

"Land in the State of New South Wales was traditionally owned and occupied by Aborigines. Land is of spiritual, social, cultural and economic importance to Aborigines. It is fitting to acknowledge the importance which land has for Aborigines and the need for Aborigines for land. The Government has accepted that as a result of past Government decisions the amount of land set aside for Aborigines has been progressively reduced without compensation."

fact sheet



New South Wales
Aboriginal Land Council
www.alc.org.au

Summary of key proposed changes to the Federal *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*

FACT SHEET



Culture and Heritage

This Fact Sheet provides general information about some of the changes being proposed by the Federal Government to the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act). The ATSIHP Act provides for the protection of Aboriginal and Torres Strait Islander culture and heritage. These fact sheets have been developed for Local Aboriginal Land Councils (LALCs) by the NSW Aboriginal Land Council (NSWALC).

Please Note: While all care has been taken in the preparation of this fact sheet, it is not a substitute for legal advice in individual cases. The information in this fact sheet is current as of September 2009.

What is the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*?

Currently, the Federal Minister for the Environment, Heritage and the Arts can protect an area or object under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act) if it is "of particular significance to Aborigines in accordance with Aboriginal tradition" and is under threat of injury or desecration.¹ The Minister can make a declaration outlining how the area or object is to be protected.

In practice only 7% of applications have resulted in a declaration being made. This amounts to only 24 declarations in 25 years and some of these declarations have been overturned by the Federal Court.²

The Federal Government suggests that the ATSIHP Act is "intended to be used only where state or territory laws and processes prove to be ineffective."³ According to section 4 of ATSIHP Act: "The purposes of this Act are 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 Aborigines in accordance with Aboriginal tradition."

As outlined in Fact Sheet 7, the Federal Government is proposing a number of changes to the ATSIHP Act including:

- who can apply for a declaration,
- what types of objects and areas can be protected,
- when declarations can be made,
- new offences relating to "secret sacred objects" and "personal remains",
- increased penalties for breaches of declarations.

For more information the discussion paper: *Indigenous heritage law reform* can be accessed at: <http://www.heritage.gov.au/indigenous/lawreform>

What would be protected under the new proposals?

The Federal Government proposes to introduce a new definition for objects and areas that may be protected under the ATSIHP Act. The new definition will require that:

- the object or area “*has a use or function*” or “*is the subject of a narrative*” under traditional laws and customs, AND
- “*is protected or regulated under traditional laws and customs*”.⁴

What types of protections are available under the ATSIHP Act?

Under the current system, where the Federal Minister is satisfied that the object or area is under threat of injury or desecration he or she *may* make a declaration for its protection.⁵ There is also a power for emergency declarations to be made where there is a serious and immediate threat of injury or desecration to an object or area.⁶

There is currently no prescribed time limit for emergency declarations under the ATSIHP Act.

The Federal Minister must remove a declaration where he is satisfied that a state law, such as the main law in NSW relating to culture and heritage, the *National Parks and Wildlife Act 1974*, makes ‘effective provision’ for the protection of the Aboriginal area or object.⁷

If there is an emergency threat will the Federal Minister be able to protect the object or area?

Under the proposed changes an emergency declaration will only be made where no other law *could* ensure protection and an application for longer term protection has or will be made. The Federal Government is proposing a limit of 28 days for emergency (‘interim’) applications.⁸

This will only apply in a state or territory whose laws are not accredited.

Will the Federal Minister be able to protect areas or objects for longer periods of time?

Under the proposed changes the Minister will only be able to make longer term declarations where the activity would impact on a traditional area or object, AND would reduce or impede the ability of Aboriginal people to:

- use or enjoy of the area or object under traditional laws and customs OR
- maintain their traditional laws and customs about the area or object.

Who will be able to apply for protection?

Any Aboriginal or Torres Strait Islander person can currently apply to the Federal Minister for a declaration for the protection of a significant area or object.⁹

The Federal Government is proposing to limit who can apply for protection to “legally recognised traditional custodians”.¹⁰ It is unclear whether this would include LALCs and native claimants that are yet to have their rights legally recognised.

