

8 January 2010

Mr Mark Tucker
Deputy Secretary (Arts, Culture, Heritage and Antarctic Group)
Department of the Environment, Water, Heritage and the Arts
GPO Box 787
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By e-mail: atsihpa@environment.gov.au.

Dear Mr Tucker,

Re: "Indigenous heritage law reform" discussion paper – August 2009

The Urban Taskforce is a non-profit organisation representing Australia's most prominent property developers and equity financiers. We provide a forum for people involved in the development and planning of the urban environment to engage in constructive dialogue with government and the community.

Property developers are extremely conscious of their obligation to work collaboratively with Indigenous and other Australians to protect the heritage of the first Australians. There are numerous examples of fantastic success stories where urban development projects have received the strong support of local Indigenous people, in part, because of the successful relationship of trust that has been built up through co-operative working relationships.

Regretfully, there also examples where Indigenous heritage laws have been politicised and sometimes abused, to either stop development, or in response to factional disputes within local communities. For example, only last month, the Tasmanian Aboriginal Land and Sea Council advised property developers that all Indigenous co-operation in all Tasmanian heritage assessments would cease.¹ This is political action was mounted in apparent opposition to the Tasmanian government's support for the Brighton bypass. An officer of the Tasmanian Department of Infrastructure, Energy and Resources observed

the decision to boycott would have far-reaching implications for developments around the state and could cost developers millions or even see projects abandoned.²

We have reviewed the Department of the Environment, Water, Heritage and the Arts' paper, *Indigenous heritage law reform: For discussion – August 2009* ("the discussion paper") and wish to provide some considered comments for your consideration.

While some more minor elements of the discussion paper have our support, we find the central proposal of the paper to be unjustified and alarming. At a time where the Federal Government is concerned about lack of private sector construction activity, particularly residential construction, the proposals of this paper are surprising and disappointing.

Our specific comments and concerns are set out below, and a summary of our key points is set out in an appendix at the end of this submission. The structure of this submission is based on the headings and questions posed in the discussion paper.

¹ Damien Brown, "Blacks' warning to developers", *The Mercury* (Hobart), 6 January 2009, <http://www.themercury.com.au/article/2010/01/06/119831_tasmania-news.html>.

² Ibid.

1. Clarifying the purposes of the legislation

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

The paper itself (correctly) describes the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ("ATSIHP Act") as "last resort" legislation.³ As the paper acknowledges, the Act is designed to be used when other processes have failed.

At a state and territory level, comprehensive laws exist to protect Aboriginal and Torres Strait Islander heritage.⁴ The protections embodied in these laws are wide-ranging. Furthermore, at a national level, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ("EPBC Act") allows specific places to be included on the national heritage list.⁵ The national heritage criteria allow a place to be listed if the place has outstanding heritage value to the nation because of (among other things):

- the place's importance as part of Indigenous tradition;
- the place's importance in the course, or pattern, of Australia's Indigenous cultural history;
- the place's possession of uncommon, rare or endangered aspects of Australia's Indigenous cultural history;
- the place's potential to yield information that will contribute to an understanding of Australia's Indigenous cultural history;
- the place's importance in demonstrating the principal characteristics of a class of Australia's Indigenous cultural places;
- the place's importance in exhibiting particular aesthetic characteristics valued by a Indigenous cultural group;
- the place's importance in demonstrating a high degree of creative or technical achievement at a particular period;
- the place's strong or special association with a particular Indigenous cultural group for social, cultural or spiritual reasons; or
- the place's special association with the life or works of a person, or group of persons, of importance in Australia's Indigenous cultural history.⁶

The ATSIHP Act only intended to come into play when these other processes break-down.

For this reason it is surprising that the discussion paper, under the heading "Why the legislation needs to be reformed" should assert that

[t]he ATSIHP Act has not proven to be an effective means of protecting traditional areas and objects.⁷

The only evidence provided to support this forthright statement is the fact that

[f]ew declarations have been made: 93 per cent of approximately 320 valid applications received since the Act commenced in 1984 have not resulted in declarations. Also Federal Court decisions overturned two of the five long term declarations that have been made for areas.⁸

Surely, the lack of declarations under the ATSIHP Act should (in the absence of contrary evidence) be taken as a sign that other processes are working well? Surely, as a community, we should be pleased that the plethora of state and federal legislation already in place has reduced the need for "last resort" legislation to be invoked?

³ Department of the Environment, Water, Heritage and the Arts, *Indigenous heritage law reform: For discussion – August 2009*(2009), MS Word format, 4.

⁴ See for example, the *Aboriginal Cultural Heritage Act 2003* (Qld); *Aboriginal Heritage Act 2006* (Vic); *Aboriginal Relics Act 1975* (Tas); *National Parks & Wildlife Act 1974* (NSW).

⁵ Part 15, Division 1A.

⁶ *Environment Protection and Biodiversity Regulations 2000* (Cth) Reg 10.01A(2)-(3).

⁷ Department of the Environment, Water, Heritage and the Arts, *Indigenous heritage law reform: For discussion – August 2009*(2009), MS Word format, 4.

⁸ *Ibid.*

The fact that two of the five long-term declarations were struck down by the Federal Court would normally be taken as a reflection on the decision-making processes in those particular matters, rather than a reflection on the quality of the Act overall. If the Department wishes to make the case that it was the Act which was flawed, then it should provide a robust argument to support this contention.

The discussion paper asserts that

there is a risk that Indigenous cultural heritage could be damaged by the activities of land users or developers through ignorance. Legislation is needed to prevent this happening.⁹

Clearly, in any regulatory system, there is a "risk" that ignorance will cause a law to be breached. This risk is present no matter what the law actually says. No law can guarantee that those subject to it have perfect knowledge. Most strategies for achieving compliance depend on a mixture of enforcement, education and the provision of information. Normally, when a regulator has concerns that ignorance will lead to breaches of the law, the regulator increases its efforts to provide information and educate those subject to the law. Introducing new laws is unhelpful, if those subject to the new law remain just as ignorant as they were before.

That's why it is curious that the discussion paper suggests that the answer to this problem is "legislation". It does not make sense to respond to an (unsubstantiated) breakdown in information/education with a proposal for new legislation. Shouldn't the first course of action be to explore deficiencies in education/information provision? In any event, we find that property developers are more aware of Indigenous heritage issues than other land owners, due in part, to the regular need by property developers to consult with experts to assist with Aboriginal heritage issues.

