

Review of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (The ATSIHP Act)

Submission of the South Australian Government

Introduction

The South Australian Government (the Government) welcomes the review of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (the ATSIHP Act). The effective management and protection of Aboriginal heritage is important, not only to Aboriginal Australians, but also to strengthen the cultural identity of all Australians.

The South Australian Government agrees generally with the shortcomings identified in the Commonwealth's Discussion Paper (page 5), in particular, the uncertainty created for Aboriginal people, developers and the Government by the potential for 'last minute' requests for intervention by the Commonwealth.

In addition, the South Australian Government supports reforms that will result in clarity of purpose, more consistent definitions and certainty of process across jurisdictions.

The South Australian Government is currently conducting a review of its own Aboriginal heritage legislation; the *Aboriginal Heritage Act 1988* (the AHA). The Government's Scoping Paper does not propose specific reform or amendment of the current Act. Rather, it establishes the broader legislative and policy context, and then sets out a series of Guiding Principles that will underpin new legislation:

- Recognising Aboriginal custodianship of cultural heritage;
- Creating a strong framework for long term protection and management of Aboriginal heritage;
- Enabling Aboriginal negotiation of agreements about heritage;
- Embedding Aboriginal heritage considerations into the development and land management process;
- Creating timely and efficient processes;
- Creating certainty for all parties;
- Complementing the *Native Title Act 1993* (Cth).

The first round of community consultations has been completed and the deadline for submissions has passed. Views expressed in the consultations and submissions received reveal a wide range of views about how best to manage and protect Aboriginal heritage and the role of Government in that process. The review process is in its early stages and reforms are not likely to be finalised until the second half of 2010.

Response to Proposals

Proposal One – New objects

The Government supports the proposed changes to the objects of the ATSIHP Act. The Government further recommends that an additional object be included to make explicit the effect of accreditation of State and Territory laws, namely, that the Commonwealth law will not apply.

Proposal Two – Making terminology consistent

The Government acknowledges the desirability of legislation such as the ATSIHP Act to have clear and precise definitions. It is appropriate that the definitions in the Commonwealth Act operate to confer protection on areas and objects of significance according to Aboriginal tradition. It is important however to note that areas of archaeological, scientific and historical significance will continue to be a part of the South Australian heritage protection scheme.

Proposal Three – Accreditation

The Government supports, in principle, the concept of accreditation of state and territory schemes. In particular, the Government welcomes both the increased level of certainty for all parties, including Aboriginal parties, as well as a framework for co-operation, that accreditation will provide.

The process of assessment of state and territory regimes should specifically include a period for dialogue and negotiation with the relevant state or territory government and independent review/assessment of the relevant legislative scheme, prior to the formal process of ministerial accreditation.

Proposal Four – Accreditation Standards

While the accreditation standards proposed in the Commonwealth Discussion Paper are not dissimilar from the Guiding Principles that the South Australian Government has proposed in its Scoping Paper, the Government cannot, at this stage, offer unqualified support (or opposition) to the standards. To do so would pre-empt the outcomes of the review generally.

At this very early stage of the review process, the Government has not yet formulated firm proposals for change, nor has any particular aspect of the range of possible reforms been costed. The Government acknowledges that there is a range of different funding mechanisms for heritage protection, including cost recovery from developers and other land users. The Government would be concerned however if the costs of compliance with standards resulted in a financial commitment that could not be sustained in the long term.

Proposal Five – Only traditional owners can seek Commonwealth protection

The Governments supports this proposal. Appropriate processes for the identification of Aboriginal people with traditional responsibility and authority for areas and objects is fundamental to the successful operation of Aboriginal heritage protection legislation generally. Indeed, one of the primary drivers for reform of the AHA is the need to improve the processes for identification and recognition of Aboriginal people with appropriate authority and responsibility. Without clear rules about who can seek protection, there is a real risk that parties who have no real interest could undermine agreements, management plans and Indigenous Land Use Agreements, entered into in good faith by all parties.

