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'Indigenous heritage law reform'

NTSCORP Ltd Submission

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The role of NTSCORP

1. NTSCORP, formerly NSW Native Title Services Ltd., is the body funded under s203FE of the *Native Title Act 1993* (Cth) to perform the functions of a Native Title Representative Body in NSW and the ACT. As such, NTSCORP is responsible for representing the interests of native title holders or persons who may hold native title in relation to any matter or proceedings relating to native title or the operation of the Native Title Act 1993.
2. NTSCORP performs the broad functions under s203B – s203BK of the *Native Title Act 1993*. NTSCORP provides services to Indigenous peoples who are the descendants of the original inhabitants of NSW and the ACT specifically to assist them exercise their rights under the Act, including by making submissions on proposed legislation and government guidelines, policies and processes which may impact upon them.
3. As one of the peak bodies advocating on behalf of Aboriginal People and communities in NSW, we trust that you will give due consideration to these submissions and recommendations. NTSCORP urges the Australian Government to recognise the need for further discussions with representative bodies regarding their concerns over the proposals, before the Federal Government begins to consider planning the new system.
4. NTSCORP wishes to formally express its support for the Central Land Council (“**CLC**”) and Northern Land Council’s (“**NLC**”) joint submission to the current consultation on Indigenous heritage law reform. We consider the following submissions to add to CLC/NLC’s contributions.

Aboriginal cultural heritage protection in NSW

5. In NSW, the *National Parks and Wildlife Act 1974* provides for the management of Aboriginal cultural heritage. This legislation has not resulted in effective protection of Aboriginal cultural heritage in NSW, with recent statistics demonstrating that in 2007, 92% of section 90 consents to destroy, deface or damage an Aboriginal object or Aboriginal place were granted by the then NSW Department of Environment and Climate Change (DECC). On a Question on Notice in October 2008, the NSW Minister for the Environment and Climate Change revealed that 100% of section 90 consents were granted up until that part of the year.¹
6. A comprehensive critique of the inadequacies of Aboriginal cultural heritage protection in NSW, including submissions on recent proposed amendments to the NSW laws, is contained in NTSCORP’s submissions dated July 2009 to the DECC. For your reference, please find attached a copy of those submissions.
7. NTSCORP and other organisations such as the New South Wales Aboriginal Land Council (“**NSWALC**”) have strongly advocated for many years that a new legislative regime for Aboriginal culture and heritage should be introduced in NSW, to bring the state into line with other states and territories in Australia. NTSCORP believes that new NSW

¹ Environmental Defender’s Office, *Reforming New South Wales’ Laws for Protection of Aboriginal Cultural Heritage - Discussion Paper* (2009) at 8.

State legislation should clearly return the responsibility for Aboriginal culture and heritage to Aboriginal people. Furthermore, new state legislation should provide for the separation of powers; specifically a separation of the power to grant permits to destroy Aboriginal culture and heritage and the responsibility to protect culture and heritage, both of which currently reside with the NSW Minister for the Environment, Climate Change and Water (DECCW).

Evatt Review of the *ATSIHP Act 1984* (Cth)

8. Question 1 of the discussion paper queries what the problems are with the current situation and what proposals are needed to improve it. This was answered in 1996 in the Evatt Report, a comprehensive review providing what NTSCORP considers to be excellent recommendations. The Evatt Report was widely regarded by Indigenous stakeholder groups as being a well-considered and balanced review. The Report made recommendations for reform, none of which the former Federal Government implemented.
9. NTSCORP supports the implementation of the Evatt Report's recommendations for law reform, particularly the need for a workable accreditation system, however we are concerned that the current proposals do not accurately reflect the Report's recommendations.

Proposal 1 – Clarifying the purpose

10. NTSCORP submits that the primary purpose of the legislation should be the *protection of Indigenous cultural heritage*. It is imperative that this become the main focus of Indigenous heritage law reform at both Federal and State levels.
11. We also consider that Aboriginal and Torres Strait Islander communities have the primary right to make decisions about their culture and heritage. The proposed objectives indicate the extent of Indigenous engagement will be limited to consultation rather than active decision-making. As noted above, NTSCORP submits that legislation should clearly return responsibility for Aboriginal culture and heritage to Aboriginal people and this should accordingly be reflected in the objectives of the Act.

