Australian Government

Department of the Environment, Water, Heritage and the Arts

Indigenous heritage law reform

FOR DISCUSSION
AUGUST 2009

Possible reforms to the legislative arrangements for protecting traditional areas and objects

Invitation to comment

All Australians have an interest in ensuring the laws that protect Indigenous heritage are effective. Protecting traditional areas and objects of importance to Australia's Indigenous peoples can help them to maintain their traditions and cultural identity. In turn this benefits all Australians. It enriches our shared culture. It demonstrates Australia's commitment to respecting Indigenous culture.

Clearly for this legislation to be effective, it must provide strong protection for traditional areas and objects, in the form of penalties that help to prevent or remedy damage. But it is not always clear to non-Indigenous people which areas and objects need to be protected from proposed developments. This uncertainty means that Indigenous Australians must have a central role in decisions about the need to protect the areas and objects that are part of their traditional heritage. This is especially true for those Indigenous Australians who have a traditional responsibility as the guardians or custodians of heritage. It was their ancestors who began the traditions that say why it is important to protect some areas and objects, and they are the people who are charged with remembering and upholding those traditions.

Effective legislation should encourage developers and governments to work with traditional custodians as early as possible when developments are being planned, to identify potential impacts and to try to agree on how to avoid damage to traditional areas and objects. Australians deserve to have the best opportunities to protect their heritage, in balance with other social and economic considerations. These opportunities happen when people meet and discuss their plans early and not in the pressured atmosphere when the work is about to start. Governments could do more to make it easier for people to avoid disputes about Indigenous heritage.

This paper sets out proposals for reforming the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act), but the reforms are about more than changing or replacing that Act. If the proposals in this paper are adopted and fully implemented, Australians could expect to see improvements in Indigenous heritage protection laws in every state and territory, based on a common set of standards. The right standards would identify the positive outcomes that good legislation can achieve, including strong protection for traditional areas and objects, a central role for traditional custodians in decision-making, opportunities for early engagement with traditional custodians in planning processes, and decisions that are made fairly and transparently.

For this reason I am keen to ensure that the Australian Government receives the best possible advice on the proposals for reforming this legislation, and in particular, whether the standards that are proposed in this paper are appropriate. I urge you to consider the proposals in this paper and provide comments by making a written submission to my department.

I look forward to receiving your input on these proposals and to considering your views.

THE HON PETER GARRETT AM MP
Minister for the Environment, Heritage and the Arts

Abbreviations

ATSIHP Act	*Aboriginal and Torres Strait Islander Heritage Protection Act 1984*
EPBC Act	*Environment Protection and Biodiversity Conservation Act 1999*
ILUA	Indigenous land use agreement (under the *Native Title Act 1993*)

Glossary

Indigenous heritage body	A body that is that is recognised under the laws of an accredited state or territory as being entitled to represent the interests of traditional custodians in a traditional area or object. See p.19
Indigenous person	A person of the Aboriginal race of Australia or a descendant of an Indigenous inhabitant of the Torres Strait Islands. See also p.14
Indigenous personal remains	The remains of a deceased Indigenous person, not including some objects made from body parts, or remains that are being used in certain medical or forensic procedures. See p.28 for a complete definition.
Secret sacred object	A traditional object that is the subject of traditional laws and customs that prohibit or regulate its display. See p.28 for a complete definition.
Traditional area	An area that is protected under traditional laws and customs. See p.14 for a complete definition.
Traditional custodian	An Indigenous person who has responsibility for an area or object under traditional laws and customs or who knows the traditional laws and customs applying to that area or object. See p.11. 'Recognised traditional custodians' means traditional owners under land rights legislation and native title holders. See p.23
Traditional laws and customs	Includes any traditions, customary laws, customs, observances, practices, knowledge and beliefs of an Aboriginal or Torres Strait Islander group. See p.14 for a complete definition.
Traditional object	An object that is protected under traditional laws and customs. See p.14 for a complete definition.

Summary

The Australian Government is seeking feedback on proposals for more effective laws to protect Indigenous traditional areas and objects across Australia. This paper explains the government's proposals, which are now open for public comment. Additional information relevant to the proposals in this paper is available at www.heritage.gov.au/indigenous/lawreform

Aims of reform

- **Ensure that Indigenous Australians will have the best opportunities to protect their heritage.** Developers would be encouraged to meet Indigenous traditional custodians early, when planning new activities that could affect a traditional area or object, to try to reach agreement on heritage protection. Existing processes, such as native title processes, would be used to secure agreements on heritage protection. Where agreement cannot be reached between parties, governments would continue to make decisions about protection. In doing so, governments would be required to consider the views of traditional custodians and to make balanced decisions based on best practice standards. Traditional custodians would be able to ask a court or other tribunal to review adverse decisions.

- **Cut duplication and red tape** by establishing a nationally consistent approach to protecting Indigenous heritage based on best practice standards. The Australian Government is committed to working with the states and territories to ensure that there is effective protection of Indigenous heritage nation-wide. All state and territory governments have enacted laws that protect Indigenous heritage to varying degrees. It is important that state and territory governments continue to have the primary responsibility for the legal protection of traditional areas and objects. The benefit of this is that state and territory governments are able to integrate the protection of Indigenous heritage into their land and development planning processes, which will help to avoid confusion, allow decisions to be made early and keep administrative costs low. The Australian Government will use its legislative powers to supplement the protection provided under state and territory laws where necessary.

Relevant legislation

Currently Indigenous heritage can be protected under state or territory heritage laws. Usually state and territory laws automatically protect various types of areas or objects, while enabling developers to apply for a permit or certificate to allow them to proceed with activities that might affect Indigenous heritage.

Indigenous Australians also can protect traditional heritage through registered Indigenous land use agreements (ILUAs) under the *Native Title Act 1993* and under land rights legislation in each state and territory. In the Northern Territory the relevant land rights legislation is a Commonwealth Act, the *Aboriginal Land Rights (Northern Territory) Act 1976*.

In addition to its land rights and native title laws, the Australian Government's legislative powers to protect Indigenous heritage include the Indigenous heritage provisions of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act) and the *Protection of Movable Cultural Heritage Act 1986*.

- The EPBC Act was introduced in 1999. Since 2003 it has protected places that are in the National Heritage List and the Commonwealth Heritage List. These include places that have Indigenous heritage values, including some traditional areas.
- The ATSIHP Act has been in place since 1984. It was designed to provide protection for Indigenous traditional areas and objects when state and territory laws were ineffective. Since then other Commonwealth, state and territory laws, including the EPBC Act, have improved processes for identifying, assessing and protecting traditional areas and objects, although more still needs to be done.

- The *Protection of Movable Cultural Heritage Act 1986* prohibits the export of prescribed Indigenous objects, such as sacred objects and human remains, bark and log coffins used as traditional burial objects, rock art, and carved trees (dendroglyphs).

Various reviews have commented on the need to reform the current legislative arrangements[1]. In considering reforms to the legislation the Australian Government is interested in exploring better approaches to providing effective protection for Indigenous traditional areas and objects nation-wide.

The EPBC Act and *Protection of Movable Cultural Heritage Act 1986* are currently being reviewed (see www.environment.gov.au/epbc/review and www.arts.gov.au/public_consultation/pmch-review). As part of the review of the EPBC Act the government has sought comments on whether there are opportunities to harmonise the provisions for protecting Indigenous heritage under the EPBC Act with similar provisions under other legislation, including the ATSIHP Act. There may be public support for including protection for traditional areas and possibly traditional objects in a revised form of the EPBC Act. Accordingly the proposals for reforming the ATSIHP Act that are presented in this paper have been designed to allow for the possibility of incorporating some or all of the eventual reforms into the EPBC Act.

How the ATSIHP Act works

The ATSIHP Act enables the Australian Government to respond to requests to protect important Indigenous areas and objects that are under threat, if it appears that state or territory laws have not provided 'effective protection'. At present the ATSIHP Act could be used to stop an activity that is permitted under an ILUA.

The Australian Government Minister for the Environment, Heritage and the Arts can make special orders, called 'declarations', to protect traditional areas and objects 'of particular significance to Aboriginals in accordance with Aboriginal tradition' from threats. However the Minister cannot make a declaration unless an Indigenous person (or a person representing an Indigenous person) has requested it. The power to make declarations is meant to be used 'as a last resort', after the relevant processes of the state or territory have been exhausted.

Why the legislation needs to be reformed

The ATSIHP Act has not been effective in meeting its purpose, which was to provide a direct and immediate means for the Commonwealth to protect traditional areas and objects when there are gaps in state and territory legislation. Instead it has created uncertainty about decisions made under other laws, provoked disputes and led to duplication of decisions, with increased costs for all parties involved.

The ATSIHP Act has not proven to be an effective means of protecting traditional areas and objects. Few 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.

The problems with the legislation derive in part from the fact that it was developed as a short-term measure over two decades ago. The main weaknesses are summarised in the following table.

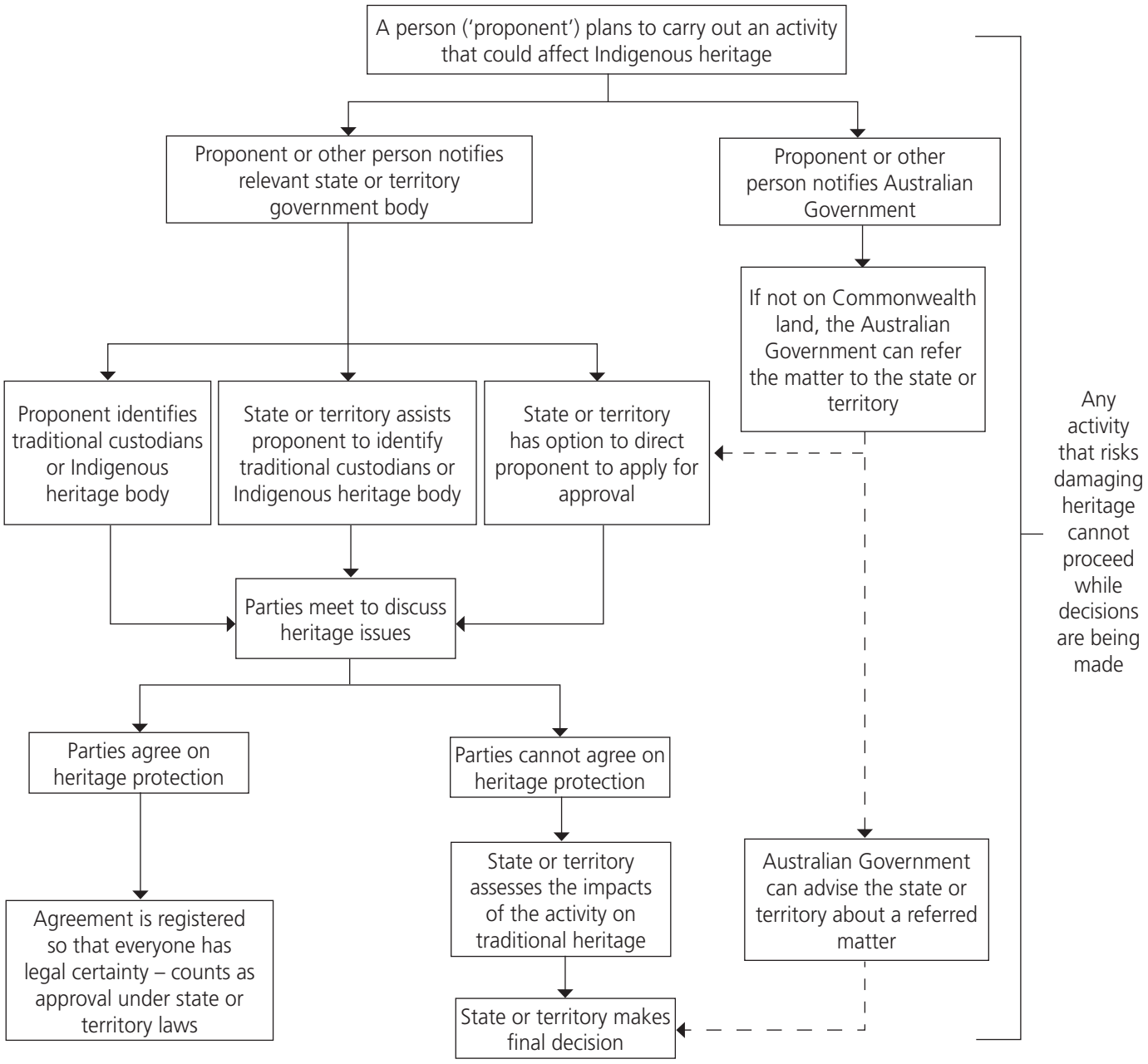
1 E.g. Evatt 1996, Commonwealth 2003, Commonwealth 2007.