The paper goes on to say that

[I]n practice, the power in the ATSIHP [Aboriginal and Torres Strait Islander Heritage Protection] Act would work better if it was used to support other processes that consider the impacts on Indigenous traditional areas and objects in full in decisions about land use and development.¹⁰

This is a very bold statement (albeit poorly worded). It's made with absolutely no evidence, examples or case history to back it up. Given that there is already:

- comprehensive legislation on Indigenous heritage at a state and territory level;
- separate federal legislation in the body of the EPBC Act;
- legislation and a body of case law to protect native title rights; and
- state and territory legislation on the subject of Aboriginal land rights,

it is far from clear why the ATSIHP Act would work better "if it was used to support other processes". Surely, the ATSIHP Act has a job to do, and the other legislation has its jobs to do. If there is an overlap, there is case to be made for the reduction in the scope of legislation. This is not an argument for the ATSIHP Act to be extended.

According to the discussion paper proposal 1 is

to use the reforms to define the purposes of the legislation as follows:

- Recognise the importance of particular areas and objects for Indigenous Australians to maintain their traditional laws and customs.
- Acknowledge that Indigenous Australians are the primary source of knowledge of their traditional laws and customs and have responsibilities to protect their traditional areas and objects.
- Encourage developers and Indigenous Australians to agree at the earliest available opportunity on practical ways to protect traditional areas and objects.
- 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.¹¹

⁹ Ibid 11.

¹⁰ Ibid.

¹¹ Ibid.

The above points do not express the purposes of the existing legislation. The existing Act, as the paper itself makes clear, is “last resort” legislation. No proper case is advanced, within the discussion paper, as to why the legislation should cease to be “last resort” legislation. We do not support this change. There is an existing regime of regulation – if the above elements of proposal 1 are adopted the ATSIHP Act will duplicate the existing laws and further complicate Australia’s muddled land use regulatory framework.

The ATSIHP Act should remain as “last resort” legislation.

The second element of proposal 1, which is based on the quote of the Hon A. Clyde Holding MP, is a more appropriate statement of the purpose of the Act:

to enable the Australian Government ‘to take legal action where state or territory laws were inadequate, not enforced or non-existent’. It was ‘not intended to be an alternative to land claim procedures’.¹²

2. Making terminology consistent with the purposes

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

The proposal referred to in question 2.1 appears under the innocuous heading “[m]aking terminology consistent with the purposes”, yet it makes far reaching changes to the nature of the ATSIHP Act.

The proposal is to remove current authority for the Minister to make a declaration if he or she is satisfied that a place or object is of “particular significance to Aboriginals in accordance with Aboriginal tradition” and instead replace it with a power for the Minister to protect any “traditional” area or object, based on a new definition of “traditional laws and customs” used in the *Evidence Act 1995* (Cth).

The Act, as last resort legislation, only applies to Aboriginal heritage that is of “particular significance to Aboriginals in accordance with Aboriginal tradition”.¹³ In commenting on this existing definition, Justice Burchett of the Federal Court has observed that

[t]he Act takes as its starting point that there are *particularly significant* Aboriginal areas and objects which it is in the national interest to preserve. Depending on the nature and extent of the particular significance, that interest may require the subordination both of other governmental interests and of private interests. *These are grave issues* (emphasis added)...¹⁴

Justice Burchett refers to the making of a declaration by the relevant Minister that set out the prohibitions and restrictions to be made with respect to the area.¹⁵ A person violating such prohibitions and restrictions may face imprisonment of up to 5 years.¹⁶ These restrictions apply irrespective of whether the land concerned is in public or private ownership.

The declaration process works differently from other laws that relate to the protection of heritage or Aboriginal places. Under the ATSIHP Act it is for the Minister to decide what specific prohibitions and restrictions are necessary in order to ensure there is no “injury or desecration”.¹⁷ This is a discretionary decision for the Minister.¹⁸ While this decision may be reviewed under the *Administrative Decisions (Judicial Review Act) 1977* (Cth), grounds for such a review are limited to questions of law, not the bona fide exercise of ministerial discretion.¹⁹

A person may be gaoled for up to five years for carrying out an activity prohibited by a ministerial declaration, even when that person had no knowledge that the activity would harm Indigenous culture or heritage.²⁰ There is no ability for a defendant to argue, in their defence,

¹² Ibid 12.

¹³ s 3.

¹⁴ *Tickner v Chapman* (1995) 89 LGERA 1, 24 (Burchett J).

¹⁵ s 10(4)(d).

¹⁶ s 22.

¹⁷ s 10(1).

¹⁸ *Tickner v Bropho* (1993) 40 FCR 183.

¹⁹ *Administrative Decisions (Judicial Review Act) 1977* (Cth) s 5.

²⁰ s 22(1).

that the conduct was not, in truth, harmful to Indigenous culture or heritage, so long as the conduct is prohibited by a ministerial declaration.

In other laws relating to Indigenous heritage there are general prohibitions against harm or damage coming to the protected features of the land concerned, but the decision as to the activity that may constitute harm is an objective decision for the courts to decide. There is a requirement for intent by an individual to carry out the harmful activity, before an offence is proven.

For example, the *National Parks and Wildlife Act 1974* (NSW) makes it an offence for a person to knowingly destroy, deface or damage an Aboriginal object or a (declared) Aboriginal place.²¹ A similar provision exists in the *Aboriginal Heritage Act 2006* (Vic) which makes it an offence for a person to knowingly undertake an act that is likely to harm Aboriginal cultural heritage.²² The EPBC Act criminalises action that results or will result in or is likely to have a significant impact on indigenous heritage values of a National Heritage place.²³ Behaviour is not criminal under the EPBC Act unless intention, knowledge, recklessness or negligence can be attributed to the alleged offender in relation to the impact their activity would have on Indigenous heritage values.²⁴ In all of these examples, it is the judicial authority that decides whether the given activity is prohibited, based on the facts of the individual case.