Proposal 2 – Making the terminology consistent with the purpose

12. It is important that the new terminology, particularly with the use of the word 'traditional', does not import a requirement to prove ongoing connection to an area subject to an application from the time of sovereignty to the present day.² To avoid any uncertainty NTSCORP submits that the new definitions should expressly provide that proof of unbroken connection is not required.
13. NTSCORP further submits that there be a specific provision to include contemporary Indigenous culture within the definitions, to catch important contemporary or post-colonial aspects of Indigenous culture which may otherwise fall outside of conventional heritage legislation regimes.

² *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.



14. NTSCORP supports the recommendations made in the CLC/NLC's submissions with respect to this proposal.

Proposal 3 – Promoting effective laws through accreditation

15. NTSCORP conditionally supports a system of Commonwealth accreditation, in order to achieve improved standards of state and territory cultural heritage protection laws. However NTSCORP does not support removal of access to the ATSIHP Act legislation in accredited states and territories.
16. There are several reasons why the Commonwealth should not seek to prevent recourse to the ATSIHP Act, even where accreditation has been granted to states and territories.
17. In NSW, the power to approve cultural heritage clearances and the responsibility to protect cultural heritage both reside with the Minister for Environment, Climate Change and Water. This often results in the compromising situation whereby the State Government may, as a proponent, be seeking certain consents to destroy. The State Government in turn then applies to the same authority to approve the destruction of cultural heritage under s. 90 of the NSW NPWA. This conflict is likely to intensify in the event that NSW obtains accreditation under the proposed changes to the ATSIHP Act. As such, NTSCORP submits there is a clear imperative to maintain the right of appeal to the ATSIHP Act particularly where this type of conflict arises.
18. NTSCORP also notes that the Evatt Report did not recommend that application of the ATSIHP Act be denied to applications originating from an accredited state or territory. Similarly, the Commonwealth must retain its right to apply for protection of a threatened area under the ATSIHP Act, even in states and territories where minimum standards are reached.
19. NTSCORP acknowledges that it would be beneficial for the Commonwealth Government to set the appropriate standards required for accreditation. As noted above in Proposal 1, NTSCORP firmly supports the right of Aboriginal people to own, control and make decisions about their own cultural and heritage. However, unless the Commonwealth government specifically includes this criterion as part of the minimum standards required to receive accreditation, there is less impetus for NSW to ever provide formal recognition of this right under State legislation. It is therefore important that the reforms do not prevent Aboriginal people from applying under the ATSIHP Act, even in accredited states or territories, where the proposed standards permit a government agency to damage or destroy Aboriginal cultural heritage in instances opposed by the traditional custodians.
20. Although under the proposed system the state and territories would continue to retain primary responsibility for Aboriginal cultural heritage, it is arguably within the *national* interest to protect Aboriginal cultural heritage. NTSCORP therefore submits that the Commonwealth Government must allow unfettered access to the protection afforded under the ATSIHP Act, in addition to encouraging states and territories to meet improved standards for protection.
21. NTSCORP is also concerned at the minimal detail provided regarding the monitoring and revoking of accreditation. NTSCORP supports a system in which accreditation is automatically revoked where the state consistently fails to act or where laws are passed which directly contravene or prevent effective compliance with the standards supporting

accreditation, however we note that the discussion paper makes no mention of a system for the monitoring and evaluation of accredited states.

22. In addition, the Commonwealth Government should also consult with organisations such as NTSCORP and NSWALC in deciding whether to provide or maintain NSW state accreditation.