What kinds of reform are needed?

Main weaknesses of the current legislation	Possible reforms
The Australian Government's requirements for 'effective protection' are not stated, creating uncertainty about decisions made under other laws (e.g. state heritage or planning laws).	**There needs to be a consistent national approach to protecting traditional areas and objects.** Specifying best practice standards would help to provide certainty.
Because applications can be made at the last minute, the Australian Government becomes involved too late in decisions, when the costs of changing plans to protect heritage are highest.	**Developers should be encouraged to apply for approval giving legal certainty for projects at an early stage of planning, and to consult Indigenous people early for these decisions.**
Any Indigenous person or their representative can apply for protection, even if they are not traditional custodians of the area or object in question. This is unfair and can undermine the entitlements of traditional custodians to negotiate agreements about access to land.	**Traditional custodians' legal entitlements and special knowledge need to be acknowledged in the legislation.** The reformed legislation could build on existing processes, such as land rights and native title processes.
The procedures for handling applications are inefficient and do not help resolve matters:	**The procedures for responding to applications need to be improved,** along the following lines:
• Applications do not need to include supporting information, but then rarely succeed.	• The reformed legislation could specify what information applicants need to provide to support their cases.
• The procedures can be triggered repeatedly over the same issue.	• The legislation could make it clear that only one application is needed.
• Triggering the procedures can require the preparation of a formal assessment, irrespective of whether this has already been done.	• The legislation could provide a process for determining what facts are agreed or in dispute, and hence whether any additional assessment work is required.
• The procedures do not encourage conciliation between the parties to an application.	• There could be a requirement for the parties to meet to attempt to resolve their disagreements.
• There is little procedural guidance about the legal requirements for making decisions, as highlighted by Federal Court decisions.	• The purposes of the legislation and the decision-making process could be set out in more detail.
• The time limits on declarations do not allow enough time to complete the decision-making procedures.	• The purposes and lengths of these time limits could be clarified.
• There are no processes to prevent secret traditions being aired publicly.	• The legislation could include powers to prevent the public disclosure of sensitive information.
• Indigenous concerns about traditional objects are not properly addressed.	• New requirements could prevent the unauthorised public display of special objects and human remains.
• The requirement to report human remains duplicates state and territory processes.	• The reporting requirement could be streamlined.
• The penalties are insufficient to promote compliance with declarations.	• The penalties and enforcement powers need to be updated.

The proposals in this paper, if adopted, would implement the Australian Government's preferred approach for decisions about protecting Indigenous heritage (see diagram). This approach could apply to state and territory processes that enable proponents to obtain legal clarity about their obligations to protect Indigenous heritage. A similar approach – i.e. encouraging the parties to meet and if possible agree on heritage protection – could apply to decisions made about developments on Commonwealth land.

Preferred way for states and territories to reach decisions about protecting Indigenous heritage



Outline of the proposals

Overall the proposals in this paper aim to ensure that Indigenous Australians have the best opportunities to protect their traditional heritage in balance with other social and economic considerations.
The proposals are designed to clarify responsibilities for protecting Indigenous heritage, to set standards of best practice nation-wide, to remove duplication of state and territory decisions that meet the standards, and to improve processes for Australian Government decisions about protection when the standards are not met.

Proposals 3 and 4 are designed to help improve Indigenous heritage protection laws nationally, based on a common set of best-practice standards. If proposals 3 and 4 are adopted, the Australian Government would be able to accredit states and territories for the way they protect Indigenous heritage. Accreditation would mean that Australian Government procedures would not apply in an accredited state or territory.

Broadly speaking, proposals 3 and 4 would apply only in states and territories that the Australian Government had accredited, while proposals 5–6 and 9–14 would apply only in states and territories that were not accredited.

PART 1: Clarifying responsibilities

1 Clarifying the purposes of the legislation
2 Making terminology consistent with the purposes
3 Promoting effective laws through accreditation
4 Specifying standards for effective protection
5 Ensuring that, if legally recognised traditional custodians exist, only they can seek Commonwealth protection
6 Ensuring that Commonwealth protection would not prevent an act authorised under a registered Indigenous land use agreement
7 Removing duplication of state and territory protection for Indigenous remains
8 Addressing gaps in state and territory laws to ensure respectful treatment of Indigenous sacred objects and remains

A scheme for accrediting states and territories

These proposals would have no effect in a state or territory that was accredited

PART 2: Improving procedures

9 Specifying the information needed for applications for protection
10 Using conferences to consider how best to deal with the issues
11 Protecting sensitive information
12 Clarifying the reasons for providing and revoking interim protection
13 Clarifying the reasons for providing and revoking longer-term protection

PART 3: Making sure that protection works

14 Updating the penalties and improving the enforcement powers
15 Reviewing the effectiveness of the legislation at regular intervals

These proposals would have no effect in a state or territory that was accredited

Benefits of adopting these proposals

- The proposals, if adopted, would reinforce Australia's commitment to advancing the interests of Indigenous Australians.
- Indigenous Australians would have the best opportunities to protect their traditional areas and objects in every state and territory and in Commonwealth-managed areas.
- Developers could reduce their costs by meeting with traditional custodians at an early stage of planning.
- Australian governments would have more certainty when exercising their land management and development approval functions.
- Everyone could rely on nationally consistent guidance about the best approach to making decisions about protecting traditional areas and objects.
- There would be less duplication, more transparency and fewer delays when the Australian Government responds to applications for protection.

What would this cost?

Part of the purpose of this paper is to seek feedback on how possible changes to the legislation might affect industry sectors and individual businesses. The Australian Government would welcome any feedback about the possible impacts of the proposals in this paper. In general the proposals are expected to reduce rather than increase costs for businesses. If the states and territories adopt the proposed standards, the legislation would reduce duplication, increase certainty, and reduce the risk of delays for developments that could affect Indigenous heritage. Consumers are unlikely to notice any price impacts from the reforms.

How were the proposals developed?

The proposals were developed after informal meetings with Indigenous organisations and groups – mainly native title representative bodies and others directly involved in heritage protection – industry, legal experts and all levels of government. These proposals do not reflect the views of any particular stakeholders.

In addition the proposals build on the former government's experience with a previous attempt to reform the ATSIHP Act. In 1996, Justice Elizabeth Evatt reviewed the legislation and proposed numerous changes. Following considerable debate the changes did not receive the support of the Parliament and the legislation remained unchanged. The proposals in this paper attempt to address the concerns raised at the time, particularly the need for a workable accreditation system (see proposals 3 and 4). The proposals also recognise that since then there have been important changes to Commonwealth, state and territory legislation for Indigenous heritage, land rights, native title and the environment, including the introduction of the EPBC Act in 1999.

Call for submissions

The Australian Government is calling for comment on the proposals in this paper from anyone who has an interest in them. People are welcome to suggest their own proposals for reforming the legislation. The Australian Government will consider all comments received in response to this paper when determining how best to proceed. The process of considering reforms to the current legislative arrangements will take some time, to ensure that any reforms are as effective as possible.

To make a submission, please write to the Department of the Environment, Water, Heritage and the Arts at the address shown on the **back cover of this paper.**

The deadline for submissions is Friday, 6 November 2009.

★ ***Question 1: Overall, what do you think are the main problems with the current situation, and what improvements are needed?***

PART 1

Clarifying responsibilities

Australia's Commonwealth, state and territory governments have overlapping responsibilities for protecting Indigenous heritage. State and territory governments have the primary responsibility for providing legal protection for traditional areas and objects as part of their responsibilities for land management and development approvals.

The ATSIHP Act is intended to be used 'as a last resort', when it appears that state or territory laws have not provided 'effective protection'; however these circumstances are not clearly defined in the legislation. A declaration made to protect an area or object under the ATSIHP Act can override any decisions affecting the area or object made under a state or territory law.

To improve the legislative arrangements for protecting Indigenous heritage and so avoid duplication of effort under state, territory and Commonwealth laws, the purpose of the legislation and the Australian Government's responsibility for protecting Indigenous heritage need to be clarified.

Proposal 1

Clarifying the purposes of the legislation

The reformed legislation would need to include a statement of purposes. The purposes should emphasise that Indigenous Australians have the right to be fully involved in the processes for making decisions about land use and development that could affect traditional areas, or about the use of traditional objects.

An Act of Parliament typically will include a statement of the purposes or 'objects' of the Act. The purpose of the current *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* is:

> the preservation and protection from injury or desecration of areas and objects in Australia and in Australian waters, being areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition.

While this statement makes it clear that the ATSIHP Act is intended to protect traditional areas and objects, it does not adequately express the underlying need for the legislation.

Some areas and objects are important for Indigenous Australians to maintain their traditions and cultural identity. Particular Indigenous groups or communities – traditional custodians or owners – are the source of first-hand knowledge about traditional laws and customs. Without their knowledge it is impossible to appreciate when and how traditional laws and customs apply to areas and objects. Consequently 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.

The ATSIHP Act operates in the context of other legislation that can also help Indigenous people to maintain their traditional laws and customs about areas and objects, particularly native title laws and state and territory heritage laws that are usually part of development approval processes. In practice, the power in the ATSIHP 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 (see proposals 3–7). This outcome would be consistent with the original reasons for introducing the ATSIHP Act[2].