The discussion paper states that “*Where there are no Indigenous people who clearly have a statutory responsibility for the land...any Indigenous person could apply for protection.*”

What would accreditation mean?

The Federal Government is proposing a new system of accreditation for state and territory legislation. Where the Federal Minister accepts that a state has ‘effective’ laws to protect cultural heritage the state could receive accreditation. This would mean that any application for protection at a Federal level will be returned back to the State. The State will then only be required to *consider* any information or representations made by the Federal Minister.¹¹

It would limit the current powers of the Federal Minister so that he or she could *not* override the decisions made by a state or territory whose laws had been accredited.

These laws and proposed changes are not designed to allow Aboriginal people to make final decisions regarding their cultural heritage. The final decision would be made by the relevant government department, agency or Minister.

How would a state or territory become accredited?

In order for state or territory laws to become 'accredited' the laws would need to meet certain standards set by the Federal Government. It is proposed that the standards would:

1. Provide *comprehensive* protection of all "traditional areas and objects".
2. Ensure that a person who acts in accordance with an approval to impact upon a traditional area or object is not liable for prosecution.
3. Avoid or minimise adverse impacts on a traditional area or object.
4. Require the state or territory to consider any representations made by the Federal Minister.
5. Require reporting of Aboriginal remains.
6. Promote compliance with the laws through significant penalties.
7. Require consultation with "traditional custodians".
8. Promote settlement through agreement between traditional custodians and proponents, and require mediation where an agreement is not possible.
9. Provide for an assessment of the impact to be made by someone independent from the decision maker.
10. Require the state or territory to maintain and make some records available in relation to the location of areas and objects and any approvals given.
11. Provide for the protection of sensitive information.
12. Provide for a legal review by a court or tribunal.¹²

It is unclear whether the *National Parks and Wildlife Act 1974* would meet these standards and NSW would receive accreditation under the proposed changes.

How would Indigenous Land Use Agreements (ILUAs) affect protection of cultural heritage?

Native Title groups can negotiate Indigenous Land Use Agreements (ILUAs) with groups such as governments or commercial parties. This proposal would introduce new legislative arrangements that would mean that if an activity is permitted under a registered ILUA then the Federal Minister could not prevent that activity from occurring even if he or she received an application to protect cultural heritage in the area.¹³

This means that if this proposal is adopted in its current form LALCs would not be able to apply to protect "traditional areas and objects" from an activity if the activity is allowed under a registered ILUA.

If the new proposals are adopted, how would I apply to the Commonwealth to protect cultural heritage?

As outlined above, if the laws in NSW were not accredited, legally recognised traditional custodians or their representative bodies, would be eligible to apply to the Federal Minister to protect an area or object.

Applications for protection would need to be detailed and meet certain criteria before being accepted by the Federal Minister.

Under these proposals the Federal Minister would *not* accept applications to protect cultural heritage if:

- A state or territory law is accredited;
- A traditional custodian of the area has been recognised under native title or land rights laws but the applicant is not applying on their behalf; or
- The activity is permitted under a registered ILUA.¹⁴

Would there be opportunities to have meetings with the Federal Government before decisions are made?

The Federal Government have outlined proposals to encourage meetings and negotiations before decisions are made about whether to protect “traditional areas and objects”. For applications made to the Federal Government, it is proposed that DEWHA could hold conferences between the relevant parties to help the Government decide whether or not to protect cultural heritage.¹⁵

Relevant parties would be defined by the Government and would set out who *would should be consulted* by DEWHA before they make a decision about an application.

Would “secret sacred” objects be protected?

Currently under the ATSIHP Act, secret sacred objects may only be protected in some circumstances, such as when an Aboriginal and/or Torres Strait Islander person makes a specific application to the Federal Minister and a declaration has been made.

The new proposals would create a new offence to display “secret sacred objects” and “personal remains” in a public place. However, it is proposed that there would be circumstances where displaying this material would be allowed, such as if the display was made by Aboriginal and/or Torres Strait Islander people in accordance with traditional laws and customs, if the remains were voluntarily donated under Commonwealth, state or territory laws or possibly if the object was imported into Australia for exhibition by a public museum or gallery.¹⁶

What about protecting cultural information?

