

Australian Institute of Aboriginal and Torres Strait  
Islander Studies

Submission to the Department of Environment,  
Heritage, Water and the Arts - Indigenous Heritage  
Law Reform

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

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November 2009

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

04 November 2009

**Re: Indigenous Heritage Reform**

Please find attached a submission to the Indigenous Heritage Law Reform proposals on behalf of the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS).

AIATSIS welcomes the opportunity to provide background information to the Department in its work to reform the heritage protection regime. The information contained in this submission reflects the research interests of a number of staff members and program areas located at AIATSIS. The submission is limited to addressing those proposals that appeal to the expertise of AIATSIS staff, however also includes some more general comments and suggestions.

Thank you for the opportunity to provide input to this inquiry. If you would like further information on this submission, please contact Dr Lisa Strelein, AIATSIS Director of Research, on 6246 1155 or [lisa.strelein@aiatsis.gov.au](mailto:lisa.strelein@aiatsis.gov.au).

Yours Sincerely

Lisa Strelein

## **Overview**

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) was established in 1964, under Commonwealth legislation. Over the last 45 years AIATSIS has established itself as Australia's premier Indigenous research institute. The Institute manages world class collections of cultural and research material, houses the Aboriginal Studies Press and engages in numerous partnerships with research and government institutions and Indigenous communities.

AIATSIS supports the Department of Environment, Water, Heritage and the Arts in its move to review Indigenous heritage laws. AIATSIS notes that many of the recommendations from the 1996 Evatt Review of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (ATSIHP Act)* were not implemented and that there is a need for further evaluation and reform of the current Indigenous heritage protection regime.

Despite agreement by the Commonwealth to provide for Indigenous heritage protection following the *Mabo* decision,<sup>1</sup> this has not been followed through successfully.<sup>2</sup> The major concerns of AIATSIS, as identified in the discussion paper, include the interplay between the Commonwealth and State/Territory regimes; the relationship between the heritage protection system and the native title system; and the effective implementation of the legislation. A number of other comments and suggestions are also offered.

AIATSIS believes that through reform of the *ATSIHP Act*, heritage protection procedures can be simplified, greater protection can be afforded to areas and objects of significance to Indigenous people, and the work burden on government can be minimised. There is a need for last resort heritage protection legislation, however the structure and implementation of the current *ATSHIP* legislation is problematic and can be disempowering for the people whose heritage it seeks to protect.

Along with general comments, this submission will address the following proposals:

- Proposal 1 – Purposes of the legislation
- Proposal 2 – Terminology – new definitions
- Proposal 5 – Traditional custodians
- Proposal 6 – ILUAs
- Proposal 14 – Penalties and enforcement

## **Proposal 1 – Purposes of the legislation**

AIATSIS supports these purposes given that they are based on the principles of self determination and empower Indigenous people to effectively practise and revitalize their cultural traditions and customs by maintaining, protecting and developing manifestations of their culture. The preamble to the legislation should make reference to these principles and their recognition under International law and Australia's

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<sup>1</sup> See 'Aboriginal Peace Plan' presented to Prime Minister Keating on 27 April 1993.

<sup>2</sup> Russell Goldflam, 'Noble Salvage: Aboriginal Heritage Protection and the Evatt Review'[1997] *Aboriginal Law Bulletin* 1.

obligation to provide mechanisms for protection and enjoyment of such rights and redress for their infringement. (eg Article 11 *United Nations Declaration on the Rights of Indigenous Peoples*). If there is no preamble to the Act then the purposes should include reference to fulfilling Australia's international obligations in this regard.

The preamble or purposes should also include reference to the importance of Indigenous cultural heritage to the heritage of the Australian state as a whole. Indigenous peoples' heritage is the most unique aspect of the heritage of the nation and should be considered of significance nationally and internationally.