Where, under other laws, there is an ability for a member of the executive government to make orders for the protection of, say, heritage listed properties, those orders are normally subject to a merits based review by a court or a tribunal.²⁵

Additionally, under the ATSIHP Act, the Federal Minister has the power to terminate a pre-existing use of a site. Taking such an action is far more difficult, if not possible, under state and territory laws.

It is therefore obvious to see what Justice Burchett was referring to, when he observed that the ATSIHP Act confers a

very great power to override the major interests and rights of citizens, and also governmental agencies ... It is a vast power ... The special nature of the power, and the severe consequences of its application, also suggest that its exercise would not have been seen as a common or ordinary task; ... The purposes of the Act ... relate to "areas and objects that are of *particular* significance" in the same respect. It is consistent with the serious purpose of the Act in relation to objects and areas of a special kind that the consideration given to the report and the representations is required to be at a high level (original emphasis).²⁶

Justice Burchett clearly saw clear links between the concept of "particular significance" and the vast power the Act confers on the government to unilaterally strip away the property rights of others.

It is a major and unjustified re-write of the basic tenets of this legislation to remove the concept of "particular significance" and instead replace it with the far more general and open concept of any "traditional" area or object with reference to "traditional laws and customs".

The discussion paper credits the *Evidence Act 1995* (Cth) as the precedent for the use of the phrase "traditional laws and customs",²⁷ however, the phrase has only recently been introduced into evidence law (in 2008). More relevantly, the phrase features prominently in the *Native Title Act 1993* (Cth) and is regularly cited in legal proceedings in connection with that Act.²⁸ It's not surprising that the **discussion paper glosses over this effort to incorporate**

²¹ s 90.

²² s 28.

²³ s 15C(7)-(8).

²⁴ s 15C(7A) and (8A); *Criminal Code* (Cth) s 5.1.

²⁵ For example: orders issued by a consent authority under section 121B of the *Environmental Planning and Assessment Act 1979* (NSW) may be appealed to the NSW Land and Environment Court under section 121ZK; an enforcement notice issued by an assessing authority under section 590 of the *Sustainable Planning Act 2009* (Qld) can be appealed under section 473 of the *Planning and Environment Court*.

²⁶ *Tickner v Chapman* (1995) 89 LGERA 1, 27 (Burchett J).

²⁷ Department of the Environment, Water, Heritage and the Arts, *Indigenous heritage law reform: For discussion – August 2009* (2009), MS Word format, 13.

²⁸ s 26A; s 26B; s 26C; s 61; s 62; s 190B; s 203FCA; s 251A; s 251B; s 203BC; s 223; and s 238.

language from Native Title legislation (which does not apply to freehold land) to legislation which does apply to freehold land.

This new proposed definition is extremely wide. It essentially removes the requirement that a place be either particularly special, or significant. Either or both elements are present in other similar legislation, to ensure that there is an ability to focus on the important matters.

For example, in NSW an “Aboriginal place” can only be declared when it is of “special significance with respect to Aboriginal culture”.²⁹ A site may be listed as a state heritage site, but only if the site carries “significance to the State”.³⁰

In Queensland a “significant Aboriginal area” is an area of “particular significance to Aboriginal people”.³¹

In Victoria an “Aboriginal place” is defined to mean a place “that is of cultural heritage significance to ... Aboriginal people”.³² The power for the state to compulsorily acquire Aboriginal places is limited to places of “heritage significance to Aboriginal people that it is irreplaceable”.³³

The removal of the requirement for “particular significance” will remove key words that ensure the ATIHPP Act is a “last resort” protection for the most important areas and objects, and instead make it a general piece of legislation extending to all such places and objectives – even when they are of no significance or importance.

On the 27 October 2009, the Prime Minister, the Hon. Kevin Rudd MP, declared that “no Commonwealth Minister wants to decide development applications”.³⁴ Given the widespread presence of Aboriginal middens,³⁵ proposal 2 will place the Federal Government at the centre of the vast number of development applications where Indigenous heritage may be impacted in minor respects. **This would mean federal involvement in a large number of greenfield development applications.** Even when the federal government attempts to administratively delegate decision-making to the states, proposal 2 will indelibly involve the federal minister in the politics of such development proposals.

Furthermore, it would be utterly inappropriate for such sweeping powers to curtail property rights and reduce the value of land to be extended to such a broad class of private property. Such a measure would weaken perceptions of certainty in Australian property rights and increase the sovereign risk of investing in politically contentious projects. **It would be a travesty if the ability for declarations were to be so radically extended, without a commensurate reduction in the consequence of a declaration.**

In short, we do not support the removal of the requirement that a place must be of “particular significance” before it is declared under the Act. Such a step would be a major weakening of the property rights of all Australians.

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’? (see also proposal 8)

The proposed change in wording is extremely broad. There is little risk that such a widely-phrased catch-all provision will omit anything.

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

Yes. This will cause grave problems. Please see our answer to question 2.1 above.

²⁹ *National Parks and Wildlife Act 1974* (NSW) s 84 (emphasis added).

³⁰ *Heritage Act 1977* (NSW) s 4A; s 32 (emphasis added).

³¹ *Aboriginal Cultural Heritage Act 2003* (Qld) s 9 (emphasis added).

³² *Aboriginal Heritage Act 2006* (Vic) s 5 (emphasis added).

³³ *Aboriginal Heritage Act 2006* (Vic) s 31.

³⁴ The Hon. Kevin Rudd MP, Prime Minister of Australia, “Building a big Australia: Future planning needs of our major cities” (Speech delivered at the Business Council of Australia, Sydney, 7 October 2009).

³⁵ A midden is a mound or deposit containing shells, animal bones, and other refuse that indicates the site of a human settlement.

In addition, we note the table in the discussion paper which provides detail on the proposed definitions “to avoid ambiguity”.³⁶

This table does remove ambiguity; it does so by making it clear that the amended ATSIHP Act will have the widest possible application. In fact, its application will be as wide, in some instances even wider, than equivalent state legislation on Aboriginal heritage and objects.

According to the discussion paper, an area will be included as a “traditional area” if:

- the area has a use or function under traditional laws; and
- the area is protected or regulated under traditional laws and customs.

There is no test requiring “particular” or “special” significance. This will allow ministerial declarations to be made in relation to land when the evidence that is a traditional area is scant or conflicting.

This definition means that it will not matter if there is disagreement between local Indigenous leaders as to the traditional value of particular areas. It will not matter if the evidence shows the land is of only peripheral traditional value.