Proposal 4 – Specifying Standards

23. As noted above, NTSCORP is generally supportive of the aims for providing standards to support accreditation, however until the rights and responsibilities of Aboriginal people to own, control and make decisions about Aboriginal cultural heritage form part of the benchmark standards, NTSCORP does not believe they are best practice standards.
24. NTSCORP submits that the standards set in Commonwealth Indigenous cultural heritage legislation must give practical effect to well-publicised commitments already made by the Federal Government. These include:
- The Federal Government support for the United Nations' *Declaration on the Rights of Indigenous Peoples*,³ which provides *inter alia* that free, prior and informed consent of Indigenous people is required for any activity that is geared towards commercial gains on their traditional territories; and
 - The Federal Government's commitment to Indigenous self-determination and increasing Aboriginal decision-making in the *Closing the Gap* strategy, which are also identified as 'things that work' in the Productivity Commission's *Overcoming Indigenous Disadvantage – Key Indicators Report 2009*.
25. In addition, the effectiveness of well-intentioned standards requires the political will to apply them, which does not exist consistently across state and territory governments.
26. With regards to whether the standards would be met in NSW, NTSCORP refers to and provides support for the submissions made by NSWALC. NSWALC's submissions clearly set out how the NSW laws – both as they currently stand, as well as taking into account the recent proposed amendments to the *NPW Act* – would fall well short of meeting the Commonwealth's proposed minimum standards. NTSCORP provides the following comments with respect to Proposal 4 in addition to its professed support for CLC/NLC and NSWALC's submissions.

(2) Enabling activities to proceed

27. NTSCORP recognises that this standard is required to provide proponents with certainty that they would not be liable for prosecution or subject to penalties if they have acted in accordance with a State Government approval. However, if the State has approved the destruction or damage of Aboriginal cultural heritage, NTSCORP submits that there must be recourse to the Commonwealth ATSIHP Act for the reasons outlined above.

(4) Call in power

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Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Statement on the United Nations Declaration on the Rights of Indigenous Peoples - Parliament House, Canberra, 03/04/2009
http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/un_declaration_03apr09.htm

28. This standard provides that the Federal Minister's involvement in Aboriginal cultural heritage protection in accredited states would be limited to having his or her representations 'considered' by the state or territory Minister. NTSCORP submits that the inability for Aboriginal people to have ultimate recourse to the *ATSIHP Act* to protect their cultural heritage where the state Minister has failed to do so, is not supported for reasons explained above.

(6) Promoting compliance

29. This standard pertains to the state or territory's ability to intervene when an activity may cause adverse impacts. NTSCORP submits that traditional custodians or other Indigenous organisations should also be empowered by law to have standing to intervene to stop unapproved activities that have the potential to cause adverse impacts on traditional areas, objects or sites of significance.

30. NTSCORP also considers that the laws should go beyond merely 'enabling' a state or territory to stop any unapproved activity that may result in adverse impacts upon a traditional area or object; rather, the laws must *require* the state or territory to intervene where this occurs.

31. NTSCORP supports the imposition of significant penalties and orders for repair where unauthorised damage has occurred. Additionally, the penalty provisions must be strong enough to act as a deterrent for well-resourced proponents.

(7) Meeting traditional custodians

32. NTSCORP submits that the standards should specify laws *requiring* proponents to meet with traditional custodians, as well as provide processes to enable proponents to identify the traditional custodians. In NSW, as in other states, such identification processes can be facilitated by organisations such as NTSCORP. Additionally, the requirement to meet with traditional custodians must go beyond a mere notification process and should further require proponents to meet with and negotiate with traditional custodians in good faith, rather than the 'going through the motions' approach adopted by some proponents.

(8) Reaching agreement

33. NTSCORP is generally supportive of direct meetings between traditional custodians and proponents; however the inequality of bargaining power and resources and the implications it has for reaching informed and free agreement must be recognised and addressed.

(9) Ability to seek approval

34. NTSCORP submits that where a proponent has been unable to reach an agreement through direct negotiations with the traditional custodians, that alternative dispute resolution (ADR) mechanisms be used in preference to court proceedings. For such a provision to be effective, governments and proponents must ensure sufficient resources are available for unfunded individuals (i.e. traditional custodians seeking to protect their cultural heritage) and representative organisations.