### **Proposal 2 – Terminology – new definitions**

In its present form this proposal is problematic. The major concerns with this proposal include:

1. Negative implications associated with the use of the *Evidence Act* definition of 'traditional' due to its similarity with the *Native Title Act 1993* (NTA) definition of 'traditional' including:
  - A lengthy enquiry into what constitutes 'tradition'
  - Greater likelihood of undue prejudice by the Minister in considering an application where there has previously been a finding in the native title system against continuity of traditional laws and customs
2. Inconsistencies with the purposes of the *ATSIHP Act* through limiting heritage protection exclusively to applicants that can satisfy this high threshold test.

Utilising a definition very closely related to that which is used in determining native title, is problematic. Employing the concept of 'traditional laws and customs' as defined under the *Evidence Act* will extend the enquiry into what constitutes a relevant interest in protecting an area or object under the *ATSIHP Act*. This is likely to delay resolution of applications. The *Evidence Act* definition might be utilised in cases where a native title party is demonstrating connection pursuant to s 223 of the *Native Title Act*. Evidence of traditional laws and customs might be adduced pursuant to exceptions to the hearsay or opinion rules under the *Evidence Act*. The *Evidence Act* provisions relating to traditional law and custom are therefore integral to the hearing of native title cases.

The jurisprudence associated with the meaning of 'traditional' is complex as demonstrated by lengthy judicial reasoning in many native title cases.<sup>3</sup> Native title cases have been unsuccessful based on findings that native title applicants no longer exercise their claimed rights and interests under traditional laws acknowledged or customs observed by the normative society.<sup>4</sup> Under native title law, 'traditional' is not defined according to its ordinary meaning. Rather, it is invested with additional layers of meaning, including in relation to the age of the traditions, having their

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<sup>3</sup> See *Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR 244 where the concept of 'tradition' was considered in detail. This case has precipitated substantial judicial consideration. See generally Lisa Strelein, *Compromised Jurisprudence: native title cases since Mabo* (second edition) Aboriginal Studies Press 2009).

<sup>4</sup> As required under *Native Title Act 1993* (Cth) s 223. See for e.g. *Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR 244, *Risk v Northern Territory* (2007) 240 ALR 75

source in a pre-sovereign normative system. Native title law requires evidence to be adduced to demonstrate the link between contemporary expressions of Indigenous law and custom and the ‘traditional’ laws and customs of the group. In addition, the federal court has required that evidence be adduced to show that such traditional laws and customs have been handed down from generation to generation, substantially uninterrupted, including evidence that those laws and customs were exercised by each successive generation.<sup>5</sup> The requirements of proof of traditional laws and customs are incredibly onerous.

While the *Evidence Act* definition does not carry the same additional terms as section 223 of the NTA, in particular the requirement of current, and therefore continuous, observance and acknowledgement, the onerous nature of the proof of traditional law and custom at the time sovereignty was acquired by the Crown is sufficiently onerous to warrant caution in adopting it into the heritage framework.

To require heritage applicants to meet similar criteria as native title applicants is inconsistent with the purposes of the *ATSIHP Act* and is likely to result in less successful applications and declarations by the Minister. Although heritage and native title are separate legal processes, a similar test about traditional laws and customs would inevitably lead the Minister, in considering an application, to have regard to the judicial reasoning, not only in relation to the interpretation of the terms, but also in relation to any outcomes of a particular native title case. This could have a prejudicial effect. In circumstances where unsuccessful native title applicants apply for heritage protection over an object or site under the *ATSIHP Act*, the Minister may give inappropriate weight to the assessment made in the native title context.

If the systems of heritage protection and native title are to be closely aligned it is imperative that inappropriate presumptions are guarded against, for example, in cases where the boundary of a native title area is determined to be different to that which was initially claimed by the native title holders or does not include all of the traditional territories of the group. For a variety of reasons a group may reach agreement with the state or other parties or have a court determine that native title does not exist in a particular area but nevertheless maintain that their traditional law and custom continues to operate and underpin rights and interests in the area. Native title is merely a recognition concept under non-Indigenous law and does not fully reflect the operation of Indigenous law and custom. This is perhaps most clearly illustrated in cases of extinguishment but also arises in relation to other aspects of the native title system. In these circumstances the Registered Native Title Body Corporate (RNTBC), on behalf of the traditional owners, might prepare an application under the *ATSIHP Act* to gain protection of sites or objects that fall outside the native title boundary, but are still considered to be ‘significant’ and over which they claim the right to speak. It is imperative that the legislation ensures that the Minister does not refuse to make a declaration for heritage protection simply because it had been determined that native title did not exist