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.

2 The ATSIHP Act was introduced 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'. Quotes are from the second reading speech by the Hon A. Clyde Holding MP, House Hansard, 9 May 1984, p.2129ff.

- Respond to requests from Indigenous Australians who are seeking to protect their traditional areas and objects from threats, if other applicable laws are ineffective and do not meet the standards.

- Ensure that government decisions about whether to allow activities to proceed will avoid or minimise the likely adverse impacts on traditional areas and objects.

- Promote fair, transparent and timely decisions that do not impose unnecessary costs on those involved.

- Ensure that Indigenous remains and objects that are secret and sacred to Indigenous Australians are not displayed contrary to Indigenous traditions.

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

Proposal 2

Making terminology consistent with the purposes

New definitions could be put in the legislation to clarify the basis on which areas and objects can be protected under the legislation. Currently the Minister must determine whether an area or object is 'of particular significance to Aboriginals in accordance with Aboriginal tradition'. This phrase is ambiguous. The legislation would be clearer and better reflect its purposes if instead it used terms based on the concept of 'traditional laws and customs', as defined in the *Evidence Act 1995.*

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

Under the ATSIHP Act, the Minister can 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'. The concept of 'particular significance' is unclear. This is a critical issue: many applications have not led to declarations because the information provided has not satisfied the Minister that the area or object is 'of particular significance to Aboriginals in accordance with Aboriginal tradition'. Proposal 2 is to simplify the problem of understanding why an area or object might need to be protected by removing the test of 'particular significance'. Instead the Minister would be able to protect any 'traditional' area or object, based on a new definition of 'traditional laws and customs' used in the Commonwealth *Evidence Act 1995*[3]. This would mean replacing the definitions of 'Aboriginal tradition', 'significant Aboriginal area' and 'significant Aboriginal object' with new definitions, as follows.

3 In 2005 the Australian Law Reform Commission recommended that governments include a definition of 'traditional laws and customs' in the laws of evidence (Commonwealth 2005) and in 2008 this definition was included in the *Evidence Act 1995*.

Proposed new definitions to avoid ambiguity arising from use of 'particular significance'

Traditional area means an area that meets both of the following criteria:

- The area has a use or function under traditional laws and customs, or is a subject of a narrative that is part of traditional laws and customs.
- The area is protected or regulated under traditional laws and customs.

A traditional area includes any traditional objects that are located in the area under traditional laws and customs.

Traditional object means an object that meets both of the following criteria:

- The object has a use or function under traditional laws and customs, or is a subject of a narrative that is part of traditional laws and customs.
- The object is protected or regulated under traditional laws and customs.

Traditional laws and customs of an Aboriginal or Torres Strait Islander group (including a kinship group) includes any of the traditions, customary laws, customs, observances, practices, knowledge and beliefs of the group.

In addition the current definition of 'Aboriginal' could be updated to 'Indigenous' to encompass both 'Aboriginal' and 'Torres Strait Islander' without changing the effect of the definition. The proposed definition is:

Indigenous person means a person of the Aboriginal race of Australia or a descendant of an Indigenous inhabitant of the Torres Strait Islands.

The proposed definitions, if adopted, would allow for the protection of traditional areas such as ceremony grounds, burial grounds, keeping places and dreaming places, and objects manufactured for a ceremonial purpose, as well as sacred objects that are part of dreamtime stories. They are consistent with legal findings that traditions may change over time. They would help to establish that the source of information about the importance of traditional areas and objects to Indigenous Australians is the knowledge that Indigenous Australians hold under their traditional laws and customs.

★ ***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)***

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

Proposal 3

Promoting effective laws through accreditation

State and territory governments have the primary responsibility for providing legal protection for traditional areas and objects. The ATSIHP Act was intended to fill gaps in protection when state and territory laws were inadequate or not applied. Accreditation can promote high standards of protection across all states and territories and minimise overlaps in responsibilities. To make this idea work, the reformed legislation could set standards for state and territory laws (proposal 4) 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.

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

Responding to applications for Commonwealth protection is not the best way for the Australian Government to ensure that there is effective protection for Indigenous heritage laws nationally. Applications for protection can be made at the last minute, when there is the least room to resolve disputes. State and territory processes can enable protection to be determined at an earlier stage, when it is easier for people to negotiate fairly and to agree on how to protect heritage. There needs to be a way of supporting state and territory decisions when they are effective.

Proposal 3 would allow the Minister to accredit individual states and territories if their laws are effective and meet the Australian Government's standards for effective protection (see proposal 4). The increased certainty offered by accreditation would create an incentive for the states and territories to implement the Australian Government's standards in their legislation.

Effects of accreditation

Accreditation would mean the Minister accepts that the state or territory has procedures that achieve the purposes of the Australian Government's legislation. If so, the Australian Government would not need to implement its own procedures.

If the Minister accredits a state or territory, the Minister would refer all applications for protection in that state or territory to the relevant state or territory minister. Also, the Minister could advise an accredited state or territory government to consider 'calling in' the activity for approval. If so the Minister could provide information and advice for the state or territory government's decision. The accreditation standards could be designed to ensure that the state or territory government would take the Minister's advice into account.

Accreditation could apply either to the traditional areas or to the traditional objects in a state or territory, or it could apply to all of the traditional areas and objects in a state or territory.

Accreditation would not prevent a person from asking the Australian Government to protect a traditional area that appears to have national heritage values, using the existing processes under the EPBC Act for including such places in the National Heritage List.

Transparent review processes

If the Minister was satisfied that a state or territory has effective laws, the Minister would make a special legal instrument to accredit the relevant state or territory. The instrument would be tabled in Parliament and could be disallowed by either House of Parliament.

As explained in proposal 15, during a review of accreditation people could have an opportunity to provide comments to an independent reviewer. This would provide a way for Australian Government to receive independent advice about how the states and territories handled individual cases.

Revocation

If the Minister is satisfied that a state or territory is not complying with the standards the Minister could revoke accreditation. For example the Minister could revoke accreditation if the accredited state or territory government changes its laws in a way that affects compliance with the standards.

In addition accreditation could cease automatically if the relevant state or territory enacts a law that exempts an area or activity from the normal assessment and approval processes that were the basis for the Minister's original decision to accredit the state or territory.

Effects of absence of accreditation

Under the reformed legislation the Minister could continue to consider applications for protection in unaccredited states and territories, irrespective of whether the accreditation was revoked or never provided in the first place (see Part 2 – Improving Procedures). For developers this would mean that the Australian Government could accept applications from Indigenous people to stop projects in states and territories that have not been accredited, or whose accreditation has been revoked.

It is not proposed that the reformed legislation include a mechanism enabling developers to obtain certainty by seeking approval directly from the Australian Government. Doing so would add a new layer of approvals to all development activities that could affect Indigenous heritage, eroding state and territory responsibilities for land management and Indigenous heritage protection.

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

- ★ ***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?***

- ★ ***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?***

Proposal 4

Specifying standards for effective protection

The legislation could specify standards for state and territory laws to encourage the best outcomes for the protection of traditional areas and objects. The standards would encourage governments to make decisions in a timely manner, to identify the traditional custodians, to resolve matters by agreement where possible, and to ensure that assessments of the possible impacts of activities on Indigenous heritage are made independently of government decisions to approve the activities. Indigenous Australians who are affected by an adverse government decision would be able to seek a legal review of the decision. The Australian Government could add new standards from time to time.

Before accrediting a state or territory's laws under proposal 3 the Minister would need to be assured that the laws meet rigorous standards. Proposal 4 is to specify those standards (see below). The standards could be used to ensure that laws across Australia consistently provide a fundamental level of protection for all traditional areas and objects. The management of Indigenous heritage on Commonwealth land would need to meet similar standards. From time to time, for example in the context of a review of accreditation (see proposals 3 and 15), the Australian Government could prescribe additional standards in regulations to ensure that the standards continue to achieve the purposes of the legislation.

Standards could improve the extent to which Indigenous heritage is protected by requiring:

- **The early identification of Indigenous heritage issues:** The earlier heritage issues are identified, the easier it is to find ways to protect heritage through careful planning. To achieve the early identification of heritage issues, laws should place the onus on proponents to avoid or minimise their potential impacts on heritage while enabling them to identify heritage by meeting with the traditional custodians and accessing government registers, enable proponents to proceed when their heritage obligations are clarified, and set penalties that encourage compliance with these requirements (see proposal 14 for models such as civil penalties and remediation orders).
- **Appropriate consultation and opportunities to reach agreements:** Indigenous people who have traditional responsibilities for heritage are best placed to advise on the manner of protecting their traditional areas and objects. Laws can provide ways to identify the traditional custodians or their representatives (for example by establishing Indigenous heritage bodies) and enable project proponents to meet them to resolve issues.
- **Independent assessments based on the advice of Indigenous people:** Government decisions about whether to protect heritage are based on expert advice. As experts on the traditional importance of areas and objects, the traditional custodians would need to have an opportunity to identify and assess possible impacts on those areas and objects. Decisions should be made after considering the assessment.
- **Protection for sensitive information:** Natural justice requires that all parties have the opportunity to comment on the information on which decisions are made. However, secret or sacred traditional information should not be divulged.
- **Transparent decision-making:** To encourage transparent decision-making, agreements and decisions about cultural heritage should be recorded in written documents lodged with a state or territory agency. Persons with an interest should be able to view them.

- **An ability for the Australian Government to provide input:** The Australian Government may need to have a limited ability to influence key decisions where necessary, without undermining the effect of accreditation.
- **An 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.

★ ***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?***

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

Proposed standards for accrediting state and territory laws

1) *Protecting all traditional areas and objects:* The laws must provide comprehensive protection for traditional areas or objects by providing that adverse impacts on traditional areas and objects, including traditional areas and objects that have not been identified or recorded by the state or territory, must be avoided.

Note: In an accredited state or territory these standards would mean that any developer, mining company, farmer or other person who is planning an activity would need to consider whether the activity could have adverse effects on areas that are important to Indigenous people in their traditions. These persons would have reasonable access to government records to find out the locations of recorded traditional areas that might be affected by the activity (see standards 18 and 19). They also could consult Indigenous people to identify traditional areas and objects that could be affected by the activity.

'Traditional area' and 'traditional object' would have the meanings given in the Australian Government's legislation. This means that to be accredited, the state or territory would need to ensure that its laws protect at least the same kinds of areas and objects that are covered by the Australian Government's definitions.

2) *Enabling activities to proceed:* The laws must provide that, despite the requirements to protect traditional areas and objects, a proponent who acts in accordance with an approval (see standards 7–17) is not liable to be prosecuted.

Note: For the purposes of these standards a 'proponent' is a person who is proposing to carry out an activity.

3) *Ability to impose conditions:* The laws must enable conditions to be attached to an approval to avoid or minimise an adverse impact on a traditional area or object when granting an approval.