(11) Requirement to consider impacts on traditional areas and objects

35. NTSCORP considers that in addition to the requirement to consider the physical and material impacts upon traditional areas and objects, a further requirement should be to consider the views of Indigenous people with respect to the spiritual and cultural dimensions of the impact.

(12) Independent assessment of impacts

36. NTSCORP supports the proposal for impacts upon traditional areas and objects to be assessed independently. However it is unclear from the proposal who would commission and pay for such an assessment. An independent assessment of impacts would only be valuable where the independence of the assessor is completely independent of both the proponent and the decision-maker. NTSCORP considers that the Northern Territory model in which an agency such as the Aboriginal Areas Protection Authority (AAPA) is tasked with the responsibility for conducting the assessment to be the benchmark for independent assessment.

(13) Need to consult traditional custodians

37. NTSCORP welcomes the recognition that traditional custodians are the primary source of information about their own laws and customs. NTSCORP submits that it must also be recognised that under traditional laws and customs, traditional custodians have responsibilities for their cultural heritage, including its protection.

(14) Respect for traditions of secrecy

38. Where an Indigenous person has provided culturally sensitive information, NTSCORP considers that such information should be returned to the Indigenous person and must not be passed on in any way without first obtaining their consent.
39. If the Government deems that certain decisions containing culturally sensitive information need to be published, NTSCORP submits that the Indigenous person (or their representative) providing the information must be given the opportunity to remove such information prior to publication. Reference is made to the National Native Title Tribunal ("NNTT") which maintains a policy allowing for the deletion of culturally sensitive material from native title registration decisions prior to their publication.

(15) Requirement to consider other matters

40. NTSCORP submits that as a minimum the views of the traditional custodians be given equal weight to those of the proponent.

(16) Requirement to consider Australian Government views

41. Although the state or territory may be required to consider the Commonwealth Government's views, it would be within their discretion to adopt or reject the views of their Federal counterpart. If the Federal Government considers that the protection of the cultural heritage must prevail over the proposed activity, there would be no opportunity for the traditional custodians to appeal to the Federal Government for protection if the current proposal with respect to accreditation is adopted. For the reasons outlined above, NTSCORP reiterates its opposition to the current proposal preventing appeal to the Federal Minister under the ATSIHP Act where accreditation has been granted.

(17) Requirements for giving approval

42. In NSW, DECCW would meet this requirement by requiring cultural heritage management plans detailing options to avoid or minimise impacts when it receives a section 90 application.
43. NTSCORP submits that in circumstances where the cultural, social, economic and environmental welfare of the community overrides the imperative to avoid adverse impacts to traditional areas and objects that such exceptions should only be applied in extraordinary circumstances. As noted above, approvals in NSW allowing for the destruction or damage of Aboriginal cultural heritage appear to be the norm rather than the exception. The consideration of such ill-defined and far reaching criteria in decision making processes which potentially result in the grant of approval to proceed with the destruction of Aboriginal heritage should be minimised, or at least assigned a weight equal to that of Indigenous concerns.

(18) Requirement to maintain records

44. NTSCORP conditionally supports this standard. It is important for this information to be accessed only in accordance with the various levels of secrecy such information may be subject to under traditional laws and customs.
45. The Aboriginal Heritage Information Management System (“**AIHMS**”) is a database maintained by DECCW for all Aboriginal objects, Aboriginal places and other Aboriginal heritage values in NSW that have been reported to National Parks and Wildlife Service. NTSCORP submits (in line generally with repeated feedback from traditional custodian groups) that the Commonwealth standards must include a requirement to implement culturally appropriate access controls to information stored on databases such as AIHMS.

(19) Requirement to make records available

46. NTSCORP holds concerns that access to databases containing information relating to Aboriginal cultural heritage such as AIHMS may be viewed by proponents as a substitute for direct consultation with affected Aboriginal communities or information obtained from traditional custodian groups. In both practice and procedure nothing must be done to foster this misconception amongst government and private sectors groups.
47. On a practical note, NTSCORP further submits that Aboriginal people wishing to access these databases should be exempted from fees and charges.