A “traditional object” will include an object that:

- has a use or function under traditional laws and customs; and
- the object is protected or regulated under traditional laws and customs.

A vast quantity of stone and shell artefacts are likely to fall in this definition.

In relation to objects, NSW has had a similarly broad definition in its legislation for many years.³⁷ In regard to the NSW definition the NSW Court of Appeal (Justice Basten, with whom Chief Justice Spigelman CJ and Justice Giles relevantly agreed) has said:

... Aboriginal objects may be found on land throughout the State, including private land, especially in rural areas where there has not been intensive development. The breadth of the definition of Aboriginal objects demonstrates that almost any land which has not been the subject of intensive development is likely to be affected.³⁸

Our assessment is the same with regard to these proposals. **The definitions proposed by the discussion paper will mean that most land which has not been the subject of intensive development is likely to be affected by the amended ATSIHP Act.**

Some would argue that it is appropriate for the federal Minister to have a broad grant of power, because it will allow the Minister to make declarations unhindered by the risk of legal challenge from unhappy land owners. No doubt this would be convenient for the Department of the Environment, Water, Heritage and the Arts, however, it will significantly increase sovereign risk issues across Australia, increase the political involvement of the Federal Government in day-to-day land use decisions (whether the minister of the day wants it or not) and reduce the resource security enjoyed by Australian businesses.

3. Promoting effective laws through accreditation

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

This proposal says that:

State and territory governments have the primary responsibility for providing legal protection for traditional areas and objects.³⁹

³⁶ Department of the Environment, Water, Heritage and the Arts, *Indigenous heritage law reform: For discussion – August 2009* (2009), MS Word format, 14.

³⁷ Under section 5 of the *National Parks and Wildlife Act 1974* (NSW) an Aboriginal object means any deposit, object or material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of NSW, being habitation before or concurrent with (or both) the occupation of that area by persons of non-Aboriginal extraction, and includes Aboriginal remains.

³⁸ *Country Energy v Williams* (2005) 63 NSWLR 699, 141 LGERA 426 [67].

³⁹ Department of the Environment, Water, Heritage and the Arts, *Indigenous heritage law reform: For discussion – August 2009* (2009), MS Word format, 15.

This appears to be a statement of the current policy position. However, the paper then goes on to assert that:

Accreditation can promote high standards of protection across all states and territories and minimise overlaps in responsibilities.⁴⁰

No examples are offered as to the existing “overlaps” in responsibilities. No examples are put forward of any jurisdiction where the standards of protection are not “high”. Our experience is that the standard of protection is high across Australia, and we don't think the government should be further restricting the rights of private property owners without making a firm and clear case.

So, without offering any evidence of current problems, the discussion paper launches straight into how “[t]o make this idea work”.⁴¹ In this regard the proposal is for

reformed legislation [that] could set standards for state and territory laws ... and enable the Minister to accredit laws that meet the standards. The opportunity to gain accreditation could be an incentive for each state and territory to make sure its laws are effective, provided it is clear that by gaining accreditation a state or territory could stop the Australian Government from overriding its decisions.⁴²

Given that there has not been a strong history of the Australian Government overriding the many routine decisions by state and territory government on the protection of Aboriginal places and objects under the ATSIHP Act, this justification is curious.⁴³ The proposition only makes sense if the Australian Government has an unarticulated policy to step up its interventions in state and territory decision-making.

In short, **this proposal is advanced without any evidence, examples or history to justify it. It does not have our support. State and territory government are sufficiently well equipped to continue have primary carriage of Aboriginal and Torres Strait Islander heritage protection.**

We can't help but read this proposal in conjunction with the massive increase in federal jurisdiction proposed by “proposal 2”. Taken together, the system of heritage protection will essentially be federalised, with the state and territories acting as federal delegates. Given that the regulatory environment for development will still primarily be managed at a state and territory level, **federalisation of Indigenous heritage regulation would create an unbalanced and incoherent regulatory environment.**

If there is a desire to reduce the number of unmeritorious applications being made under the ATSIHP Act, **we would support tougher gate keeping rules, to ensure the most efficient use of federal taxpayer funded resources.**

Question 3.2: Could the proposed method of accreditation be improved?

No, we do not support the accreditation proposal. See our answer to question 3.1 above.

We would support tougher gate keeping rules, for example, rules that require only those groups eligible to make a native title claim, being entitled to make an application to the federal Minister under the ATSIHP Act. **We would also support a quick triage process** (with a statutory deadline of, say, 30 days) **being conducted by the Department of the Environment, Water, Heritage and the Arts, before the Minister is obliged to appoint someone to prepare a report.**⁴⁴ The triage process would allow the Department to reject the application, without a ‘reporter’ being appointed, if the Department forms the opinion that:

- the application is frivolous or vexatious; or
- no reasonable cause of grounds for the application is disclosed by the application and/or its accompanying material; or

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Of the vast number of decisions made by state and territory governments said the federal “last resort” legislation came into operation, only 320 valid applications to the federal government have been made. Of these, 93 per cent have not resulted in declarations.

⁴⁴ It was held in *Tickner v Bropho* (1993) 40 FCR 183 that the proper exercise of the Minister's discretion under s 10(1) obliges the Minister to obtain a report under s 10(4) of the Act on the area sought to be protected and to consider the report and any attached representations before the Minister can decide not to make a declaration.

- the application is an abuse of process – for example, the applicant is motivated by a purpose that is not in-keeping with object of the ATHIP Act.

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?

No, we do not support the accreditation proposal. See our answer to question 3.1 above.

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

No, we do not support the accreditation proposal. See our answer to question 3.1 above.

4. Specifying standards for effective protection

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 proposal follows on from proposal 3 (which we opposed in answer to question 3.1 above).

Whilst opposing any form of federal accreditation system, we note there are serious issues with the proposed accreditation standards themselves.

Fragmentation of decision-making

The standards will

place the onus on proponents to avoid or minimise their potential impacts on heritage ...⁴⁵

The principles of ecologically sustainable development require the integration of social, economic and environmental issues in a single decision-making process. This often involves balancing competing interests and claims, and arriving at a decision which is the best outcome for the community as a whole, and respects the rights of individuals.