The Government agrees that native title processes for certification and registration of native title holders provides a sound platform for identification of Aboriginal people with authority for heritage matters. Leaving these matters of identification to be resolved through native title processes alone however is inadequate. In areas of the State where no or multiple native title claims have been registered, or where native

title may be found to have been extinguished, additional processes for identification and recognition of other organisations will be required.

It is important to note also that unlike the *Aboriginal Land Rights (Northern Territory) Act 1976*, *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* and the *Maralinga Tjarutja Land Rights Act 1984*, the *Aboriginal Lands Trust Act 1966* does not provide a process for claiming land on the basis of traditional ownership, nor does it hold land on behalf of traditional owners.

Proposal 6 – Treatment of acts authorised by an Indigenous Land Use Agreement

The Government fully supports this proposal. One of the Scoping Paper's Guiding Principles that will underpin reformed heritage legislation is to complement the *Native Title Act 1994*. In addition to the general confusion and uncertainty that dual processes create, the time and resources that are required to comply with both native title and Aboriginal heritage processes are unnecessary and wasteful.

Proposal 7 – Removing Duplication regarding ancestral remains

The Government supports this proposal. It is appropriate that state laws cover the discovery and subsequent dealing with ancestral remains. Until such time as forensic and archaeological analysis can establish whether the remains in question are Indigenous personal remains, then the involvement of law enforcement and coronial officers is necessary.

South Australian law currently requires a person to report a death that may be a reportable death to the Coroner or a police officer (section 28, *Coroner's Act 2003*). In practical terms, where human remains are discovered, the discovery is reported to the police in the first instance. If the remains are likely to be ancestral remains to which the *Aboriginal Heritage Act 1988* may apply, then the police, the relevant agency and Indigenous people will discuss the matter and agree an appropriate course of action.

Proposal 8 – Addressing Gaps regarding treatment of sacred objects and remains

The Government supports this proposal. The South Australian Museum already has in place policies that operate to ensure that the objects and remains that it holds are treated with respect and according to the relevant Aboriginal law and custom. These policies have been developed in consultation with relevant traditional owners. The Government and the South Australian Museum will continue to discuss these matters in the course of developing its reform proposals.

The South Australian Government suggests that the new definitions for proposed prohibition on public display extend also to cover the display of funerary items such as death masks, and casts of other body parts

Proposals 9 – 12 - Improving Procedures

The Government supports these proposals. Greater clarity and more detailed steps are far more effective ways of ensuring that protection of areas and objects can be provided when appropriate and necessary. Not only does such a process reduce the considerable costs and time involved for all parties, it also provides a much stronger basis for confidence in the process. In particular, the proposed treatment of culturally sensitive information, consistent with already established court and tribunal practice,

represents a workable balance between the need to protect and respect Aboriginal cultural traditions and the need to provide transparency and procedural fairness.

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

The Government supports this proposal. A long term order that prevents development from occurring has serious consequences for individuals, and often for state and territory governments. Equally, an activity proceeding may have a significant impact on the capacity of Aboriginal people to practice and maintain their traditional laws and customs.

Given the serious consequences of making or declining to make a long term protection order, a transparent process for assessment and decision making, based on an agreed 'statement of facts', is useful. The current requirement for personal consideration by the Minister of all 'representations' is cumbersome and arguably not a necessary step in ensuring that decisions are made consistent with the rules of procedural fairness.

Proposal 14 – Penalties and Enforcement

The government supports improvements in the enforcement of Aboriginal heritage legislation. In particular, remediation orders and similar instruments provide a practical means by which any damage to Aboriginal heritage could be remedied. At the very least, the power to order remediation may provide a platform for education and public awareness about Aboriginal heritage, to reduce the likelihood of damage occurring in the future.

Proposal 15 – Regular reviews of effectiveness

The Government supports this proposal. Again, the Government would have concerns if a regular review process resulted in significant costs for South Australia.