(20) Opportunity for legal reviews

48. NTSCORP supports this proposal.

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

49. The discussion paper proposes that if there has been formal legal recognition of Aboriginal traditional custodianship via native title or land rights claims, then this should be the mechanism to identify who has standing to apply for protection under the ATSIHP Act. NTSCORP understands that proposals to recognise traditional custodians pertain only to recognition of traditional custodianship under the Commonwealth *Native Title Act 1993* and the *Aboriginal Land Rights (Northern Territory) Act 1976*.

50. NTSCORP supports the acknowledgment that traditional custodians are the people who have the right to speak for Country and share the primary obligation to protect it under their traditional systems of law and custom. While we support the native title process as a mechanism to identify traditional custodians, in the eastern states, such as NSW, there is a low likelihood of recognition of native title.
51. Accordingly, NTSCORP submits that any system of Aboriginal cultural heritage protection must ensure *all* traditional custodians have standing to bring an application for protection under the ATSIHP Act.

Identification of traditional custodians

52. In NSW, native title is the only formal, legal process to identify traditional custodians. NTSCORP supports the proposition that the rights and interests of native title holders, once recognised, should not be challenged by non-traditional owners. To do so would be to undermine the lengthy and demanding process native title holders undergo to have their rights and interests recognised in the first place.
53. We understand that where there is a native title determination, applications for protection of Indigenous cultural heritage on native title land can only be made by members of the native title group and the Prescribed Body Corporate (PBC). Aboriginal applicants who are not part of the native title determination group would be required to seek permission from the traditional owner group or PBC. NTSCORP supports this proposal, which gives full effect to the recognition of connection to, and responsibility for, Country under the *Native Title Act 1993* (Cth).
54. NTSCORP understands that this proposal would only apply to full determinations, not registered native title claimants. The proposals would suggest that notwithstanding the existence of a registered claim, any Indigenous person would have standing to bring an application. NTSCORP submits that the views of registered native title claimants must be properly canvassed and given due weight.
55. Where PBCs exist, NTSCORP agrees that it should not be possible to make a cultural heritage application without their consent. However, in order for this proposal to be effective, it is important that the PBC (or the entity or group which holds the common law rights and interests) is functioning properly. Where governance problems or insolvency and administration arise, or the PBC has not yet been established, then individual traditional custodians should have the appropriate standing to make the application.

Where there has not been a registered native title claim or determination

56. In the absence of a registered native title claim or determination, any Indigenous person who can demonstrate a low level of traditional connection should be given standing. The test should not be onerous, especially so with interim applications for protection which by their very nature do not provide sufficient time for an applicant to prepare detailed submissions.
57. In addition, Indigenous persons who are not traditionally associated with the area may also have knowledge of narratives relating to sacred sites, although they may not have primary responsibility for these areas. This may particularly be the case in areas of shared country, or where there is a long history of occupation due to the forced removal

and relocation of Indigenous persons. Therefore if the area or object has significance to an Indigenous person, NTSCORP considers that they should be given standing.

58. NTSCORP recognises the legislative responsibilities of Local Aboriginal Land Councils (LALCs) to protect Aboriginal cultural heritage in NSW. We recommend that where there is no registered native title claim or determination, LALCs (and if relevant NSWALC) should be invited to comment on culture and heritage issues.
59. NTSCORP maintains that the standing given to LALCs and NSWALC should only take place in instances in which there is no registered native title claim or determination. Unlike the Northern Territory Land Rights Act, the NSW *Aboriginal Land Rights Act 1983* does not provide a mechanism to recognise traditional custodians and although LALCs have historically exercised responsibility for cultural heritage under statute, traditional owners have responsibilities for culture and heritage under traditional laws and customs. In other words, the existence of an Aboriginal land rights claim or determination should not preclude the standing of traditional custodians who do not have the benefit of formal recognition under the *Native Title Act 1993* (Cth).