4) *Call in power:* The laws must allow the state or territory to direct a proponent to apply to the government for approval. The laws must also require the state or territory to consider any representations from the Minister responsible for administering the Australian Government's legislation in deciding whether to direct a proponent to apply for approval.

Note: In an accredited state or territory this standard would mean that the relevant state or territory minister could instruct any developer, mining company, farmer or other person who is planning an activity that might affect a traditional area to seek government approval, i.e. the relevant minister could 'call in' the activity. This would help to avoid situations where a proponent is unaware that their activity could affect a traditional area. The relevant Australian Government minister could ask his or her counterpart in the state or territory government to take additional information into account when making the decision about whether to call in the activity.

5) *Reporting discoveries of personal remains:* The laws must require a person who discovers objects that he or she has reasonable grounds to believe are Indigenous personal remains to report the discovery to the government. The laws must require the government to consult Indigenous persons when deciding what to do about the discovery and what to do with the remains.

Note: 'Indigenous personal remains' has the meaning given in proposal 8.

6) *Promoting compliance:* The laws must enable the state or territory to stop an unapproved activity that could cause adverse impacts on a traditional area or object. The laws must include:

   a) significant penalties for causing an adverse impact on traditional areas or objects, and for failing to comply with the conditions of an approval

   b) provisions for orders to repair adverse impacts on traditional areas.

Preferring agreement-making to arbitration

7) *Meeting traditional custodians:* The laws must enable a proponent of an activity that could have an adverse impact on traditional areas or objects to meet the traditional custodians at the earliest practicable opportunity, and must provide a process to enable a proponent to identify all of the traditional custodians.

Note: For the purposes of these standards 'the traditional custodians' are any Indigenous Australians who have responsibility for an area or object under traditional laws and customs or who know the traditional laws and customs applying to that area or object. The traditional custodians may be represented by an 'Indigenous heritage body' that has a statutory responsibility under the state or territory laws to consult the traditional custodians about decisions that could affect the area or object.

The reason for this meeting is to help the proponent and the traditional custodians to try to agree on any conditions that may be required to avoid or minimise the adverse impacts of the proposed activity on traditional areas or objects.

8) *Reaching agreement:* Subject to standard 4, and subject to any requirement to obtain an approval for a matter other than Indigenous heritage, the laws must enable a proponent to carry out an activity if:

a) the activity is undertaken in accordance with an agreement with the traditional custodians who are identified in accordance with the processes in standard 7

and

b) the laws specify the form of the agreement, and

c) the agreement expressly provides either:

i) the proposed activity will not cause adverse impacts on a traditional area or object

or

ii) the adverse impacts will be minimised or avoided if the activity is carried out in accordance with agreed conditions.

Note: For example the laws could enable a proponent to carry out activities under a cultural heritage management plan that was agreed with the traditional custodians.

Providing for arbitration when agreements are not possible

9) *Ability to seek approval:* If a proponent cannot reach agreement with the traditional custodians the laws must enable the proponent to apply for an approval of an activity under state or territory law.

10) *Efficient applications process:* The laws must require the government to provide the application to the traditional custodians within 21 days of receiving it, unless the proponent agrees to delay the handling of the application.

Note: The government must respond to applications as quickly as possible to ensure that decisions about protection can be made at the earliest stage. However proponents may agree to delays if projects are large and complex.

11) *Requirement to consider impacts on traditional areas and objects:* The laws must require that, before a decision is made whether to approve an activity, the adverse impacts on traditional areas and objects of allowing the activity to proceed must be considered, including:

a) whether the activity, if it proceeded, would be likely to have an adverse impact on a traditional area or traditional object

b) whether, as a result of that impact, the activity would reduce or impede the ability of Indigenous people to:

i) use or enjoy the area or object under their traditional laws and customs

or

ii) maintain their traditional laws and customs about the area or object.

Note: These criteria are intended to ensure that an accredited state or territory could provide protection on a similar basis to the Australian Government (see proposal 13). The assessment would inform the decision-maker about the causes, scale and nature of the impact of the decision on traditional laws and customs as practised by Indigenous people.

12) *Independent assessment of impacts:* The laws must require that, before a decision is made as to whether to approve an activity, advice about any impact an activity could have on a traditional area or object be obtained and considered. The advice must be a written assessment that has been prepared by a person or body with appropriate expertise, background or qualifications who is independent of the person who makes the decision on approval. If the assessment concludes that an activity could have an adverse impact on a traditional area or object the assessment must provide details about the traditional laws and customs that apply to the area or object.

13) *Need to consult traditional custodians:* The laws must require that the traditional custodians have a reasonable opportunity to provide information for and comment on the assessment, including, if requested by the traditional custodians, opportunities for Indigenous men and women to provide information separately from each other.

Note: This standard is required because the traditional custodians are the primary source of information about their own traditional laws and customs, and because some traditions are known to one gender only.

14) *Respect for traditions of secrecy:* The laws must prevent the disclosure of information that an Indigenous person has provided as part of the assessment if the Indigenous person advises that the information is restricted under traditional laws and customs, except as necessary:

a) to provide natural justice

b) for a review of a decision

c) for a review of the effectiveness of accreditation.

Note: This 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.

15) *Requirement to consider other matters:* The laws must require that the following matters be considered before a decision is made as to whether to approve an activity:

a) the views of the proponent and the traditional custodians about practical options to avoid or minimise the likely impact

b) the likely effect of giving or withholding approval on:

i) the interests of the proponent

ii) the interests of persons other than the proponent and the traditional custodians who may be affected by a decision

iii) the cultural, social, economic and environmental welfare of the community.

16) *Requirement to consider Australian Government views:* The laws must require that any representations made by the Commonwealth Minister be considered before a decision is made as to whether to approve an activity.

Note: The Commonwealth Minister could ask his or her counterpart in the state or territory government to take additional information into account when making the decision about whether to approve the activity.

17) *Requirements for giving approval:* The 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.

Transparency and accountability

18) *Requirement to maintain records:* The laws must require the state or territory to maintain records of:

a) the locations and physical description of traditional areas and objects in standard 1, where known

b) assessments of whether an area or object is a traditional area or traditional object

c) agreements between a proponent and the traditional custodians in the terms set out in standard 8

d) reasons for decisions about whether to approve an activity.

19) *Requirement to make records available:* The laws must require the state or territory keep these records securely at a place where they can be viewed by interested persons, including proponents, subject to any restrictions needed because of secrecy under traditional laws and customs or commercial confidentiality. The laws must enable the records to be produced for official purposes, including to the Australian Government for statutory reviews and other purposes.

Note: These minimum requirements would not prevent governments from making information about the location and extent of traditional areas available to the public.

20) *Opportunity for legal reviews:* The laws must provide for traditional custodians, proponents and other persons whose rights or interests are affected by a decision that affects a traditional area or a traditional object, including a decision as to whether to approve an activity, to apply to a court or tribunal of the state or territory for a review of the decision.

Proposal 5

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

Currently any Indigenous person (or their representative) can apply for Commonwealth protection of areas and objects. This is inconsistent with Indigenous traditional laws and customs that entitle specific people to make decisions about traditional areas and objects. Many of these people have gained formal legal recognition of their traditional entitlements to be the custodians of their lands. This has happened under native title and land rights laws. In these cases, only the legally recognised traditional custodians should be able to apply for Commonwealth heritage protection on their lands.

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

When assessing the need to protect a particular area or object it can be difficult to identify the traditional custodians who have the relevant knowledge and traditional entitlements. Nevertheless Indigenous persons with traditional connections to land have been identified under land rights legislation, and native title holders have been recognised.

Land rights laws and native title laws provide ways of representing the rights of traditional owners and native title holders through organisations and legal processes. These arrangements give traditional owners and native title holders legal certainty about their traditional entitlements. They also enable developers and the wider community to know who they need to consult about the activities that could affect the land. It is important that other government policies do not undermine these advantages. Instead reformed Commonwealth Indigenous heritage legislation could build on the progress that has already been made.

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

Proposal 5 would make it clear that, where traditional custodians have been recognised under native title or land rights laws, only those traditional custodians, using their representative organisations and processes, could apply for heritage protection on their lands. Specifically, where native title rights and interests are held by a native title prescribed body corporate, or where land is held as freehold title by an Aboriginal land trust or similar organisation for the benefit of traditional custodians, only persons acting on behalf of those organisations should be entitled to apply for Commonwealth protection of traditional areas or objects on the land. Allowing applications from others would conflict with the status of the recognised traditional custodians, which has been tested and decided under a statutory process, and also would undermine the effectiveness of their representative organisations and the laws under which they operate.

★ ***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?***

Where there are no Indigenous people who clearly have a statutory responsibility for the land, the situation that exists under the current ATSIHP Act would operate, i.e. any Indigenous person could apply for protection.

Proposal 5 is not expected to load extra responsibilities or work onto recognised traditional custodian bodies, which already have the ability to apply for Commonwealth protection of threatened areas or objects.

- ***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?***

- ***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?***

In principle, similar considerations could apply to traditional objects that are owned by Indigenous Australians. However, there are no legally effective methods for identifying the traditional ownership of traditional objects equivalent to those under native title and land rights laws.

Proposal 6

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

Native title groups can negotiate Indigenous land use agreements (ILUAs). ILUAs can determine whether particular activities that affect native title rights and interests (called 'future acts') can proceed. New legislative arrangements could support the right of native title groups to negotiate agreements by ensuring that future acts permitted under a registered ILUA could not be prevented by the Minister under Indigenous cultural heritage legislation.

★ ***Question 6.1: Overall, what do you think about this proposal?***

The *Native Title Act 1993* gives persons who claim or hold native title certain procedural rights in connection with the doing of 'future acts'. Future acts are acts that 'affect' native title. Some future acts cannot be done unless they are authorised in a registered ILUA. At present, the ATSIHP Act could be used to impede or stop future acts authorised under registered ILUAs by allowing any Indigenous person or group, including persons or groups who are not party to the ILUA, to apply for Commonwealth heritage protection over the same area.

Under proposal 6, the new legislative arrangements could prevent the Minister from accepting an application to stop an activity if the activity is a future act that is permitted by a registered ILUA. It is expected that this would give native title groups and developers more confidence when they negotiate, and would help to guarantee the effectiveness of the resulting agreements.

★ ***Question 6.2: Is it fair to stop applications to protect traditional areas and objects from an activity if the activity is allowed under a registered ILUA?***

★ ***Question 6.3: If not, is some other reform needed to prevent applications from impacting on ILUAs?***

★ ***Question 6.4: Would this proposal complicate ILUA negotiations by encouraging people who are not native title parties to become involved in negotiations?***

★ ***Question 6.5: (a) Would ILUA negotiations be more difficult if native title parties could not ask the Minister to protect traditional areas and objects from activities permitted under an ILUA? (b) Or would the ILUA be a stronger agreement as a result?***

Proposal 7

Removing duplication of state and territory protection for Indigenous remains

Currently people are required to report all discoveries of Indigenous personal remains to the Minister. However this requirement duplicates state and territory legal processes, except where the remains are found in an area that is managed by the Australian Government. In Australian Government areas the requirement could be retained in a modified form. The discoveries could be reported to the Australian Government minister who is responsible for managing the area. That minister would consult Indigenous people about how to deal with the discovered remains.