In relation to places and objects of special significance to Indigenous culture and tradition, the normal practice of developers (and regulatory authorities) is to seek outcomes which avoid or minimise impact on the heritage concerned. However, such an outcome cannot always be guaranteed, particularly, when the social, economic or environmental benefits of works are great. That's why this policy goal is often not mandated by law.

In relation to the far more numerous objects and places of low-grade heritage significance, located on private land, it may be necessary for items to be relocated and places to be modified in order for the community to benefit from the social, economic and environmental gains of greenfield urban development projects.

As the NSW Court of Appeal has observed, any land which has not been the subject of intensive development is likely to be affected by Aboriginal heritage laws.⁴⁶ In many cases, particularly when the heritage objects concerns are made up of scattered middens and stone artefacts it is simply not possible to proceed with urban development without impacting on some items. On occasions, items of very low heritage significance may be destroyed, when regulators and the proponent are both satisfied there is little to be gained by removing them and storing them elsewhere.

This proposal for a statutory accreditation principle will fragment the decision making process by requiring a proponent to "avoid or minimise impacts" on an item or place of peripheral heritage value, even when the economic social (and possibly) environmental costs of doing so are very high.

Any standard should allow decisions to be made in an integrated way balancing the social, economic and environmental costs and benefits. Therefore there should not be a statutory requirement to "avoid or minimise" potential heritage impacts.

⁴⁵ Department of the Environment, Water, Heritage and the Arts, *Indigenous heritage law reform: For discussion – August 2009* (2009), MS Word format, 18.

⁴⁶ *Country Energy v Williams* (2005) 63 NSWLR 699, 141 LGERA 426 at [67].

When discussing the above accreditation principle in detail, the discussion paper says that complying laws

must state that an approval for an activity that could cause an adverse impact on a traditional area or object can be granted only if the state or territory considers:

- a) whether there are practical options to avoid or minimise the possible impact and, if there are no practical options
- b) that the cultural, social, economic and environmental welfare of the community outweighs the imperative to avoid adverse impacts on the traditional area or object.⁴⁷

(Reference to “practical options” does not carry much meaning. Does the Department mean “practicable options”?)

This approach cannot be supported, because it creates a presumption against a private land owner using their own land in a manner that is consistent with their property rights, even when the traditional or cultural value of a location or objects on their land is of peripheral or low-grade value. Additionally the protection of such areas or objects, including low-grade areas or objects, is described as an “imperative” to be balanced only against the “welfare of the community”. There appears to be no consideration of the property rights of the individual land owner at all in this process.

The discussion paper does not acknowledge

the need for ensuring that measures adopted should be cost-effective and not be disproportionate to the significance of the environmental problems being addressed.⁴⁸

This idea is not one manufactured by the Urban Taskforce – it has been agreed by all states and territories, together with the federal government, as part of their shared commitment to “ecologically sustainable development” (in the 1992 Intergovernmental Agreement on the Environment).

When a property right and/or a legitimate expectation of development is quashed in pursuit of the “public interest” private individuals bear significant costs. Additionally, the perceived increased sovereign risk reduces investment generally, thus imposing wider costs on the community as a whole. These costs must be factored into any policy approach. Put simply, **taking the property rights of non-government land owners seriously should be an important public policy goal in itself.**

Retention of procedural fairness when property rights are to be impacted

The proposal accreditation criteria correctly asserts that

[n]atural justice requires that all parties have the opportunity to comment on the information on which decisions are made.⁴⁹

But then it goes onto say that

secret or sacred traditional information should not be divulged.⁵⁰

We wish to honour and respect Indigenous traditions whenever it is practicable to do so. However, **we strongly object to suggestion that government may prevent the use or development of private land, for reasons kept secret from the owner of the land.** That defies all common sense, and runs against the well established principles associated with the internationally recognised right to own private property.⁵¹

⁴⁷ Department of the Environment, Water, Heritage and the Arts, *Indigenous heritage law reform: For discussion – August 2009* (2009), MS Word format, 22.

⁴⁸ *Intergovernmental Agreement on the Environment* (1992) available at <<http://www.environment.gov.au/esd/national/igae/index.html>>.

⁴⁹ Department of the Environment, Water, Heritage and the Arts, *Indigenous heritage law reform: For discussion – August 2009* (2009), MS Word format, 17.

⁵⁰ *Ibid.*

⁵¹ See article 17 of the Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948.

The discussion paper says that secret information will be made available when necessary to provide natural justice or for a review of a decision.⁵² A note explains that

[t]his could mean that the information is provided to the parties to a decision to provide them with natural justice, or to a court or tribunal that is reviewing a decision, or to the Australian Government when it is reviewing the effectiveness of accreditation. The information could not be retained or passed on to another person.⁵³

This strongly suggests that a person could be deprived of rights to their own property based on information that they are unable to release in the public domain. That is, the decision-making processes, and related tribunal and court processes, will not be capable of being publicly scrutinised. It also means that future owners of the land would be denied the right to understand why development proposals by previous owners have been refused.

We express no view about whether government or public authorities should be deprived of their property rights based on information that is kept secret from the public – that is a matter for them. But **it is crucial for a private land owner to be able to publicly discuss with the media, industry organisations, parliamentarians, lawyers and others the reasons that they are being disenfranchised of some or all of the rights to use their property.**

In the more detailed provisions of the paper, there is a statement that information will be held to be secret if an

Indigenous person advises that the information is restricted under traditional laws and customs ...⁵⁴

This seems to be suggesting that whether or not information is 'secret' will be determined exclusively by the subjective opinion of the Indigenous person who provides the information. That is, an *assertion* by an Indigenous person that information is secret will be enough to conclusively establish that it is secret. In all other areas of law, whether or not information is secret (such as trade secrets, religious confessionals and legally professionally privileged information) the legal test as to whether information is secret is *objective*. That is, when there is doubt or a dispute, a third party, such as court or a tribunal, must consider evidence and decide (usually on balance of probabilities) whether in fact the information is truly secret.

It seems that the Department is seeking to overturn the decisions of the Federal Court in *Minister for Aboriginal Affairs v Western Australia*⁵⁵ and *Tickner v Chapman*⁵⁶ which upheld the right of the community to have access to information used in decision-making.