The proposal to define ‘significance’ by reference to traditional law and custom would also prevent applications for heritage protection of sites that are *known* to be significant to Indigenous people, but the traditional laws and customs that gave rise to

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<sup>5</sup> *Bennell v State of Western Australia* (2006) 153 FCR 120.

this significance are unidentifiable due to loss of specific knowledge or changes in law and custom. Sites and objects might be known to be significant by virtue of inter-generational knowledge transmission and it should not be assumed that claims are irrelevant or unfounded because the connection to a particular law or custom cannot be made out.<sup>6</sup>

In addition, the reliance on traditional law and custom to determine significance would not necessarily allow for protection of sites of cultural significance because of their social or economic importance to the history and heritage of the group. For example, a group who wish to pass on information about their culture and traditions by reference to domestic sites, such as middens or stone tool scatters or trees scarred by cutting bark canoes would currently be within the ambit of the heritage framework, but those areas or objects may not have sufficient connection to a law or custom with normative content. In this context, rules of statutory construction are important. While the *Evidence Act* definition of traditional laws and customs includes ‘practices’ the scope of the term would likely be limited by the normative context implied by the composite term ‘law and custom’.<sup>7</sup>

Such an outcome exacerbates the limitations on protection afforded by native title that have been recognised by all parties to the process and have prompted calls for reform to the requirements and burden of proof.<sup>8</sup> In particular, it further disadvantages those Indigenous groups who are most affected by colonisation and dispossession and who rely exclusively on heritage legislation to protect areas of significance. Being last resort legislation, the *ATSIHP Act* should not set the threshold this high. Heritage protection under the *ATSIHP Act* provides a final avenue for safeguarding significant sites or objects. The *ATSIHP Act* is therefore a critical tool for Indigenous groups to maintain their cultural heritage, and protection should be made as accessible as possible. In particular, the heritage regime should seek to augment the native title regime and provide protection in circumstances where native title fails to do so. Requiring heritage applicants to demonstrate a similar threshold to native title is likely to limit the success of heritage applications particularly where there has been an unsuccessful native title claim in the past. It is critical to remember that the motivations behind native title applications are distinct from the motivations behind heritage protection applications. Heritage and native title are distinct systems with distinct processes.

For the Minister to make an objective decision about a heritage application the provision would need to specify that previous decisions about whether native title does or does not exist in an area, and previous evidence supporting such a finding, should be disregarded as irrelevant considerations. In this case applicants would have recourse under the *Administrative Decision (Judicial Review) Act 1977* where their application is unsuccessful and they feel that the basis of the decision was unduly prejudiced by earlier evidence.

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<sup>6</sup> compare the increasingly onerous tests in relation to ‘connection’ under s223(1)(b) of the NTA

<sup>7</sup> There appears to be no requirement in Australian law to provide a beneficial interpretation that would favour the recognition or protection of Indigenous rights: see *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232 and Lisa Strelein, ‘A captive of statute’ in Australian Law Reform Commission, ‘Native Title’ (2009) *Reform* 93.

<sup>8</sup> Australian Law Reform Commission, ‘Native Title’ (2009) *Reform* 93.

## **Proposal 5 – Traditional custodians**

AIATSIS supports this proposal as defined. Where native title holders have been determined, they should be recognised as the traditional custodians of the land and should be permitted to apply for heritage protection to the exclusion of others. Where recognition of traditional owners to an area has been established under the NTA the native title holders, or their representative in the form of the Registered Native Title Body Corporate (RNTBC), may apply for heritage protection. The RNTBC for the native title group should be the primary contact for matters concerning heritage protection. This should be provided for in the legislative framework. Where recognition of native title holders conflicts with other status under state land rights regimes, the NTA framework should prevail.