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

The ATSIHP Act contains requirements that are triggered when a person discovers Indigenous remains. The person is required to report the discovery to the Minister.

In practice discovered remains are rarely reported to the Minister. The obvious step for people who discover human remains is to contact the police. State and territory laws require the reporting of discovered Indigenous remains, although they do this in different ways. In general, protocols within the states and territories determine whether police or coroners have responsibilities and set out how to determine whether the remains are Indigenous remains.

The proposed standards for state and territory laws include requirements to report Indigenous personal remains and to consult Indigenous people about what to do with the remains (see standard 5 in proposal 4). Indigenous personal remains are defined in proposal 8.

Indigenous Australians in states and territories that are not accredited could apply for Australian Government protection of discovered Indigenous personal remains if they considered the state or territory processes were ineffective or inappropriate (see proposal 9).

★ ***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?***

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

Under proposal 7 the requirement to report discovered Indigenous personal remains could be retained for Commonwealth lands and waters where state or territory laws do not apply. The Commonwealth agency that manages the land where the remains are discovered would be responsible for identifying which Indigenous people need to be consulted about the proper handling of the discovered remains, and the minister who supervises that agency would decide how the remains are to be dealt with, after appropriate consultation. However, the initial referral should be to the police to exclude the need for criminal investigations or coronial enquiries.

Proposal 8

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

New requirements could prohibit the public display of Indigenous personal remains and 'secret sacred objects'. Public display of these objects is a source of offence to many Indigenous Australians that generally is not addressed by state and territory laws. The new requirements would remove the need for applications to protect the objects from public display.

★ ***Question 8.1: Overall, what do you think about this proposal?***

The main reason for previous declarations to protect objects under the ATSIHP Act has been to prevent them from being displayed in public. These declarations appear to have reinforced the message that displaying certain objects is unacceptable. However in most jurisdictions it is still legal to display these objects.

Proposal 8 would make it an offence to display a secret sacred object or Indigenous personal remains in a public place, such as a museum, gallery or shop. However there would be no offence if the public display was made by Indigenous persons acting in accordance with traditional laws and customs. Also, in the case of personal remains, there would be no offence if the remains were voluntarily donated under a Commonwealth, state or territory law.

★ ***Question 8.2: Are there other situations where it might be necessary to prohibit or allow display?***

A ban on displaying secret sacred objects would not go as far as some state legislation that regulates trading or owning these objects, and returns them to their traditional custodians. However it might encourage anyone who has these objects to return them to Indigenous Australians through government programs. It would also remove the need for case-by-case applications for the Australian Government to prevent the public display of these objects. In addition the Australian Government would retain its existing export controls under the *Protection of Movable Cultural Heritage Act 1986*.

The prohibition on display would be confined to objects that are the subject of strict rules and sanctions and to Indigenous personal remains – in other words, to objects whose display would cause offence to Indigenous Australians. Hence it would not need to apply to some Indigenous decorative objects that contain hair, teeth or bone, or to medical treatment, post-mortem examinations, or voluntary organ donation schemes that might operate in places that could be defined as public. This could be made clear by including new definitions in the legislation (see box on next page).

★ ***Question 8.3: How would prohibiting the public display of these objects affect your business?***

★ ***Question 8.4: Would the proposed definitions (box) exclude any objects that might need to be protected from public display because they have a special meaning in Indigenous traditions?***

New definitions for proposed prohibition on public display

Secret sacred object means a traditional object that meets all of the following criteria:

- The object has a specific application to or use in a sacred ceremony under traditional laws and customs.
- The object is the subject of specific rules and sanctions under traditional laws and customs which prohibit or regulate its display.
- The object is not an object created for exhibition, gift, sale or barter, or to be a work of art.
- The object is not an object imported into Australia for exhibition by a public museum or gallery.

Indigenous personal remains means the whole or part of the bodily remains of a deceased Indigenous person, but does not include any of the following things:

- An object that is made from, using or incorporating human hair, teeth or bone, such as a personal ornament, a vessel or a pointing bone.
- A body that is, or the remains of a body that are, being dealt with or to be dealt with in accordance with a law of the Commonwealth, a state or a territory relating to medical treatment, post-mortem examinations or the voluntary donation of bodily remains.

Note: An object made from, using or incorporating human hair, teeth or bone, such as a personal ornament, a vessel or a pointing bone could be a secret sacred object.

PART 2

Improving procedures

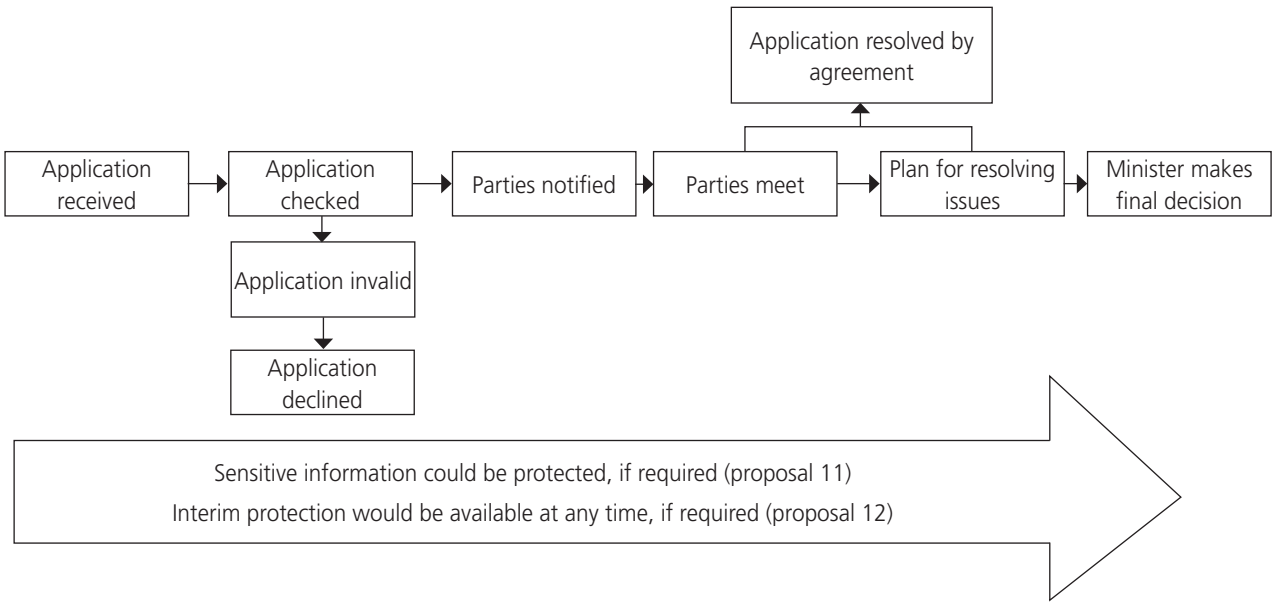
The procedures described in this part of the discussion paper would apply in the absence of accreditation (proposal 3) or a relevant ILUA (proposal 6). If proposal 3 is adopted, the procedures in this part would apply in states and territories that are not accredited. If proposal 6 is adopted, the procedures would apply to activities that are not covered by a registered Indigenous land use agreement (ILUA).

In the absence of accreditation or a relevant ILUA, Indigenous Australians need to be confident that their traditional areas and objects can still be protected from threats. The ATSIHP Act provides a means for the Australian Government to respond to applications to protect traditional areas and objects, if it appears that state or territory laws have not provided 'effective protection'.

However, the ATSIHP Act was originally drafted as interim legislation to be replaced within two years. As a result it contains little detail about the procedures to be followed. Many of the current issues with providing protection are due to the procedures in the ATSIHP Act being unclear or inflexible and inefficient. The weakness of the procedures partly explains why the Act can delay projects without improving heritage protection. It also makes the Act costly to administer.

The procedures for making and responding to applications need to be improved. The improved procedures described in this part of the discussion paper are intended to provide clear guidance about how to apply to the Australian Government for protection and what the government can do in response.

Overview of a streamlined applications process (proposals 9–12)



Proposal 9

Specifying the information needed for applications for protection

At present the Minister can be required to make decisions in response to applications that contain minimal information. The low success rate of applications is partly due to the lack of clarity for applicants on what is needed. To fix this problem the legislation could require that applications for protection are made on a prescribed form and checked by a delegated departmental officer before they are accepted. Some applications might not be accepted, for example because of the other changes proposed in this paper, such as accreditation (proposal 3). This proposal would clarify the application process and prevent multiple applications when only one is required, hence improving the quality of applications and avoiding unnecessary delays.

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

Finding a better way to deal with applications for protection is one of the key aims of this reform. The application process needs to be improved to reduce wasted effort and duplication. Reforming how applications are made, handled and decided would clarify the information needed for decisions and the roles of applicants and other stakeholders.

Currently there is no formal process for making an application. This can create unrealistic expectations about stopping activities that appear to threaten Indigenous heritage. A person can make a valid application that includes very little information and yet triggers the procedures for deciding whether to provide protection. However the Minister needs strong evidence to decide whether to protect the area or object in question. Part of proposal 9 is to make it clear to applicants what evidence is needed, by setting out what information applications must include. The following box sets out possible requirements.

Applications – proposed content

The applicant would need to provide enough information so that other people could determine if the application would affect their interests, and to assure the government that evidence of the threat exists. This information could include:

Contact details: The name and contact address of the applicant and any (other) Indigenous person(s) who is providing information, to enable contact during the period of the application.

Location of area: If the application is for an area, the location and extent of the area for protection described in words and shown on a map.

Description and location of object: If the application is for an object, a description of the object, the location of the object and the identity of any persons in possession of the object.

Traditional custodianship: Whether the application is by or on behalf of a recognised traditional custodian, if any, who has responsibilities for the area or object under Commonwealth, state or territory law; or, if there is no recognised traditional custodian, whether the applicant is a traditional custodian.

Description of activity: The proposed activity that the applicant wants the Minister to stop, when the activity is due to occur and, where known, the identity of the person proposing the activity.

Traditional laws and customs: A statement of the traditional laws and customs that apply to the area or object, including any traditions, customary laws, customs, observances, practices, knowledge and beliefs of traditional owners about the area or object, including the traditional laws and customs that explain why it is important to limit the impacts that the activity would have on the area or object.

Impact of activity: The impact of the activity, if it were to proceed, on the area or object and, as a consequence, on the maintenance of traditional laws and customs about the area or object.

Sensitive information: Whether there is information about the area or object that the applicant has not provided because providing the information would be contrary to traditional laws and customs[4].

Existing agreements: Whether the applicant is aware of any written agreements permitting the activity to occur to which Indigenous persons were parties.

Other government processes: Whether the Commonwealth, a state or territory government is carrying out or has completed any processes related to protecting the area or object.