Agreements with Indigenous communities

If a developer and an Indigenous community reach an agreement outside the regulated process of Aboriginal heritage legislation, we do not understand why it is automatically necessary for an agreement to be lodged with a state or territory agency. Such arrangements do not apply to any other agreement that may be reached with members of the community (such as neighbouring land owners).

The justification advanced in the paper is that “[p]ersons with an interest should be able to view them”.⁵⁷ We can’t argue with a proposition that a party with “an interest” in an agreement should be able to view the agreement, so long as “interest” means a legal or equitable interest. In such circumstances the law already offers mechanisms for the agreement to be made available to them.

If on the other hand, “interest” means something else entirely, then this constitutes a re-write to the existing law of contract in each state and territory. **We do not support a proposal**

⁵² Department of the Environment, Water, Heritage and the Arts, *Indigenous heritage law reform: For discussion – August 2009* (2009), MS Word format, 21.

⁵³ *Ibid.*

⁵⁴ Department of the Environment, Water, Heritage and the Arts, *Indigenous heritage law reform: For discussion – August 2009* (2009), MS Word format, 21.

⁵⁵ (1996) 66 FCR 40.

⁵⁶ (1995) 57 FCR 451.

⁵⁷ Department of the Environment, Water, Heritage and the Arts, *Indigenous heritage law reform: For discussion – August 2009* (2009), MS Word format, 17.

mandating that private agreements between non-government entities, reached outside of any regulatory process, must automatically be made public documents.

A single level of government should make decisions

We note the proposal for

the Australian Government ... to have a limited ability to influence key decisions where necessary, without undermining the effect of accreditation.⁵⁸

Let's not kid ourselves. This is a contradiction in terms. Either accreditation means that the government hands over decision-making to the accredited state or territory government, or it continues to informally dabble, and dictate outcomes (either publicly or behind the scenes). Such a provision will guarantee the political involvement of the Federal Government in all contentious developments. It means a more complex decision-making process, with two levels of government simultaneously having substantive jurisdiction for the same matter at the same time.

We do not support any formal rule for the Federal Government to influence key decisions in an accreditation framework, other than by the making of a public submission, when public submissions are invited.

Third-party merits legal reviews

The paper proposes that there be

[a]n ability for Indigenous Australians and others to seek legal reviews: An interested person who was unhappy with the approach taken by their state or territory government would be able to find out the reasons for the state or territory government's decision about whether to protect heritage. The person would be able to ask a court or tribunal of the state or territory to review the fairness of the process for reaching the decision.⁵⁹

This text suggests more than the usual right to review a decision for legal errors, this text seeks to mandate third-party merit appeals against decisions.

We find it ironic that the Federal Government, which does not permit even applicant-initiated merit reviews of land use decisions (either under the ATSIHP Act or under the EPBC Act) is now proposing to require state and territories to adopt the most extreme form of merits review model – third party merits review.

There is an army of publicly funded organisations (such as the environmental defenders offices in each state and territory) ready and willing to harass government decision-makers with legal challenges. In one Aboriginal heritage case, consent was issued three times, and subject to four legal challenges before the matter was ultimately resolved by the NSW Court of Appeal, who said this:

It is readily apparent that the appellants, being dissatisfied with the merit assessment of the [land owner's] application and the outcome of the exercise by the [Department of Environment] of the discretionary power to grant the Permit, have sought to disguise a challenge to the merits of that assessment by reference to one of the recognised grounds of judicial review⁶⁰

In many cases (as in this example) a legal challenge may be mounted by individuals, in spite of the support for a development project offered by a more representative group (in this example, an elected local Aboriginal land council). This is just the status-quo - with the existing regime of third-party reviews being restricted to legal matters.

Opening up third party reviews to merits reviews will transfer the effective responsibility for decision-making from government agencies to courts and tribunals. In our view, given the competing views that are often encountered within Indigenous communities, such a regime will reduce the incentive for developers to reach an agreement with a majority group, because there will often be a minority group who will still mount a challenge.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ *Anderson v Director-General, Department of Environment and Climate Change* (2008) 163 LGERA 400, 427 (Tobias JA); Spigelman CJ and Macfarlan JJA concurred.

The rights of third parties to seek reviews of decisions should be restricted to legal issues only, not merits or fairness issues.

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

See our answer to question 4.1, above.

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

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

This proposal has our support.

As we mentioned above, the preference in our industry is to reach agreements with the appropriate local representatives of Indigenous communities affected by individual projects. This process is frequently undermined by apparently unrepresentative individuals, who are still able to access public processes and use them to secure leverage for their claims.

As industry we have no desire to pick and choose who we talk to – we would prefer government to establish a clear direction as to which representative groups are legitimate and ensure that any public rights to participate in processes are accorded to them, and them only.

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

We have no opinion on this question.

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?

Yes. Refer to our answer to question 5.1 above.

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?

No. Refer to our answer to question 5.1 above.

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 have no opinion on this question.

6. Ensuring that Commonwealth protection would not prevent an act authorised under a registered Indigenous land use agreement

We have no comments to make in connection with proposal 6.

7. Removing duplication of state and territory protection for Indigenous remains

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

We support this proposal.

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?

Yes.

Question 7.3: If not, how could Commonwealth legislation be used to encourage improvements without always overlapping state and territory responsibilities?

See our answer to question 7.2 above.

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

We have no comment on questions 8.1 to 8.4.

9. Specifying the information needed for applications for protection

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

We generally support the approach taken in section 9 of the paper, subject to reviewing the details of more advanced proposals. We also refer you to our answer to question 3.1 where we made it clear that **we would also support a quick triage process** (with a statutory deadline of, say, 30 days) **being conducted by the Department of the Environment, Water, Heritage and the Arts, before the Minister is obliged to appoint someone to prepare a report.**⁶¹ The triage process should allow the Department to reject the application, without a 'reporter' being appointed, if the Department forms the opinion that:

- the application is frivolous or vexatious; or
- no reasonable cause of grounds for the application is disclosed by the application and/or its accompanying material; or
- the application is an abuse of process – for example, the applicant is motivated by a purpose that is not in-keeping with object of the ATHIP Act.

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

Yes.

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

Refer to our answer to question 9.1.

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

Yes. Refer to our answer to question 9.1.