Complexities arise, however, when native title holders are not yet recognised, or a claim is being contested. Determining who the native title holders of an area are, can be a prolonged process. There are some 448 active native title applications waiting to be determined and only 128 successful native title determinations since 1992 (both exclusive and non exclusive). To address this, the definition of traditional custodianship for the purposes of this provision should extend to registered claimants. These groups may or may not have an incorporated body.

It should be noted that in some circumstances non-native title holders might possess knowledge about an area or site and that the native title group may consult with other parties or appoint an agent to determine the significance of a site or object. If a RNTBC fails to, or chooses not to make an application for protection, the Native Title Representative Body or service provider (NTRB) for the region or a person with knowledge and standing should be able to make an application. NTRBs have a role in providing advice and representation to native title holders and may have resources and infrastructure that the RNTBC does not possess.

Consideration must also be given to circumstances where there has been a native title claim in the past but it has subsequently been dismissed or withdrawn. In such circumstances there will not be a PBC established. Under Queensland legislation, when this situation arises the last authorised applicants of the registered claim hold the cultural heritage rights until another claim is registered.<sup>9</sup> A provision to this effect could be integrated into the new *ATSHP Act*.

The foremost priority for the heritage protection regime should be protection of the site or object of significance to an Indigenous group regardless of whether that group has been formally recognised by some legal mechanism of the State. Adherence to a precautionary principle, similar to that established under environmental law, should apply. Section 3 of the *Intergovernmental Agreement on the Environment* states:

In the application of the precautionary principle, public and private decisions should be guided by:

- (i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and

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<sup>9</sup> *Aboriginal Cultural Heritage Act 2003* (Cth) s 35-36.

(ii) an assessment of the risk-weighted options of the various options.

This principle should guide the decision of the Minister and, when an application is received under the *ATSIHP* Act. As a result, AIATSIS considers it necessary that where there is no legal recognition or traditional custodians other options for Indigenous people to apply for protection should be available.

For example, in circumstances where there is not currently, or has never been, a native title claim, recent reforms to Queensland heritage legislation are useful to consider as a model. Under Queensland legislation where there is no native title party, the applicant must be an Aboriginal or Torres Strait Islander person with particular knowledge of the traditions, customs and beliefs associated with the area or object, and who either has responsibility under Indigenous tradition for some or all of the area or is the member of the family or clan that has this responsibility.<sup>10</sup> This approach is consistent with the long established precedent from the 1981 case of *Onus v Alcoa*.<sup>11</sup>

### **Proposal 6 - ILUAs**

Overall this is a useful proposal as it is consistent with the purposes of the *ATSIHP* Act and the NTA. However, there are risks in allowing a private contractual agreement to override a statutory heritage protection regime.

As it stands, the proposed reform would deliver certainty to native title parties and prospective developers, mining companies and other parties, that any negotiated outcome under an ILUA is definitive and that an outside interest that could compromise an agreement will not present itself after an ILUA is registered. ILUAs have onerous authorisation, notice and objection provisions that must be met prior to registration of the Agreement with the National Native Title Tribunal

However, negotiations would need to foresee any future implications that might arise in relation to the act with respect to heritage matters and ensure that these matters are dealt with under an ILUA. It should be clear under the ILUA provisions of the NTA that, where an ILUA is entered into, the agreement covers all heritage matters in relation to each act (similar to the guarantees in relation to compensation). This would place the onus on the parties to the ILUA to ensure that they anticipate heritage implications or provide for an alternative heritage protocol. An alternative would be to require an ILUA to expressly provide for heritage in the terms of the ILUA before the operation of the *ATSIHP* Act becomes inapplicable/unenforceable.

An alternative perspective may suggest even greater caution about excluding the operation of heritage legislation in this way. The proposal places the responsibility for monitoring and compliance on the parties, in particular the Indigenous party, who do not have the powers of enforcement and punishment of the Crown. Relegating national heritage to a private contractual relationship may be inconsistent with the

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<sup>10</sup> *Aboriginal Cultural Heritage Act 2003* (Cth) s35(7).