Proposal 6 – ensuring that Commonwealth protection would not prevent an act authorised under a registered ILUA

60. NTSCORP provides the following comments in addition to supporting the views expressed by CLC/NLC.
61. Where an ILUA has been entered on the Register of Indigenous Land Use Agreements, the agreement has effect as if it were a contract among the parties to the agreement. NTSCORP submits that it is important the legislation recognises that while an ILUA may provide for certain future acts to take place, it may not necessarily approve the destruction of Indigenous cultural heritage to allow the activities to take place.
62. It is also well-recognised that not all of the Indigenous cultural heritage in an area, subject to an ILUA, may be identified. Indeed, the ILUA may lay down a process which allows for its progressive identification and mapping. In these circumstances, and unless expressly excluded, NTSCORP submits the traditional custodians should be able to make an application under the ATSIHP Act. In the event of any ambiguity, then the right of appeal to the ATSIHP Act must be preserved.
63. In relation to ILUAs registered before the date of any proposed amendments to the ATSIHP Act come into effect it is highly unlikely parties to these agreements would have consented to excluding the operation of any Commonwealth cultural heritage protection laws. NTSCORP strongly recommends this proposal not apply retrospectively to ILUAs registered before amendments to the ATSIHP Act are enacted.

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

64. NTSCORP supports the views expressed by the CLC/NLC in their submission.

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

65. NTSCORP is generally supportive of this proposal. The need to obtain consent from the relevant Indigenous community before publically displaying sacred objects and remains is fundamental. The proposals outline that where there has been a voluntary donation under a Commonwealth, state or territory law, exemption from committing an offence under the ATSIHP Act should only apply where the donation is made by the relevant Indigenous community. In these circumstances, NTSCORP considers that the entity or person wishing to display the sacred object or remains would nonetheless need to obtain consent for its display by the relevant Indigenous community.
66. NTSCORP submits that for reasons of efficacy and deterrence there must be adequate resourcing made available to allow for the implementation and enforcement of the proposed range of new offences and penalties, such as those relating to the unauthorised display of sacred objects and remains.

PART 2 – IMPROVING PROCEDURES

67. NTSCORP provides the following comments in addition to expressing its support for the views put forward in the joint CLC/NLC submission.

Proposal 9 – Specifying the information needed for applications for protection

68. The Evatt Report recommended that for the purpose of improving access to the ATSIHP Act the process for making applications to the Minister should be easy and straight forward. Specifying information needed for applications would be helpful to the decision-maker, however it should not be burdensome on the Indigenous person seeking to protect their cultural heritage. Specifically, a requirement for the application to reveal sensitive information should not be borne by the Indigenous applicant, given that it is the actions of the proponent which have triggered the appeal for protection.
69. With regards to ‘traditional custodianship’ there must not be a high threshold test. If disputes arise concerning the right to speak for Country, it would be preferable to resolve the disputes after the application is made, rather than the Government seeking to automatically exclude applications which lack proof of traditionality, or where traditionality is disputed.
70. We note there is no proposed definition of traditional custodians in the discussion paper. For your reference, we draw your attention to the recently enacted clause 80 in the National Parks and Wildlife Regulation 2009 (NSW), which may assist the Federal Government in developing a broad definition of the term:
- traditional owners, in relation to land, means those persons who have an association with the cultural area within which the land is situated that derives from the traditions, observances, customs, beliefs or history of the original Aboriginal inhabitants of the cultural area.*
71. NTSCORP submits that the definition of traditional custodians should also include those individuals who by traditional process of incorporation and adoption become members of the traditional custodian community.
72. NTSCORP acknowledges that the Commonwealth seeks to streamline the application process. Presumably any proposed changes to the Act would seek to have applications heard quickly and expeditiously. However, NTSCORP notes that no information was presented in the discussion paper identifying features of the current system which prevented the expeditious hearing of applications. While NTSCORP understands the need for applications to be heard without delay, such expedition should not be at the cost of properly notifying and contacting affected Indigenous parties, particularly those residing in regional and remote areas.
73. The preamble to the proposals suggests that some applications for protection may fail because there is not enough information provided. This is particularly concerning where information is withheld because of the reticence of traditional custodians to make bodies knowledge of a sacred or protected nature publically available or supply it to government..
74. We appreciate that the Government is seeking to address this by specifying what information is useful in assessing an application. However, failure to provide such information for the reasons stated above should not make an application prima facie invalid or incomplete.