10. Using conferences to consider how best to deal with the issues

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

The calling of a conference is a reasonable proposition, provided that strict statutory deadlines govern the process. It is a common tactic for those who are seeking to block a development (and are therefore not genuine about resolving differences) to use conferences as a delaying tactic to prevent the dispute from being conclusively decided.

Any requirement for a conference should be applied within a strict time period after an application is lodged, and there should not be more than one conference convened unless the key parties to the process (including the private land owner, where there is one) **agree.**

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

Industry organisations may have something to add in certain circumstances (for example if a large number of landowners are impacted).

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

Refer to our answer to question 10.1.

⁶¹ It was held in *Tickner v Bropho* (1993) 40 FCR 183 that the proper exercise of the Minister's discretion under s 10(1) obliges the Minister to obtain a report under s 10(4) of the Act on the area sought to be protected and to consider the report and any attached representations before the Minister can decide not to make a declaration.

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?

Refer to our answer to question 10.1.

11. Protecting sensitive information

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

We do not support this proposal. As we previously said in our answer to question 4.1, **we strongly object to suggestion that government may prevent the use or development of private land, for reasons kept secret from the owner of the land.** That defies all common sense, and runs against the well established principles associated with the internationally recognised right to own private property.⁶²

The discussion paper says that secret information will be made available when necessary to provide natural justice or for a review of a decision.⁶³ A note explains that

[t]his could mean that the information is provided to the parties to a decision to provide them with natural justice, or to a court or tribunal that is reviewing a decision, or to the Australian Government when it is reviewing the effectiveness of accreditation. The information could not be retained or passed on to another person.⁶⁴

This strongly suggests that a person could be deprived of rights to their own property based on information that they are unable to release in the public domain. That is, the decision-making processes, and related tribunal and court processes, will not be capable of being publicly scrutinised. It also means that future owners of the land would be denied the right to understand why development proposals by previous owners have been refused.

We express no view about whether government or public authorities should be deprived of their property rights based on information that is kept secret from the public – that is a matter for them. But **it is crucial for a private land owner to be able to publicly discuss with the media, industry organisations, parliamentarians, lawyers and others the reasons that they are being disenfranchised of some or all of the rights to use their property.**

12. Clarifying the reasons for providing and revoking interim protection

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

This proposal involves removing the existing requirement that the federal Minister be satisfied that:

- an area is a significant Aboriginal area; and
- the area is under serious and immediate threat of injury or desecration.⁶⁵

he or she may, by legislative instrument, make a declaration in relation to the area.

Currently emergency declarations are limited to a period of 30 days to 60 days.⁶⁶ This proposal will abolish these provisions and

[t]he Secretary of the Minister's department (or delegate) could make a short interim protection order of up to 48 hours to allow time for an applicant to lodge an application, and a separate short interim protection order of up to 96 hours after receiving an application to allow time to brief the Minister about the application. The Minister could make one or more interim protection orders that operate for up to 28 days at a time, to allow time to resolve the application.⁶⁷

⁶² See article 17 of the *Universal Declaration of Human Rights* adopted by the United Nations General Assembly in 1948.

⁶³ Department of the Environment, Water, Heritage and the Arts, *Indigenous heritage law reform: For discussion – August 2009* (2009), MS Word format, 21.

⁶⁴ *Ibid.*

⁶⁵ s 9(1).

⁶⁶ s 9(2)-(3).

⁶⁷ Department of the Environment, Water, Heritage and the Arts, *Indigenous heritage law reform: For discussion – August 2009* (2009), MS Word format, 37.

The bottom line is that this change would allow the indefinite sterilisation of private land, based solely on the authority of rolling 28 days protection orders. Each of these protection orders could be made without any threshold tests being satisfied. This is an outrageous grab for power over property by the executive government.

No evidence or case studies are presented of instances where Indigenous heritage has been destroyed within a matter of hours, prior to the Minister being able to make an emergency declaration. The proposal seems to ignore the presence of a vast array of mechanisms under other laws which already provide opportunities for the emergency protection of heritage and/or traditional objects. We also note that there already an existing provision of the Act that allows authorised offices to making emergency declarations for a 48 hours period, pending a emergency ministerial declaration.⁶⁸

We would note, most such statutory provisions still require a measure of fairness and objective satisfaction that certain conditions precedent exist. Generally, such powers are accompanied by a full right of merits appeal (for the affected landholder) to challenge decisions concerning their land.

We do not support the removal of existing conditions precedent for the making of an emergency declaration, nor do we support removal of the 60 day cap on the duration of such a declaration. We also believe that any decision to make or extend an emergency declaration should be subject to a merits-based appeal in the Administrative Appeals Tribunal (or similar such body).

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

We do not support this proposed change – please see our answer to question 12.1.

Question 12.3: Would having up to 6 days (i.e. 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 do not support this proposed change – please see our answer to question 12.1.

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

We do not support this proposed change – please see our answer to question 12.1.

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?

No. Please see our answer to question 12.1.

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

Please see our answer to question 12.1. As a general comment the legislative regime should give express recognition to the rights of private property owners.

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

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

We do not support this proposal.

The mere preparation of a document titled “Statement of Facts” and its presentation to the Minister, does not make those facts true. The Minister should not be entitled to hide behind that document, and refuse to consider the representations made by land owners, as to the accuracy or truth of those facts.

⁶⁸ s 18.

Although the discussion paper does not expressly acknowledge it, this proposal is an attempt to overturn *Tickner v Chapman*.⁶⁹ In the case, it was held that the Minister must consider not only the report prepared for him/her, but any representations attached to the report. It was held (appropriately) that this obligation requires substantial and non-delegable personal ministerial involvement. Chief Justice Black, said this requirement reflected

the policy of public involvement in the process and the potential gravity of the consequences of granting or withholding a declaration.⁷⁰

The logic of Chief Justice Black is as relevant today, as it was when the decision was handed down in 1995.

We do not support the removal of the Minister's obligation to personally consider representations from affected private property owners, nor do we support any attempt to reduce the obligation of the Minister to satisfy him or herself of the true state of the facts.

Additionally we believe there should be an opportunity for a merits review, initiated by an affected private property owner, of any ministerial declaration affecting a private property in the Administrative Appeals Tribunal (or similar such body).