Good faith undertaking: An undertaking by the applicant to participate in the processes for making the decision in good faith, including being contactable, being available for conferences with other parties and to take all practical measures to meet deadlines for providing additional information or comments.

If an application was received and some of the information was missing or insufficiently detailed, the applicant would be advised and given a reasonable opportunity to provide the missing information. If, after that time, the application still lacked the required information, the Minister would not be able to accept the application.

If these requirements are included in the legislation, people who are considering whether to make an application would know what evidence they would need to provide in their applications. They would also know that they would be expected to participate in the decision-making process. This would give applicants a clearer idea up front about what is required for applications to succeed.

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

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

One way to set out the requirements would be to have a standard form for applications. Having a form would reduce the time needed to process applications.

In practice, applications could be directed, in the first instance, to the department. To make this work, the Minister could delegate the application processing functions to senior officers in the Minister's department (currently the Department of the Environment, Water, Heritage and the Arts). Delegations could include directions about how the delegated power may be exercised, similar to s515 of the EPBC Act.

Section 30 of the ATSIHP Act enables applicants and other parties to seek a grant of assistance from the Attorney-General. A provision like this could be retained in the new legislation, although it would need to be made clear that, to be eligible for assistance, applicants must demonstrate that they are suffering financial hardship.

4 The applicant would be advised that parties who could be affected by the Minister's decision are entitled to view the information provided for the application.

Circumstances where applications would not proceed

The Minister would not need to accept an application that is redundant. An application could be redundant because the Minister has already accepted another application to protect the same area or object from the same activity, or has already made a decision about another application to protect the same area or object from the same activity. The Minister would need an ability to decline redundant applications automatically. This would save time from being wasted processing applications that are not needed. Similarly, the Minister would also need an ability to reject any application that is frivolous or vexatious.

Also, if other proposals in this paper are adopted, there are several situations in which the Minister would not be able to accept an application:

- The area or object is in a state or territory that has accredited laws (see proposal 3).
- A traditional custodian of the area has been recognised under native title or land rights laws but the applicant is not acting on their behalf, using their representative bodies and processes (see proposal 5).
- The activity is permitted under a registered ILUA (see proposal 6).

All of these reasons could be set out in the new legislation to make it clear to applicants and administrators why the government might not be able to accept an application.

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

The legislation could make it clear that applicants can withdraw applications at any time after they have been completed. This might occur because the parties to the application reach an agreement that makes the application unnecessary. An applicant who withdraws an application after entering into an agreement could submit it again at a later date if the agreement failed.

Proposal 10

Using conferences to consider how best to deal with the issues

The department could call a conference of the parties to plan how to handle an application. Holding one or more conferences could help to resolve issues with less delay. The conferences could resolve the matter if the parties agreed, or plan how to resolve any outstanding issues. Also, the rules for notifying and involving the parties to an application could be clarified consistent with natural justice.

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

Procedural fairness, or natural justice, means that everyone whose rights, interests or legitimate expectations are affected by a decision has a right to be consulted in making the decision. The ATSIHP Act is unclear about how people can participate in decisions that could affect them. In the past this has allowed poor decision making resulting in the Federal Court overturning several decisions. A basic improvement would be to include procedures in the legislation to ensure that the people who would be affected by a decision to protect heritage can comment on the claims in the application.

Identification of people who need to be consulted

The reformed legislation could clearly define the people who should be consulted. After accepting an application as valid, the department would take all practicable steps to identify anyone whose legal rights and interests may be affected by a decision on the application.

For **areas** this would include:

- the owners and occupiers and any other person with a legal right to carry out an activity in the area, including persons entitled to explore for minerals in the area
- Indigenous persons, other than the applicant, who have rights and interests in the area
- bodies established in accordance with a law of the Commonwealth, state or territory that are entitled to represent Indigenous persons in relation to the area
- the relevant Commonwealth, state or territory minister, or their delegates.

For **objects** this would include:

- any person or body with a legal right to possession or custody of the object or collection of objects
- Indigenous persons, other than the applicant, who have rights and interests in the object or collection of objects
- the relevant Commonwealth, state or territory minister, or their delegates.

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

Where a large number of people could be affected, notices may be published in a newspaper or another medium inviting people to register their interests. The department would provide copies of the application to these parties. When giving notice of the application to the state or territory, the Minister could ask the state or territory minister to advise about whether the activity is legally permitted under state or territory law and, if not, whether there is a process under way or imminent, to permit the activity under state or territory law.

Conferences as a way to help resolve disputes

In its current form the ATSIHP Act does little to encourage parties to resolve issues by dialogue, which is likely to be a far more effective way to come to agreements. Opportunities for parties to resolve issues or confine their disagreement to specific issues could be improved through a conference of all of the people whose interests are affected by an application.

Holding conferences before deciding what to do about an application could enable the Australian Government to implement a concerted and planned method to identify matters that are agreed and to focus on resolving problems by dialogue between the parties. It is difficult to specify timelines to cover all cases, but the parties could be required to participate in good faith and to avoid unreasonable delays.

Proposal 10 suggests that when an application is accepted the Minister or a delegate could convene one or more conferences where all of the interested parties could meet to propose how to handle the application. The conferences could be used to work out what information is already available and the best way to respond to the application. If it is not possible to resolve the matter immediately, the convenor of the conference could advise the Minister of a process to resolve the matter. This might include details such as timeframes for providing comments and the responsibilities of the parties.

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

How the conferences might work in practice

The conferences could be in person at a specified location, by telephone or other electronic media. The Minister would need to use his or her best endeavours to identify anyone whose interests would be affected by the application and give them a reasonable opportunity to attend the conferences or make representations about the matter. The applicant must also demonstrate good faith by being available to attend the conferences after being given reasonable notice.

If the applicant or the person who is proposing to carry out the activity declined to attend the conference the Minister would decide whether to protect the area or object in the application as quickly as possible using the processes outlined in proposals 12 and 13. If another person whose interests were affected was unable to attend a conference they would be entitled to a report on the conference.

In practice the Minister could delegate all of these functions to senior officers in the Minister's department or to another person nominated by the Minister. If appropriate the Minister could provide directions about how the delegated power may be exercised. The relevant senior officer would notify the parties and chair the conferences, or appoint another person to chair the conferences. If the senior officer decides that the conferences are not required, he or she would notify the Minister as well as the parties.

The principal aim of the conferences would be to find out the quickest way to resolve the issues raised by the application. The conference could be used to obtain the applicant's and other parties' views on whether it might be possible to resolve the issues raised in the application by negotiation, or by using another state, territory or Commonwealth government process. The parties would have an opportunity to propose ways to ensure the area or object in the application is protected while an agreement or decision is being made, and to develop and consider proposals for handling confidential information.

The chair would record these outcomes and prepare a plan for resolving any outstanding issues. The plan could specify timeframes for the parties to provide any further information that may be required and comment on it, and to attend any further conferences. It could also specify any requirements to protect confidential information. The chair could ask the parties to agree with the plan, which would include undertaking to meet the commitments and times identified in the plan.

The chair could report these results back to the Minister and, where necessary, provide a copy of the plan and advise the Minister on the extent to which the parties have agreed to it. The chair could also advise the Minister on the need for any requirements for interim protection to be made or to continue (see proposal 12). If the parties have agreed to deal with the application through negotiation or another state, territory or Commonwealth government process, the Minister would not need to make the final decision on whether to protect the area or object, except as a last resort if the negotiation or other process fails.

The plan could be provided to the parties. The plan could be used to influence parties to meet commitments. Parties who failed to meet the commitments to provide information and comment could be deemed to have had reasonable opportunities to provide this for the Minister's final decision on whether to make a protection order (see proposal 13). The Minister could use compliance with the plan as a basis to resolve the application. Overall, the plan could help to minimise procedural delays for all parties.

★ ***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?***

Proposal 11

Protecting sensitive information

The Minister could be given the power to direct the parties to protect culturally and commercially sensitive information. This could help to address the concerns that some people have when using the legislation, particularly the need to protect aspects of traditional knowledge from broad public disclosure.

The balance between procedural fairness and the need to protect culturally sensitive information was a key issue in the previous major review of the ATSIHP Act, the 1996 Evatt review. The Evatt review recommended that the government change the freedom of information and archive laws to limit a person's ability to access restricted information. It also recommended that the Act should reflect the principle that the government is not obliged to provide interested persons with information used to support an application. In general these recommendations go against accepted principles of fairness and transparency.

As part of applying the Act fairly the government might ask people to provide sensitive information and then share this information with other people who are affected by a decision under the Act. Sometimes this conflicts with commercial sensitivities, or with Indigenous customs that restrict a person's ability to reveal traditions to uninitiated people or to people of the other gender. The ATSIHP Act does not contain any provisions that specifically deal with sensitive information. Instead procedural fairness requires that the substance of sensitive information be provided to other people whose interests are affected. The Minister, as the decision-maker, must consider all the information relating to the application, including sensitive information.

In practice traditional customs about information have been accommodated by tribunals and courts in recent years when hearing claims of traditional land rights and native title. Using court procedures as a model, the reformed legislation could allow the Minister to issue directions about protecting information from disclosure. The Minister could be given the power to direct the parties to protect culturally and also commercially sensitive information.

Specifically, the Minister could direct that copies of information be marked appropriately to indicate that the information is confidential, used only for the purposes of the application, protected from copying, and returned to the Minister's department to be held under appropriate archival security. If the parties agree, the Minister could also direct that the information be limited to persons of specified gender or age. Before providing information the participants would be told about the limits of this method.

To further minimise the risk of disclosure, breaching the Minister's lawful directions about the use of this information could be made an offence.

If court proceedings were commenced the question of access to confidential material would be a matter for the court to determine.

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

Proposal 12

Clarifying the reasons for providing and revoking interim protection

The rules for providing and revoking emergency (interim) protection could be clarified to ensure this form of protection is readily available but used only where necessary. Currently 'emergency declarations' allow too little time and the threshold tests discourage quick decisions. Instead a new system of 'interim protection orders' could provide protection at short notice when it is required. The 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.

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

A central feature of the current legislation is that it creates powers for the government to stop activities that could impact on heritage. Under the ATSIHP Act the Minister can protect areas and objects by making 'declarations'. Declarations can prevent the harm that would otherwise occur because of a threat. They make it illegal to carry out the activity that has created the threat.

The reformed legislation could include a power like this to protect heritage in the absence of accreditation (proposal 3) or registered ILUAs (proposal 6). The word 'declaration' does not convey very much about this power, so the proposals outlined here use the words 'protection order' in place of 'declaration'. As with the current legislation, it would be an offence to breach the conditions of a protection order.

As is the case with the current legislation (s28), the new legislation could include a provision providing for the payment of just terms compensation if any protection order (including an interim order) results in an acquisition of property.