75. If the Government requires information to make a decision and the information was not provided in the initial application, NTSCORP submits that the Government should engage with the Indigenous applicant and advise what further information is required. If, following a period of consultation the required information is unable to be provided, the Government should take into account when assessing the application any reasons offered as to why the information is unavailable.

Circumstances where applications would not proceed

76. NTSCORP strongly recommends that there must not be any automatic rejection of applications based on any of the three criteria identified. Please refer to NTSCORP's comments provided in relation to Proposals 3 -6 above.

Proposal 10 – Using conferences to consider how best to deal with the issues

77. NTSCORP provides qualified support for this proposal. Early consideration and meeting with the applicants is a positive suggestion, however practical obstacles may prevent the ultimate efficacy of such conferences. Specifically, the Indigenous party requires access to adequate resources in the form of representation and financial assistance particularly where it is faced by a well resourced proponent. NTSCORP submits that further information is required from the Department on how the use of conferences will encourage more fair and just outcomes.
78. Additionally, NTSCORP submits that any conferences must be convened on a 'confidential and without prejudice' basis.

Proposal 11 – Protecting sensitive information

79. NTSCORP supports the submissions made by the CLC/NLC with respect to this proposal.
80. In regards to the provision of traditional knowledge and culturally sensitive information, NTSCORP considers that it should, as a matter of course, be kept strictly confidential, unless the traditional custodians or Indigenous applicant who provided the information have consented to its release.

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

81. NTSCORP supports the submissions made by the CLC/NLC with respect to this proposal.
82. NTSCORP does not believe the proposed timeframes are sufficient to overcome practical difficulties Indigenous applicants may face in preparing an emergency or interim application for protection. Examples of practical difficulties Indigenous applicants may experience are problems accessing transport, online information and services and other information sources. Additionally, some applicants may not have a high level of literacy, in which case oral evidence should be accepted. This also has a very strong bearing on the quality of the application. In that regard please refer to NTSCORP's comments at [77].

83. NTSCORP would therefore support legislation which provides that upon application, an emergency protection order can be granted by the Department for seven days, and interim protection orders granted for up to four months. Both emergency and interim protection orders should be capable of being extended if required.

Criteria for providing short-term protection

84. The proposals suggest a criterion that where the Secretary has reasonable grounds to believe that other laws exist that *could* provide protection, short-term protection would not be granted. Please see NTSCORP's comments at [5], [6] and [17] with respect to protection of cultural heritage in NSW. A review of the operation of NSW heritage legislation and the rate at which 'consents to destroy' are granted does not indicate such laws are likely to be applied in an effective or timely manner. In the circumstances, amendments to the ATSIHP Act should not prevent applications for interim protection orders.

Consultation and notification requirements

85. If the right of appeal under the ATSIHP Act remains after accreditation, which is NTSCORP's position, then the Federal Minister should retain the ability to canvass the opinion of the relevant state or territory minister.

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

86. NTSCORP supports a structure in which an independent entity assesses the area the subject of any application for protection under the Act. Given the proposed reliance by the Minister on the independent assessment, the processes in place to develop the independent assessment must reflect the objects under the ATSIHP Act. NTSCORP refers to AAPA model in the Northern Territory, and the CLC/NLC submissions with respect to AAPA in that regard.
87. NTSCORP shares the concern of other native title representative bodies that the development of an independent assessment of the impacts should not be an adversarial process. NTSCORP would welcome further dialogue with the Federal Government regarding the development of an alternative to a statement of facts.
88. Specifically and with respect to NSW, other information sources such as the Register of Aboriginal Owners maintained by the Registrar, *Aboriginal Land Rights Act 1983* may assist in identifying appropriate Indigenous persons with whom to consult. However the proposed reforms should clearly set out that it would be insufficient for governments to make decisions on who should be consulted solely by referring to such a list or database.