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

It is important that there are opportunities for procedural fairness, and ideally, an opportunity for any private land owner to comment on proposed factual finding prior to any final decision being made.

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

Please see our answer to question 13.1.

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

Please see our answer to question 13.1.

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

Please see our answer to question 13.1.

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

Please see our answer to question 13.1.

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

The impact of any decision on private property rights and/or legitimate expectations of development should always be an explicit consideration.

14. Updating the penalties and improving the enforcement powers

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

This proposal briefly flags the possibility that Indigenous people might be entitled to compensation payments if a declaration is breached, and Indigenous heritage is damaged.

We would support provision that ensures that appropriate penalties are in place where a person, with knowledge, recklessness or negligence, allows Indigenous heritage to be damaged in breach of a ministerial direction (if proved to the normal standard of "beyond a reasonable doubt"). However, **any penalties in relation to such a matter should be payable to the government only.**

⁶⁹ (1995) 89 LGERA 1.

⁷⁰ *Tickner v Chapman* (1995) 89 LGERA 1, 11.

Any requirement to pay money to third parties will effectively give those third parties a property right in the area concerned. This legislation has never been about conferring land rights or native title, and it should not be confused with such legislation. Private land subject to a ministerial declaration under the ATSIHP Act *remains* private land.

These comments are offered to encourage constructive dialogue between government and the development industry and we ask that you accept these comments as our contribution to the policy development process. We are always able to provide a development industry perspective on policy proposals and we would welcome the opportunity to meet and discuss these issues in more detail.

Yours sincerely

Urban Taskforce Australia

A handwritten signature in black ink that reads "Aaron Gadiel". The signature is written in a cursive style with a long horizontal stroke at the end.

Aaron Gadiel
Chief Executive Officer

Encl.

Appendix:

Summary of the Urban Taskforce's key points

Proposal 1

The points in Proposal 1 do not reflect the purposes of the existing legislation. The ATSIHP Act should remain as "last resort" legislation.

Proposal 2

Proposal 2 abandons the existing requirement that something should be of "particular significance to Aboriginals in accordance with Aboriginal tradition" before it is eligible for protection under the Act, and instead makes the phrase "traditional laws and customs" central to the Act's jurisdiction. This incorporates language from Native Title legislation to legislation which applies to freehold land.

This would mean federal involvement in a large number of greenfield development applications. It would be a travesty if the ability for declarations were to be so radically extended, without a commensurate reduction in the consequence of a declaration.

In short, we do not support the removal of the requirement that a place must be of "particular significance" before it is declared under the Act. The definitions proposed by the discussion paper will mean that most land which has not been the subject of intensive development is likely to be affected by the amended ATSIHP Act.

Proposal 3

Proposal 3 will see the Federal Government setting benchmarks for state Indigenous heritage legislation; with the threat of greater federal intervention in day-to-day decisions if states do not comply.

This proposal is advanced without any evidence, examples or history to justify it. It does not have our support. State and territory governments are sufficiently well equipped to continue to have primary carriage of Aboriginal and Torres Strait Islander heritage protection.

Given that most land-use regulation will still primarily be managed at a state and territory level, federalisation of Indigenous heritage regulation would create an unbalanced and incoherent regulatory environment.

If there is a desire to reduce the number of unmeritorious applications being made under the ATSIHP Act, we would support tougher gate keeping rules, to ensure the most efficient use of federal taxpayer funded resources. We would also support a quick triage process (with a statutory deadline of, say, 30 days) being conducted by the Department of the Environment, Water, Heritage and the Arts, before the Minister is obliged to appoint someone to prepare a report. The triage process would allow the Department to reject the application, without a 'reporter' being appointed, if the Department forms the opinion that:

- the application is frivolous or vexatious; or
- no reasonable cause of grounds for the application is disclosed by the application and/or its accompanying material; or
- the application is an abuse of process – for example, the applicant is motivated by a purpose that is not in-keeping with object of the ATSIHP Act.

Proposal 4

Whilst opposing any form of federal accreditation system, we note there are serious issues with the proposed accreditation standards themselves.

Any standard should allow decisions to be made in an integrated way balancing the social, economic and environmental costs and benefits. Therefore there should not be a statutory requirement to "avoid or minimise" potential heritage impacts.

No presumptions should be created against a private land owner using their own land in a manner that is consistent with their property rights. Respecting the property rights of non-government land owners should be an important public policy goal in itself.

We strongly object to suggestion that government may prevent the use or development of private land, for reasons kept secret from the owner of the land. It is crucial for a private land owner to be able to publicly discuss with the media, industry organisations, parliamentarians, lawyers and others the reasons that they are being disenfranchised of some or all of the rights to use their property.

We do not support any formal rule for the Federal Government to influence key decisions in an accreditation framework, other than by the making of a public submission, when public submissions are invited.

The rights of third parties to seek reviews of decisions should be restricted to legal issues only, not merits or fairness issues.

Proposal 5

Proposal 5 has our support.

Proposal 10

Any requirement for a conference should be applied within a strict time period after an application is lodged, and there should not be more than one conference convened unless the key parties to the process (including the private land owner, where there is one) agree.

Proposal 11

It is crucial for a private land owner to be able to publicly discuss with the media, industry organisations, parliamentarians, lawyers and others the reasons that they are being disenfranchised of some or all of the rights to use their property.

Proposal 12

We do not support the removal of existing pre-conditions for the making of an emergency declaration, nor do we support removal of the 60 day cap on the duration of such a declaration. We also believe that any decision to make or extend an emergency declaration should be subject to a merits-based appeal in the Administrative Appeals Tribunal (or similar such body).

Proposal 13

We do not support the removal of the Minister's obligation to personally consider representations from affected private property owners, nor do we support any attempt to reduce the obligation of the Minister to satisfy him or herself of the true state of the facts.

Additionally we believe there should be an opportunity for a merits review, initiated by an affected private property owner, of any ministerial declaration affecting a private property in the Administrative Appeals Tribunal (or similar such body).

Proposal 14

Any penalties in relation to such a matter should be payable to the government only.

Any requirement to pay money to third parties will effectively give those third parties a property right in the area concerned. This legislation has never been about conferring land rights or native title, and it should not be confused with such legislation. Private land subject to a ministerial declaration under the ATSIHP Act remains private land.