

National Centre for Indigenous Studies  
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*Australian of the Year 2009*



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Indigenous Heritage Law Reform  
Heritage Division  
Department of the Environment, Water, Heritage and the Arts  
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RE: Response to Possible Reforms to the Legislative Arrangements for Protecting Traditional Areas and Objects (*Aboriginal Torres Strait Islander Heritage Protection Act 1984*)

I welcome the opportunity to provide both general and specific comments on the proposed reforms to the *ATSIHP Act 1984*. I will structure my comments into two sections: the first will address substantive issues raised by the overall discussion paper. The second will address specific remedies and issues raised within the 15 Proposals outlined in the Paper.

General Comments

I believe that the *ATSIHP Act* has not been an effective mechanism for protecting traditional areas and objects (*cf.* Evatt Review 1996). The simple statistic that only 3 of the 320 valid applications received since 1984 have resulted in long term declarations is ample witness to this failure. The summary of weaknesses of the current legislation and the thrust of possible reforms as proposed in the Table on Page 5 are well expressed and I agree with the overall intention of the remedies.

There are two major substantive weaknesses in the Paper, as it currently stands.

Firstly, the Standards specified on pages 17 -19 make no mention of international best practice exemplars for cultural heritage practice, from international charters and conventions, including the Declaration on the Rights of Indigenous People, World Bank and IFC Directives, Burra Charter and WAC Code of Ethics. There must be due recognition of the customary laws pertaining to Indigenous traditional knowledge.

The fact that tangible and intangible cultural heritage, Indigenous knowledge systems, intellectual property, copyright and patents are not mentioned once in the Paper is evidence, in my view, that the Act is still too narrowly focused on 'traditional laws and customs and objects' rather than the broader social significance, educative and beneficiary 'values' of Indigenous sites, places and remains within modern Australia.

Secondly, the proposed accreditation of State and Territory heritage regulatory regimes rests on proposed (uniform) standards and requirements (pages 18-22) which in my view are seriously underdeveloped. Specifically, statements or assessments of relative significance of places/objects by both Traditional Custodians and/or experts are not canvassed - yet these are the cornerstones of good planning. How will potential impacts on say a Mission complex, massacre site, *Wandjina* regeneration/art site and artefact scatter be arbitrated if their relative values, vulnerability and risk are not assessed? There also needs to be a clear statement as to who will actually do the accrediting and who will audit this.

### Specific Comments

Proposal 1: General agreement with the proposed reforms, however contest the statement that decisions "...do not impose unnecessary costs on those involved". The costs should be commensurate with the nature of the proposed impact, the significance of the tangible/intangible cultural heritage and the likely benefits to the land-user (contrast, for example, a home extension vs an iron ore mine).

Proposal 2: Agree with the majority of definitions to avoid ambiguity arising from use of term 'particular significance', however there are inadequate provisions made for sites and places of (post-contact) significance to Indigenous people - such as Mission sites and contemporary law grounds near townships.

Proposal 3: Who arbitrates the accreditation of State and Territory heritage regulatory regimes outside of government? World Heritage landscapes are omitted in this discussion.

Proposal 4: As noted, above, the uniform national standards are not benchmarked against *any* international instrument. There are many reviews on this topic (see below).

Proposal 5: While relying on native title holders and freehold land-owners as 'authorised' Indigenous stakeholders is a start - but the fact that the Federal Court has a backlog of over 550 native title cases waiting for determination makes this definition unworkable. Here, and elsewhere in the report, there is a need to embrace the principles of Indigenous facilitation and mediation and explicitly define a role for Indigenous mediators where representation for land is not settled.

Proposal 6: I have no major issue with these recommendations.

Proposal 7: Discovery of human remains should always be reported to relevant Indigenous organisations and the State Minister. The Federal referral process is all but defunct.

Proposal 8: I agree with the new definitions for the proposed prohibition of public display of sacred objects and remains.

Proposal 9: The proposed application form for protection should make provisions for both intangible and tangible cultural heritage (e.g. Dreamings, historic associations - occupation sites, ceremonial grounds) and the form should list different categories of cultural data. These categories should be comprehensive, rather than proscriptive, and have guidelines attached to them.

Proposal 10: The term 'Rights and interests in the area' needs to be defined. While conferencing is supported – this is not a substitute for formal mediation – and certainly not by teleconference!

Proposal 11: I support the 1996 Evatt review's recommendations for changes to the Freedom of Information Act and archive laws with respect to limiting access to restricted material.

Proposal 12: The very short time period allowed for lodging an application (48 hrs) runs contrary to the plea for more detail in the form and the need for a factual basis for longer-term planning.

Proposal 13: There is no consideration of cultural landscapes here. Where a cultural impact may be identified in an Order there is no consideration of actual site significance or thresholds of risk to the site.

Proposal 14: I support updating the penalties and improving the enforcement powers of the Act (and actually enforcing them) – especially with respect to non-accredited heritage regimes.

Proposal 15: Regular review of the legislation should occur – and importantly include the Executive of any new National Representative Body, NTRBs, LALCs and heritage corporations.

I am happy to elaborate on these comments if you require so.

Yours Sincerely,



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**Some sources relied on:**

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