Under the ATSIHP Act the Minister or an 'authorised officer' can protect areas and objects on a temporary basis by making 'emergency declarations'. The main purpose of emergency declarations is to make sure that Indigenous heritage is not harmed while the Minister is making the decision about whether to protect the heritage in the longer term. However the Act is unclear about how emergency declarations fit into the process for making decisions about long-term protection.

Proposal 12 would make it clear that emergency protection would be provided only if there is a process under way to decide what to do in the longer term, and there is no other way to protect the heritage while the decision is being made, for example, where the proponent has not agreed to halt the activity or where an unaccredited state or territory has enabled the activity to proceed. The term 'interim protection' might be a better way to convey the sense that a final decision is pending. This form of protection would not be necessary if the person who is responsible for the activity provides a written undertaking that the activity will not proceed while the decision is being made.

Short-term protection when an application is being processed

Under the current Act an authorised officer can provide emergency protection for up to 48 hours. This power could be retained in a slightly modified form: the Secretary of the Minister's department could make one short interim protection order of up to 48 hours. The purpose of this protection would be to allow time for an applicant to complete and lodge an application, which, if proposal 9 is adopted, would need to include more detail than currently is required in an emergency.

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

Additional time would be needed to advise the Minister about the application. After the department has received the completed application the Secretary could make a separate short interim protection order of up to 96 hours to allow time to brief the Minister about the application.

★ ***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?***

Criteria for providing short-term protection

Emergency declarations are meant to provide a way to protect heritage at short notice but in its current form the Act discourages quick decisions. This is largely because emergency declarations have prerequisites that are just as stringent as long term declarations. This problem could be solved by changing the threshold test for emergency protection from 'being satisfied' to 'having reasonable grounds to believe' that a threat to heritage exists. Also, under the current Act authorised officers have to form their own opinion about what the Minister would do before they can provide emergency protection. Instead they could make this decision based on the information to hand.

To give effect to these ideas:

- Before making either the 48 hour or the 96 hour protection order, the Secretary would need to have reasonable grounds to believe that:
  (1) the activity is occurring or due to occur immediately;
  (2) there is no other law that could ensure protection in the circumstances;
  (3) the activity is likely to affect the area or object contrary to traditional laws and customs; and
  (4) the Minister has not been provided with the application and other advice to enable the Minister to decide whether to make a protection order.
- To make the 48 hour protection order, the Secretary would need to have reasonable grounds to believe that an Indigenous person is preparing an application and will submit the application within 48 hours.
- To make the 96 hour protection order the Secretary would need to have received a completed application that the Secretary believes is a valid application.
- The Secretary would be able to delegate all of these powers (as under s515 of the EPBC Act) to an officer in the department. The delegate would then exercise these powers subject to any directions of the Secretary. It is likely that the Secretary would delegate the power to make protection orders to senior executive officers only.

These changes, if adopted, would make it easier for government officers to protect an area or object for a short period of time in an emergency, while ensuring that this type of protection is provided only when it is needed.

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

Temporary protection while a final decision is being made

After accepting a valid application to protect a traditional area or object from an activity, the Minister may need to provide temporary protection to allow time to resolve the application. Under proposal 12 the Minister could make an interim protection order for up to 28 days, and then make further interim orders of up to 28 days each as required. Parties affected by interim protection orders could ask the Minister to revoke the order sooner if circumstances changed.

★ ***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?***

Criteria for providing temporary protection

The Minister would not need to make an interim protection order unless there is a need to prevent activities from proceeding that would otherwise pre-empt the Minister's final decision about protection. However the Minister may need to decide whether to make an interim protection order without the benefit of all the information that would be available for the final decision about longer term protection. Taking these factors in to account, the circumstances when the Minister could make an interim protection order could be limited to when the Minister has reasonable grounds to believe that:

(1) the activity is likely to affect the area or object contrary to traditional laws and customs

(2) there is no other means for preventing the activity from occurring before the Minister has the opportunity to make a final decision on the application.

In making this decision the Minister would also need to consider the costs and inconveniences to individuals of delaying activities. These costs can be substantial and can accumulate over the time that the activities are delayed. Parties who are suffering costs and inconvenience because of interim protection would want to minimise the delay. They are likely to place pressure on the Minister to make the final decision quickly. The parties may seek legal review of decisions about interim protection.

The Minister needs to be able to revoke each form of interim protection as soon as it is no longer required, for example if the application is withdrawn. The Minister would revoke an interim protection order when the Minister is satisfied that the order is no longer required for the purpose that it was made.

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

Consultation and notification requirements

Some applications raise complex issues and can affect large numbers of people. For example, an application that could prevent a dam being built could attract wide public interest and also could involve the evaluation of complex technical matters. It is a requirement of all Commonwealth decisions that parties who could be affected by a decision be provided with the information on which the decision will be made, including technical reports, and the opportunity to comment on it.

Before making a short interim protection order the Secretary would need to take all practical steps to contact and seek the views of:

(1) the person undertaking or proposing to undertake the activity; and

(2) the responsible state or territory minister, or their delegate.

If the Secretary makes a short interim protection order, he or she would need to inform the Minister and provide a copy of the protection order to the persons whose interests are affected, including the applicant, the person responsible for the activity, and the relevant state or territory minister, or their delegate.

Before making an interim protection order the Minister would need to take all practical steps to contact and seek the views of:

(1) the person undertaking or proposing to undertake the activity

(2) if a state or territory government is approving or about to approve the activity, the government minister responsible for approving the activity under state or territory law.

If the Minister makes an interim protection order, the Minister would need to publish the order in the *Australian Government Gazette* and to provide a copy of the protection order to the persons whose interests are affected, including the applicant, the person responsible for the activity, and the relevant state or territory minister.

★ ***Question 12.7: Would any other people need to be consulted before a protection order is made, or notified after the order is made?***

Proposal 13

Clarifying the reasons for providing and revoking longer-term protection

The rules for providing and revoking longer term protection could be clarified to strengthen the basis for the Minister's final decision. When providing long term protection, the Minister could seek independent advice about whether an activity will have an adverse impact on the use and enjoyment of a traditional area or object under traditional laws and customs. This assessment could be part of a statement of facts that also includes the likely effect of preventing the activities on individuals and the community. The Minister would make the decision based on the statement of facts. This may help to avoid disputes about the reasons for the Minister's decision. Also, there could be a clearer process for revoking protection when it is no longer needed. Currently the Minister must revoke a declaration if he or she is satisfied with state or territory protection. Instead the test could be whether the protection order is still required for the purpose for which it was made. Indigenous people could be consulted for the decision to revoke a final protection order.

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

The inflexibility of the ATSIHP Act can lead to wasted effort. For example, before the Minister can make a decision on long term protection, he must commission a report into whether to protect the area in question. This is the case even if it is clear that there is no reason to consider protecting the area under the Act, for example because the activities have occurred, or because the government has already made a decision about protection through another process.

The reformed legislation could make it clear that the Minister's final decision about making a protection order is a discretionary decision. To be consistent with the purposes of the legislation, the Minister would consider making a protection order to avoid or minimise any impact on a traditional areas or objects, but could decline to do so on the grounds that it would have unacceptable consequences for other persons and the community.

Reaching agreement about the factual basis for decisions

The ATSIHP Act does not distinguish sufficiently between the factual basis for decisions about protection and the Minister's discretion to make the decision. So that everyone can understand the factual basis for decisions, the reformed legislation could introduce a 'statement of facts' into the process when the Minister is considering the need for longer term protection. The statement of facts would need to cover:

- the assessment of whether an activity will have an adverse impact on the use and enjoyment of a traditional area or object under traditional laws and customs
- proposals to avoid or mitigate those impacts
- the likely consequences for individuals and the community of those proposals.

The Minister should be able to rely on the statement of facts for the decision and should not be obliged, as under the current law, to consider all representations personally.

The Minister could continue to have the option of nominating a person – an assessor – to provide a statement of facts for the purposes of making a decision, similar to the current process for deciding long term protection of areas under the ATSIHP Act. Alternatively, the Minister may require the department to prepare the statement of facts, for example when the parties have agreed about the facts from the outset.

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

The nominated assessor or the department could circulate drafts of the statement of facts to enable parties to comment on it. After receiving the statement of facts the Minister could release the statement of facts as a public document, excepting any information that is confidential. The Minister would do this only if he or she is satisfied that the statement of facts includes the required information (see box).

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

Statement of facts – possible content

The statement of facts could set out:

(1) the procedure by which the assessor or department produced the statement of facts, including the opportunity for the parties to comment on it

(2) the likelihood and extent to which the activity could have an impact on a traditional area or traditional object

(3) if so, whether the impact of the activity on a traditional area or traditional object, if it proceeds, would reduce or impede:

  (i) the ability of Indigenous persons to use or enjoy the area or object under their traditional laws and customs

  (ii) the ability of Indigenous persons to maintain their traditional laws and customs

(4) a summary of the traditional laws and customs about the area or object that explains the impact of the activity, including a summary of the information contained in any written assessments or other documents about Indigenous knowledge of the area

(5) whether there are practical options to avoid or minimise the likely impact

(6) possible terms of a protection order to prevent or mitigate adverse impacts of the activity on traditional areas or objects

(7) the likely effect of making a protection order in those terms on the interests of the proponent of the activity and on the cultural, social, economic and environmental welfare of the wider community

(8) any other relevant matters arising from the circumstances of the decision

(9) any part of the statement of facts that contains information that is confidential under traditional laws and customs or for commercial reasons.

Criteria for making a protection order

The Minister may make a final protection order if the statement of facts shows that:

(1) the activity, if it proceeded, would have an impact on a traditional area or traditional object

(2) as a result of that impact, the activity would reduce or impede the ability of Indigenous people to:

   a. use or enjoy the area or object under their traditional laws and customs or

   b. maintain their traditional laws and customs about the area or object.

These factors would inform the Minister about the causes, scale and nature of the impact of the decision on traditional laws and customs as practised by Indigenous people.

If the statement of facts shows that an activity would be likely to have a substantial impact in the terms set out above, the Minister would have the discretion to decide whether to make a final protection order. When deciding whether to make a final protection order the Minister also would need to consider:

(1) whether there are practical options to avoid or minimise the likely impact

(2) the likely effect of making a protection order on:

   a. the interests of the proponent of the activity

   b. the cultural, social, economic and environmental welfare of the community

(3) any other relevant matters arising from the circumstances of the decision.

The statement of facts would need to address these points.

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

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

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

Ability to revoke protection

The Minister needs to have the ability to revoke a protection order when it is no longer required. With the passage of time the Minister may conclude that revoking the order would be consistent with the purposes of the legislation and the cultural, social, economic and environmental welfare of the wider community.

The circumstances in which the Minister can revoke protection could be clarified and extended to give Indigenous people a greater role in this decision. For example the traditional custodians of the heritage might ask the Minister to revoke protection. Before revoking protection the Minister would be required to consult the traditional custodians.

