

**WESTERN AUSTRALIAN GOVERNMENT SUBMISSION**

**INDIGENOUS HERITAGE LAW REFORM –  
POSSIBLE REFORMS TO THE LEGISLATIVE ARRANGEMENTS FOR  
PROTECTING TRADITIONAL AREAS AND OBJECTS**

**Introduction**

Western Australia supports the review of Indigenous heritage law reform by the Commonwealth Government and recognises the importance of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) [ATSIHP Act] in protecting Indigenous heritage.

Within Western Australia, the *Aboriginal Heritage Act 1972* (WA) [AH Act] is the primary means of protecting and preserving Indigenous heritage. The AH Act provides an expansive definition of Indigenous sites that may be protected under the legislation, as well as establishing mechanisms for ensuring their preservation. Western Australia supports retaining its primary responsibility to protect Indigenous heritage in Western Australia under its own legislation. Western Australia concurs that the ATSIHP Act should remain a genuine Act of 'last resort'.

Western Australia notes that the ATSIHP Act both in its current form and with its intended reforms covers only areas of traditional importance to Indigenous matters and not the broader range of matters covered by heritage laws such as the *Aboriginal Heritage Act 1972* (WA), *Heritage of Western Australia Act 1990* (WA) and Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (Cth) [EPBC Act].

Western Australia is supportive of reforms that would enable the States to be accredited under the Commonwealth Indigenous heritage legislation. This would benefit WA by providing greater certainty and clarity for Indigenous peoples and others affected by State approvals in relation to Indigenous heritage.

It is recognised that in order for WA to meet the proposed standards, it would need to amend the AH Act. To ensure a collaborative approach, WA would like more detail about the process to help coordinate its decisions about legislative change with the Commonwealth about accreditation. One option is for the Commonwealth to establish a Commonwealth/State Working Party to examine these details, including pathways for State and Territory accreditation. In providing broad support for the accreditation proposal Western Australia believes more detailed discussions are necessary, including consideration of the following matters:

- Process to review whether State and Territory laws meet the proposed standards;
- Process and mechanisms of accreditation; and
- Revocation of accreditation.

Western Australia would not support ATSIHP Act being subsumed by the EPBC Act, if this were to operate as an additional level of Commonwealth approval. It is also

important that heritage concerns are not considered an additional 'trigger' of the EPBC Act resulting in avoidable environmental assessment processes. Indigenous heritage is best protected through the State's regime with a genuine last resort power retained by the Commonwealth with the prospect of accreditation.

## **PART ONE – CLARIFYING RESPONSIBILITIES**

### **Proposal One**

Western Australia supports the statement of purposes to the ATSIHP Act outlined in Proposal One.

### **Proposal Two**

Western Australian supports the proposal to adopt the language in the *Evidence Act 1995* (Cth) and its definitions of traditional owner, traditional area and traditional object. Western Australia notes that traditional areas and objects as defined are not the only types of heritage valued by Indigenous Western Australians, and that the AH Act protects a wider range of heritage in addition to those of traditional importance.

### **Proposal Three**

The current ATSIHP Act enables the Commonwealth Government in exceptional circumstances to override decisions made by a State Government regarding the protection of Indigenous heritage. Western Australia supports the proposal to enable States and Territories to be accredited, if their laws meet Commonwealth requirements. This means that the Commonwealth would not be able to override State decisions.

The discussion paper states that the Commonwealth Minister "could advise an accredited state or territory government to consider 'calling in' the activity for approval." Currently, there is nothing preventing the Commonwealth Minister from suggesting to the State Government that an area of Indigenous heritage may need special protection under the AH Act (that is, requesting that an area be deemed a 'protected area'). Western Australia questions the need for such a provision to be enacted in law.

Western Australia asserts its right to decide whether and when to seek Australian Government accreditation. In the meantime, Western Australia would resist any use of last resort mechanism by the Commonwealth to apply pressure on the Western Australian Government.

### **Proposal Four**

Western Australia notes that the proposed standards promote fairness, early decision making and acknowledges traditional custodians as the source of information about traditional areas and objects. Western Australia supports the Commonwealth specifying standards by which a State or Territory may be

accredited, and is currently considering the practicality and costs that would arise from the implementation of these standards.

Western Australia proposes that in order to be consistent with the Commonwealth's proposed approach to native title, outlined in proposals 5 and 6, the standards should include that in relation to native title land, the proponent of an activity will be deemed to have consulted traditional custodians if the proponent has consulted the Proscribed Body Corporate for that native title land, subject to the Prescribed Body Corporate having reasonable capacity to consult.

### **Proposal Five**

Western Australia supports the move to clarify who may apply for heritage protection under the ATSIHP Act. Traditional custodians have already undergone a clear and transparent statutory process to be recognised as the area's traditional custodians. The *Native Title Act 1993* (Cth) effectively determines the identity of native title holders and stipulates rights accorded to them.

### **Proposal Six**

Western Australia agrees that the ATSIHP Act should not be able to override an act authorised under a registered Indigenous land use agreement (ILUA). It is noted, however, that the AH Act applies regardless of the existence of a registered ILUA.

### **Proposal Seven**

Western Australia agrees that it is unnecessary to have duplicative State and Commonwealth procedures for protection of Indigenous heritage remains. There are already several pieces of State legislation which protect Indigenous remains in Western Australia, and as such, the proposal to remove the Commonwealth reporting obligation is supported.

### **Proposal Eight**

Western Australia supports this proposal, but notes that public display of certain Indigenous objects are already prevented under section 48 of the AH Act.

## **PART THREE**

### **Proposal Fifteen**

Western Australia understands the need to review the effectiveness of processes and supports an initial review after seven years, thereby allowing States and Territories to establish whether standards provide an effective means of protecting traditional areas and objects under accredited State and Territory laws.

## **Attachment 1 – Act and Commonwealth Proposals**

The Commonwealth proposes the following standards. It is unlikely that the ATT Act can comply with these standards, and the following and some of the areas.

### *Call in power*

Western Australia does not have a 'call in' power in the AH Act. It is at the discretion of the owner of land to apply for consent to use its land in a manner which might impact an Indigenous site.

### *Promotion compliance*

There are no provisions in the AH Act which allow orders to repair adverse impacts. However, there are provisions which apply significant penalties for causing an adverse impact to Indigenous site.

### *Meeting traditional custodians*

The AH Act does not require the owner of land to perform any consultation with traditional custodians, or any other people. The AH Act establishes the Aboriginal Cultural Material Committee (ACMC) which is required to inform itself to an appropriate standard to evaluate the importance and significance of an Indigenous site. Generally the ACMC consult with the relevant group, including traditional custodians.

### *Reaching agreement*

The AH Act does not allow consent to use land in a manner which might impact an Indigenous site to be given by an agreement between the owner and the traditional custodians. The AH Act applies regardless of any agreement in place. As such, even if an agreement existed any adverse impacts to Indigenous sites would be an offence under s. 17 of the AH Act.

### *Efficient applications process*

There is no requirement for a Section 18 under the Act notice to be given to traditional custodians within 21 days. However, before a notice is considered by the ACMC, it is advertised in the *West Australian* and sent to native title representative bodies as an administrative practice.

### *Need to consult traditional custodians*

The AH Act does not require traditional custodians to be consulted before a decision is made to approve an activity. However, procedural fairness requires that any affected party (which includes traditional custodians) must be given a chance to make submissions to the ACMC before they make their recommendations, and again, this is the general administrative practice.