters in the general vicinity, are limited in many respects. Most registers are “discovery” driven in that items are registered as they are “found”, typically by heritage consultants as part of a development process. This biases the registers toward areas of development activity, especially metropolitan and coastal areas, and creates the situation that registration becomes the step before destruction or salvage. They require disclosure of sensitive cultural information and the precise location of the item, exposing the item to the risk of harm. Other registers require the items to be of “state

heritage significance” before listing, a threshold many Aboriginal heritage items struggle to meet.

The State or Territory databases should not be seen as exhaustive lists of areas or objects, such that exclusion does not equate with non-significance.

20. *Opportunity for legal reviews: The laws must provide for traditional custodians, proponents and other persons whose rights or interests are affected by a decision that affects a traditional area or a traditional object, including a decision as to whether to approve an activity, to apply to a court or tribunal of the state or territory for a review of the decision.*

The proposed standard would provide for interested parties to apply to a ‘court or tribunal of the state or territory’ for a review of a decision under any heritage protection legislation.

It is unclear whether this is a reference to merits review, judicial review (of administrative decisions) or both. NSW supports the availability of both merits and judicial review, recognising the value of both in providing oversight of administrative decision-making. It may be appropriate to locate merits review in a tribunal rather than court in order to keep costs to a minimum.

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

The Australian Government has clarified in discussions with NSW that Proposal 5 proposes that outside of native title land, and Aboriginal land in the Northern Territory, any Aboriginal person could apply for Commonwealth protection under the proposed reform should it be necessary.

In NSW, given the small number of registered native title claimants, there are many interested Aboriginal people who are not legally recognised traditional custodians who should be involved in the protection of places and objects of cultural significance. As such, NSW would oppose a scheme which only allowed legally recognised traditional custodians to seek Commonwealth protection.

The practice in NSW is to discuss issues of impacts on cultural heritage with those who have relevant cultural knowledge. While some form of statutory recognition is a useful tool, it is by no means the only source of authority. NSW has a number of other processes in place for this, including a Register of Aboriginal Owners under the *Aboriginal Land Rights Act 1983*, and functions given to Local Aboriginal Land Councils to protect heritage. It is important that the Commonwealth recognise and accommodate the situation in NSW.

Proposal 6 – Ensuring that Commonwealth protection would not prevent an act authorised under a registered Indigenous Land Use Agreement (ILUA)

Attempting to tie cultural heritage approvals process with native title negotiations or outcomes is problematic for NSW for similar reasons as stated for Proposal 5. This is because the issues sought to be resolved through an ILUA (predominantly rights to use and enjoy land) and the issues sought to be resolved in heritage protection overlap, but might not necessarily correspond. It would be preferable if reference could be made to an existing ILUA without its existence providing an exemption from Commonwealth action.

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

NSW legislation mandates the reporting of any Aboriginal objects to the Director General of the Department of Environment, Climate Change and Water (section 91 *National Parks and Wildlife Act 1974*). This includes human remains. NSW agrees that the current duplication in Commonwealth legislation is unnecessary and should be removed.

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

NSW does not have an equivalent provision but is pursuing a proposal of its own to add an offence for “desecrating” an object as part of the review of the *National Parks and Wildlife Act 1979*. Such an offence, if enacted, could cover situations such as those envisaged under this proposal.

A complementary concern in NSW relates to the role of the ATSIHP Act in protecting Aboriginal objects across interstate borders. The *Protection of Moveable Cultural Heritage Act 1986* (PMCH Act) makes it an offence to export certain objects without approval. However, the PMCH Act does not cover the interstate movement of objects.

While state or territory bans on interstate movement of Aboriginal objects within their own Aboriginal heritage legislation is a worthwhile means of protecting Aboriginal objects, effective enforcement requires a national approach. This is particularly critical for the offering of sale of Aboriginal objects online, and for instances where unscrupulous owners will move themselves and their objects to a state or territory with a lesser heritage protection regime.

Proposals 9-13 – Improving Procedures

These proposals relate to the process the Commonwealth would use were it to become involved in a heritage protection issue. These proposals aim to clarify and codify the current practice of dealing with applications.

Consideration of the interaction between Proposal 9 (information required in applications for protection) and Proposal 12 is required, which includes time frames for interim protection orders. Where an application requires substantial descriptions (e.g. demonstration of custodianship and traditional laws and customs), a 48-hour protection order is unlikely to be sufficient to allow for the preparation of an application. Further, consideration could be given to aligning the time periods for preparation of an application and Ministerial consideration of the application (96 hours in the current proposal).

It should also be noted that the participation of Aboriginal communities in Aboriginal heritage protection places a burden on the communities and individuals involved. For example to complete the application process the community may be required to seek advice from lawyers or heritage practitioners. The Minister should have broad discretion to refuse an application in cases of duplication or where the application is frivolous or vexatious. Similarly, applicants should be able to withdraw applications at any time prior to decision, for example if the matter is resolved by way of an agreement.

Proposals 14 and 15 – Making Sure That Protection Works

Offence Provisions

The proposal provides for both civil and criminal penalties for a range of offences. It is not appropriate to pursue civil monetary penalties as further punishment where criminal penalties have been pursued but deemed insufficient. Doing so twice punishes a person for the same cause, inefficiently using court time and violating the principal of double jeopardy. If there is evidence that higher fines are necessary in these cases, consideration should be given to raising the level of fines that can be imposed by the court. Fines could be structured to create different penalty levels for natural and corporate persons.

Inspectors and enforcement

This proposal includes creating a Ministerial power to appoint inspectors to monitor compliance with the legislation or a protection order. It also suggests that, similar to the provisions of the *Environmental Protection and Biodiversity Conservation Act 1999*:

- inspectors could be given powers broader than general police investigation powers; and
- the Minister could be able to require people to produce documents when enforcing the legislation.

The provision of powers to investigators other than police should take into account the level of training provided to police in exercising those powers as against the training provided to the investigators; particularly in relation to powers involving the use of force.

Conclusion

The complex issues and concerns raised by the proposed reform are unlikely to be comprehensively or conclusively addressed through responses to this discussion paper. There remain a range of tensions and difficulties with the detailed proposals. It may be more effective to engage in a cross jurisdictional process to further tease out complexities, competing considerations and how any proposal interacts with existing legislation in order to develop a workable scheme that all jurisdictions will sign up to.

The NSW Government would welcome the opportunity to work further with the Commonwealth Government in developing an effective regime for protecting Aboriginal heritage in Australia.