In applications made to the Federal Government, the Federal Minister could decide to protect both culturally and commercially sensitive information. However, this information could still be disclosed if protecting this information is not balanced by the need for transparency and procedural fairness in the view of the Government. Also, this matter could be decided by the courts if it was disputed.¹⁷

What offences and penalties currently exist under the Act?

Declarations made by the Federal Minister are legally enforceable.

If a person is found guilty of breaching a declaration in relation to a significant area they may be fined up to \$10,000, imprisoned for 5 years or both. For a corporation the fine is up to \$50,000. If a person is found guilty of breaching a declaration in relation to a significant object they may be fined up to \$5,000, imprisoned for 2 years or both. For a corporation the fine is up to \$25,000.¹⁸

No person or corporation has ever been prosecuted under the ATSIHP Act.¹⁹

What new penalties and enforcement measures are being proposed?

The Federal Government proposes to introduce higher penalties for breaching a protection order and remediation or compensation orders for people or companies who have damaged or destroyed areas or objects protected under the ATSIHP Act.²⁰

This proposal also suggests that investigators could be given additional powers, such as searching persons or premises for evidence, to monitor compliance with the laws.

Where can I get more information about the proposed changes?

For more information about the *Federal Indigenous Heritage Law Reforms* visit the DEWHA website at www.heritage.gov.au/indigenous/lawreform, contact DEWHA at the details below, refer to NSWALC Culture and Heritage Fact Sheets, or attend a DEWHA Information Session in NSW in September.

Can I have a say about the *Indigenous Heritage Law Reforms*?

Yes. DEWHA has invited submissions from the community on the proposals outlined in the Discussion Paper.

The closing date for written submissions is **Friday 6 November 2009**.

Comments can be emailed to atsihpa@environment.gov.au or posted to:

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

Ph: 1800 003 164

Submissions should include your name, address, contact phone numbers and email address. DEWHA have indicated that all submissions they receive will be published on their website unless you indicate otherwise.

Local Aboriginal Land Councils wanting to discuss the changes and the NSW Aboriginal Land Council's response should contact their local Zone Office or the Land, Policy and Research Unit on Tel: (02) 9689 4444.

(Footnotes)

- ¹ See sections 3, 11 & 12 of the ATSIHP Act.
- ² See page 4 of the Discussion Paper: 'Indigenous heritage law reform'.
- ³ Department of Environment and Heritage, 'The Aboriginal and Torres Strait Islander Heritage Protection Act 1984: Guide to purposes, applications and decision-making'.
- ⁴ See proposal 2 of the Discussion Paper: 'Indigenous heritage law reform'.
- ⁵ See sections 10 & 12 of the ATSIHP Act.
- ⁶ See sections 9 & 18 of the ATSIHP Act.
- ⁷ See section 13(5) of the ATSIHP Act.
- ⁸ See proposal 12 of the Discussion Paper: 'Indigenous heritage law reform'.
- ⁹ See sections 9 & 10 of the ATSIHP Act.
- ¹⁰ See proposal 5 of the Discussion Paper: 'Indigenous heritage law reform'.
- ¹¹ See proposal 3 of the Discussion Paper: 'Indigenous heritage law reform'.
- ¹² See proposal 4 of the Discussion Paper: 'Indigenous heritage law reform'.
- ¹³ See proposal 6 of the Discussion Paper: 'Indigenous heritage law reform'.
- ¹⁴ See proposal 9 of the Discussion Paper: 'Indigenous heritage law reform'.
- ¹⁵ See proposal 10 of the Discussion Paper: 'Indigenous heritage law reform'.
- ¹⁶ See proposal 8 of the Discussion Paper: 'Indigenous heritage law reform'.
- ¹⁷ See proposal 11 of the Discussion Paper: 'Indigenous heritage law reform'.
- ¹⁸ See section 22 of the ATSIHP Act.
- ¹⁹ See page 46 of the Discussion Paper: 'Indigenous heritage law reform'.
- ²⁰ See proposal 14 of the Discussion Paper: 'Indigenous heritage law reform'.