Criteria for making a protection order

89. Regarding the proposals of what the Minister would need to take into account when making a decision under the ATSIHP Act, NTSCORP submits that the impacts on the Indigenous cultural and heritage and the views of the traditional owners should be given primacy over the interests of the proponent or the social, environmental and economic impacts of the activity. As noted above, NTSCORP believes that the protection of Indigenous cultural heritage must be the primary consideration for decision-makers when



determining both long-term and short-term protection orders, and should be specified within the objects and the substantive provisions of the Act.

90. In terms of whether the Minister would need to consider other factors, NTSCORP submits that in arriving at a decision, notice should be taken of the objectives of the Act. In practical terms NTSCORP submits that the Minister should give due weight to other information that could not be included in the proposed statement of facts, specifically the disadvantaged bargaining power of traditional custodians or the Indigenous applicants. This could be done fairly and without undue delay by including a pro-forma statement regarding the resources of the applicant.

Ability to revoke protection

91. NTSCORP supports the submissions of the CLC/NLC on the revocation of a final protection order. In addition, NTSCORP submits that the Minister must also be satisfied that by revoking the protection order that no other fresh cause or activity will threaten the Indigenous cultural heritage previously subject to the order.

PART 3 – MAKING SURE PROTECTION WORKS

Proposal 14 – Updating the penalties and improving the enforcement powers

92. NTSCORP supports the proposal to amend the offences and penalty provisions of the ATSIHP Act. We particularly support the removal of the defence in s24(3) of the ATSIHP Act, which has the effect of preventing a person from being fined in circumstances where they did not know of the existence of a declaration. It is worth observing that as a general proposition ignorance of the law is not a defence.
93. Introducing higher penalties for breaches of protection orders is supported and welcomed as a deterrent to any proponents seeking to ignore the protection granted. However the application of penalties only has an impact on the protection of Aboriginal cultural heritage if the Minister makes a protection order in the first place. As seen from the statistics,⁴ this rarely occurs.
94. In addition to greater sanctions, we submit the ATSIHP Act should afford the traditional custodians with the opportunity to engage the offender in an alternative or accompanying process of restorative justice. A recent discussion paper prepared by the Environmental Defenders Office (“**EDO**”) references a situation in the Land and Environment Court where a defendant was required to participate in a ‘restorative justice’ conference with affected members of the local Aboriginal community in conjunction with a small penalty.⁵
95. We believe that the suggestion by the EDO is one of many options that should be available to affected traditional custodians in situations where areas of cultural significance have been harmed. It is important for the Defendant to understand the harm experienced by traditional custodians when their sacred sites and objects are damaged, especially where financial penalties cannot adequately compensate for the damage done. Furthermore, it may be more appropriate that fines paid by defendants be directed to the affected members of the Aboriginal community.
96. Any punitive process should seek to actively engage affected Indigenous party. We envisage such processes would empower affected Aboriginal people by ensuring that the perspectives of the group are adequately heard and understood.

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

97. NTSCORP considers that for such a significant reform to the ATSIHP Act, the initial review should be after 5 years, and then every 7 years, if appropriate.
98. Regular reviews of state and territory laws are required to ensure states and territories are adhering to accreditation standards. This may be a process by which the accredited state or territory is required to notify DEWHA (as the accrediting body) whenever amendments to the state or territory’s Indigenous cultural heritage laws are proposed. This would provide DEWHA with an opportunity to review the proposals and notify the state or territory government whether its proposed amendments, if enacted, would mean accreditation is maintained or in danger of being revoked.

⁴ *Indigenous heritage law reform discussion paper*, at 4.

⁵ Environmental Defenders Office, *Reforming NSW Laws for the Protection of Aboriginal Cultural Heritage – Discussion Paper*, at 3.7. See also *Garrett v Williams, Craig Walter* [2007] NSWLEC 96.