<sup>11</sup> *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, 6.



purposes of the national heritage protection framework and is reliant on the under-funded native title sector for protection.

One option may be to incorporate a last resort provision for an aggrieved party to invoke where they feel that their interests should be considered as a matter of natural justice, and include, for example, a 'show cause' provision to the effect that the applicant must, within a set period of time, demonstrate why their application should prevail over the terms of the ILUA.

## **Other Comments**

### **Mediation and Indigenous dispute resolution management**

In matters of heritage protection, it is likely that disputes will arise in relation to:

1. The significance of an area or site; and
2. Ownership boundaries/right people for country

AIATSIS advocates for the use of mediation in Indigenous heritage matters and notes that Evatt, in her 1996 review, suggested that the *ATSHIP* Act 'should provide for a specific voluntary mediation procedure which is offered to parties before reporting procedure leading to declaration is considered'.<sup>12</sup> Work completed by AIATSIS researcher Toni Bauman and others on the Indigenous Facilitation and Mediation Project (IFaMP) has reiterated the need for Indigenous decision making and dispute management process on all levels.<sup>13</sup> Most recently the report by Ms Bauman and Juanita Pope to the National Alternative Dispute Resolution Advisory Council titled '*Solid work you mob are doing*'<sup>14</sup> explains that 'Indigenous perspectives on conflict management often differ markedly from mainstream understandings of 'dispute resolution'.<sup>15</sup>

The Executive Summary of the report points out that:

Effective processes are crucial not only for disputes among Indigenous people, but also for disputes involving non-Indigenous parties and in broader areas of Indigenous engagement, including whole-of community approaches and agreement-making.<sup>16</sup>

Cultural heritage protection and repatriation of cultural material are explicitly mentioned as key areas of relevance to the findings of the report, noting that service

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<sup>12</sup> Elizabeth Evatt (1996) *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, p. xvii.

<sup>13</sup> See generally Toni Bauman, 'Final report on the Indigenous Facilitation and Mediation Project July 2003 - June 2006: research findings, recommendations and implementation' 2006 Report Number 6, AIATSIS.

<sup>14</sup> Bauman, T and Pope, J (eds) 2009 '*Solid Work you mob are doing*'. Report to the National Alternative Dispute Resolution Advisory Council by the Federal Court of Australia's Indigenous Dispute Resolution and Conflict Management Case Study Project.

<sup>15</sup> Ibid, p. xiii

<sup>16</sup> Ibid, p. xv (point 6).

delivery, policy development and evaluation takes place at a State and Territory level.<sup>17</sup>

A mechanism for alternative dispute resolution should be integrated in the legislation to provide for resolution of complaints arising from heritage protection procedures. Proposal 10 deals with conferences, however dispute resolution through other means such as mediation should also be considered.

### **Consultation with Indigenous people**

Consultation with Indigenous people at all stages of the reform process is critical. When questioned at an information session by DEHWA about the process through which the reform proposals were developed, a senior departmental officer confirmed that there had been limited and ‘informal’ consultation with Indigenous people. It was also suggested that this approach was preferred so that firm proposals could then be commented on rather than developing the proposals in consultation with stakeholders and interested parties. Consultation is important in ensuring consistency with the *United Nations Declaration on the Rights of Indigenous People*, which the Australian Government has formally supported. Articles 18 and 19 particular pertinent to development of policy affecting Indigenous people:

#### **Article 18**

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

#### **Article 19**

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

It is well established that engagement with Indigenous people is central to policy development, particularly where it affects Indigenous interests and rights. Targeted engagement with a range of interested Indigenous parties should be carried out before the reforms are implemented into a legislative regime and formally enacted.

### **Amending section 14(2)(b)**

As it stands s 14(2)(b) refers to the ‘Australian Institute of Aboriginal Studies’. This name should be amended to read the ‘Australian Institute of Aboriginal and Torres Strait Islander Studies’.

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<sup>17</sup> Ibid, p. xv (point 7) and p. xvi (point 12)