To give effect to these ideas, the Minister could have the ability to revoke a final protection order if he or she is satisfied that the final protection order is no longer required for the purpose that it was made and:

(1) a recognised traditional custodian (see proposal 5) or, if there is no recognised traditional custodian, an Indigenous person has requested that the protection order be revoked

(2) the Minister has considered the advice of any relevant state or territory minister about whether the protection order should be revoked, and

(3) the Minister considers that revoking the order would be consistent with the purposes of the legislation and with any other relevant matters including the cultural, social, economic and environmental welfare of the community.

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

Content of protection orders

Like declarations for areas under the long term protection provisions under the ATSIHP Act, the Minister's final protection orders might need to operate for a specified period or indefinitely. Hence they would need to be exempt from sunsetting provisions of the Legislative Instruments Act.

As with the current legislation, protection would apply only to specific threats. The circumstances in which the protection order was put in place may change over time, for example if the activity could proceed with less impact, so it would be appropriate to build the opportunity for review into any decision to provide lasting protection.

An order for an area would need to include at least part of the area described in the application, although it could apply to a larger or smaller area. An order for an object would apply to the object described in the application. The order could prohibit activities or impose conditions on them to prevent or mitigate harm. In the case of objects the best way to avoid or mitigate a threat may be for a government agency to acquire and, in appropriate circumstances, repatriate an object.

Notification requirements and possible disallowance

The Minister would provide a copy of the order to the persons whose interests are affected, including the applicant, the person responsible for the activity, and the relevant state or territory minister, or their delegate. The Minister would need to publish notice of the final protection order in the *Australian Government Gazette* and in a newspaper circulating in the region where the area or object is located.

When revoking a protection order the Minister would need to take all practical steps to notify anyone whose interests may be affected by revoking the protection order, including any surviving Indigenous person identified in the original application whose interests may be affected, and other traditional custodians.

The Parliament could be given an opportunity to disallow a final protection order, as is the case with declarations under the ATSIHP Act. The Parliament could also have an opportunity to disallow the instrument to revoke a final protection order, which would be exempt from the sunsetting provisions of the Legislative Instruments Act. This instrument would be published in the *Australian Government Gazette* and in a newspaper circulating in the region where the area is located.

PART 3

Making sure that protection works

The new legislative arrangements would need to include provisions for monitoring and review as well as effective penalties to ensure compliance. These provisions would help to reinforce and improve the standards for effective protection by the states and territories (proposal 4).

Proposal 14

Updating the penalties and improving the enforcement powers

The Minister's decisions about protection and other proposed provisions to protect traditional areas and objects could be supported by effective legal deterrents and enforcement modelled on the EPBC Act.

Indigenous Australians want to make sure that there are strong deterrents that prevent damage to their heritage.

The ATSIHP Act creates criminal offences where a person contravenes a provision of a declaration, fails to report Indigenous remains to the Minister, or fails to return an identity card to the Minister. There have been no prosecutions under the Act, and no injunctions sought under s26. This may reflect a combination of the small number of declarations made, the ability of interested persons to monitor compliance with declarations and the high level of compliance achieved.

Prevention or repair of damage

There are currently no legal requirements to remedy damage to heritage or to compensate Indigenous Australians, who may feel it is unfair that they do not get any benefit when a government fines someone who has destroyed their heritage.

Some of the provisions of the EPBC Act offer an answer to these issues. Under proposal 14, new provisions for injunctions, remediation orders, remediation determinations and extended liability could be included in the reformed legislation, so that:

- The Minister, inspectors and other interested persons could have the ability to apply to the Federal Court for an injunction to prevent a person from acting in breach of the legislation or a protection order[5].
- The court could be able to make an order for a person who has breached the legislation or a protection order to repair the damage he or she has caused, similar to the provisions for remediation orders in the EPBC Act.
- If a person breaches the provisions of the legislation for protection orders the Minister would be able accept a written undertaking from the person to pay money for remediation to the Commonwealth or to others. The court would be able to enforce this undertaking.
- The Minister would be able to make an order for a person who has breached the civil penalty provisions of the legislation to repair the damage he or she has caused, similar to the provisions for remediation determinations in the EPBC Act.
- In some circumstances the executive officers of corporations and landholders would be accountable for offences that happen 'on their watch', in similar terms to the extended liability provisions of the EPBC Act[6].

5 The definition of 'interested persons' could be modelled on s475 of the EPBC Act. This would enable Indigenous Australians who have been engaged in the protection of the area or object to apply for an injunction.

6 These proposals are modelled on s475, ss480A–C, ss480D–N, s481, ss486DA–B and ss493–6 of the EPBC Act.

Offences and penalties

The offences in the ATSIHP Act could be brought into line with current practice under the *Criminal Code Act 1995* (Commonwealth) by including a range of offences and associated penalties that cover the degree of intent behind the criminal behaviour. The Criminal Code Act includes a range of standard defences that remove the need for the unusual defence in s24(3) of the ATSIHP Act, which has the effect of preventing a person from being fined in the situation where they did not know of the existence of a declaration. Similar to s24 of the current Act, in proceedings relating to breaches of protection orders, proof of a protection order (gazettal) would be *prima facie* evidence that the areas or objects subject to the protection order are traditional areas or traditional objects.

Under proposal 14, both criminal and civil penalties could apply to actions that:

- contravene a protection order – higher penalties would apply when the actions cause damage to areas and objects
- involve the display of secret sacred objects and Indigenous personal remains
- contravene the Minister's directions about maintaining confidentiality.

Civil penalties can deter damage to heritage arising from major projects and land development, where the fine for a criminal offence might be insufficient. Enforcement of civil penalties would be governed by similar rules to those in the EPBC Act. The Minister would be able to apply to the Federal Court for an order for a person to pay a civil penalty. In line with general policy, civil proceedings could not be completed before criminal proceedings. There might be a need to delay civil proceedings while criminal proceedings are under way.

The penalty amounts in the ATSIHP Act need to be updated and expressed in penalty units, not dollar amounts, to ensure that fines retain their deterrent and punitive value over time.

Penalties for the proposed offence of displaying Indigenous personal remains and secret sacred objects could include imprisonment, fines, adverse publicity orders and apologies. Also, these could be 'continuing' offences, so that an offender is penalised for each day that they knowingly display the object.

Inspectors and enforcement

Currently investigations are referred to the police, who have extensive powers under the *Crimes Act 1914*. The *Crimes Act 1914* sets out the enforcement powers of police officers when investigating offences like the offences under the ATSIHP Act. The police have extensive powers covering matters such as searching premises and persons for evidence. Investigators could be given additional powers, mainly to monitor compliance, similar to the provisions of the EPBC Act.

The Minister could be able to appoint inspectors to monitor compliance with the legislation, or a protection order[7]. The Minister could delegate the power to appoint inspectors to senior officers of the Minister's department. The Australian Federal Police and Customs could be given automatic access to the enforcement powers in the legislation as inspectors. The Minister could be able to make arrangements with the appropriate state or territory minister so that the police and other officials of the state or territory can be inspectors for the purposes of the legislation.

The Minister could be able to require people to produce documents when enforcing the legislation. This power could be delegated[8].

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

7 cf ss407–12A of the EPBC Act.

8 cf ss486E–J of the EPBC Act.

Proposal 15

Reviewing the effectiveness of the legislation at regular intervals

The effectiveness of the legislation could be reviewed at regular intervals, for example after seven years and then every 10 years.

Under proposal 15 the Minister could appoint a person to produce a report reviewing the effectiveness of the legislation. It may be appropriate to set the first review for seven years after the commencement date of the new arrangements to allow the Australian Government to monitor the commencement of the new national scheme of accreditation (proposal 3). Later reviews could follow at longer intervals – perhaps every 10 years.

★ ***Question 15.1: What would be the best intervals for reviewing the legislation?***

The reviews would be similar to the review of the operation of the EPBC Act (s522A) and require an independent person or body to produce a report to the Minister, and for the report to be tabled in the Parliament.

The reporter could publish a notice of the review and invite comments from Indigenous Australians, state and territory governments, business and the public. The accreditation of states and territories would be considered as part of the review. The review would give special consideration to the effectiveness of the standards and could make recommendations about improving the national scheme.

★ ***Question 15.2: What would be the best way to review the effectiveness of accreditation?***

★ ***Question 15.3: What specific aspects of accreditation would need to be reviewed?***

References

Commonwealth 2003 — *Exploring Australia's Future – impediments to increasing investment in minerals and petroleum exploration in Australia* (also known as 'the Prosser Review'), House of Representatives Standing Committee on Industry and Resources, Parliament of the Commonwealth of Australia, August 2003. Available online via www.aph.gov.au/house/committee/isr

Commonwealth 2005 — *Uniform Evidence Law* (ALRC Report 102, NSWLRC Report 112, VLRC Final Report), Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, Commonwealth of Australia, December 2005. Available online at www.austlii.edu.au/au/other/alrc/publications/reports/102

Commonwealth 2007 — *Annual Review of Regulatory Burdens on Business – Primary Sector,* Productivity Commission, Commonwealth of Australia, December 2007. Available online at www.pc.gov.au/projects/study/regulatoryburdens/primarysector

Evatt 1996 — *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, Report by the Hon Elizabeth Evatt AC, Commonwealth of Australia, August 1996. Available online at www.austlii.edu.au/au/special/rsjproject/rsjlibrary/evatt

House Hansard — House of Representatives Official Hansard, Parliament of the Commonwealth of Australia. Available online via www.aph.gov.au/hansard

Copies of Commonwealth Acts and the Australian Constitution are available online at www.comlaw.gov.au

How to have your say

We would like to hear your views on the proposals in this paper. Please use the submission form accompanying this paper, which sets out our policy on publishing submissions. Alternatively you may wish to write to one of the addresses below.

It is up to you what you put in your submission.

Your submission is more likely to have influence if you include brief recommendations about whether and how to improve the legislation, such as whether to use the proposals in this paper. To assist you we have included questions with each proposal. However we encourage you to raise any issues that are important to you to ensure the information provided to the government is as robust as possible. You are welcome to add your own proposals for reforming the legislation if you wish.

Please be sure to include your contact details, including your name, address, and web site (if any), so that we can acknowledge your submission. If you have a particular interest in this legislation it may be appropriate to include some information about yourself and your interests. Also, please indicate whether you are acting on behalf of other people or an organisation.

As explained in the submission form, we intend to publish all the submissions we receive on our website, where anyone will be able to view them, but we reserve the right not to publish a submission or any part of a submission. For example, to protect the privacy of third parties, we will not publish personal information that could be used to identify them. If you prefer we can conceal your address when we post your submission on our website. Please let us know if you want us to do this.

To have your say, please send your written submission to:

Indigenous Heritage Law Reform
Heritage Division
Department of the Environment, Water, Heritage and the Arts
GPO Box 787
CANBERRA ACT 2601

or to:

atsihpa@environment.gov.au.

The deadline for submissions is Friday, 6 November 2009.

Notes

Notes

More information

Additional information is available online at www.heritage.gov.au/indigenous/lawreform

If you need more information about making a submission please contact:

Phone: 1800 003 164

Email: atsihpa@environment.gov.au