



fact sheet

ABORIGINAL CULTURE AND HERITAGE



New South Wales
Aboriginal Land Council

Federal Government Protection of Aboriginal culture and heritage

9

This Fact Sheet provides general information about the Federal laws that can be used to protect Aboriginal culture and heritage, in particular, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (**ATSIHP Act**).

This is one of a series of Fact Sheets which have been developed for Local Aboriginal Land Councils (**LALCs**) and the Aboriginal community by the NSW Aboriginal Land Council (**NSWALC**). Copies of the Fact Sheets are available from www.alc.org.au or by calling the NSWALC Resource Centre on 02 9689 4444.

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. This Fact Sheet is current as of 20 January 2011.

How is Aboriginal heritage protected by the Federal Government?

While the State Government has the main responsibility for Aboriginal culture and heritage in NSW, the Federal Government also has some powers to protect Aboriginal culture and heritage. The main Federal law is called the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (**ATSIHP Act**).ⁱ

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.”ⁱⁱ

The ATSIHP Act itself states that: “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 Aboriginals in accordance with Aboriginal tradition.”ⁱⁱⁱ

In practice only 7% of applications made to the Federal Government to protect sites have resulted in a declaration being made. This equates to just 24 declarations in 25 years.^{iv} Some of the declarations made by the Federal Minister have been overturned by the Federal Court.

How does the current ATSIHP Act protect Aboriginal cultural heritage?

The ATSIHP Act gives the Federal Minister with responsible for the Act, currently the Minister for Sustainability, Environment, Water, Population and Communities (SEWPC) the power to make declarations for the protection of Aboriginal objects and areas.

Any Aboriginal or Torres Strait Islander person or their representative can apply to the Minister for the protection of an object or area of “particular significance to Aboriginals in accordance with Aboriginal tradition”.

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.

Are there any Federal protections for areas and objects under immediate threat?

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.^v

Aboriginal and Torres Strait Islander peoples can request that the Federal Minister make an emergency declaration protecting areas and objects that are under ‘serious and immediate threat of injury or desecration, or being used in a manner inconsistent with Aboriginal tradition’.^{vi}

The declaration has effect for up to 30 days, but the Minister can extend it for a further 30 days.

Other laws to protect culture and heritage at the Federal level

Whilst the ATSHIP Act is the main law for protecting Indigenous culture and heritage at a federal level, the following laws may also provide some protections:

SITE PROTECTION

January 2011

- **Native Title Act 1993** (Cth), which provides certain rights to Aboriginal people who are registered native title claimants, and a range of rights if a native title claim is successful.
- **Environmental Protection and Biodiversity Act 1999** (Cth), which establishes the National Heritage List for places that are of 'outstanding' heritage value to the nation and the Commonwealth Heritage List for lands and waters of significance. However, few Aboriginal sites are recognised.

Law reforms proposed by the Federal Government

The last comprehensive review of the ATSIHP Act took place in 1996. This Review recognised that the Act was failing to protect cultural heritage and recommended major changes^{vii}. However, none of the Review's recommendations have been implemented.

In August 2009, the Australian Government decided to undertake another review of the ATSIHP Act, acknowledging again that: "The ATSIHP Act has not proven to be an effective means of protecting traditional areas and objects".^{viii}

A discussion paper was released that made a number of proposals, including to introduce of minimum standards, and an accreditation scheme for State and Territory laws.

Recommendations by NSWALC to the 2009 Review of the ATSIHP Act

The Review received over 70 submissions nationwide, including from Aboriginal communities, State and Territory Governments, heritage consultants, mining companies and property developers.

NSWALC prepared a comprehensive submission, *Respect and Protect*^{ix} addressing the issues raised in the Federal Governments' discussion paper.

NSWALC's key recommendations were:

- That any reforms must not erode the current protections available under the ATSIHP Act;
- That any standards for the 'accreditation' of State culture and heritage regimes must be based on best practice international standards, and the *UN Declaration on the Rights of Indigenous Peoples*;
- That appeal processes should be maintained and strengthened;
- That Aboriginal communities must have the right to be the key decision makers when it comes to Aboriginal culture and heritage; and

- Aboriginal concepts of Aboriginal culture and heritage must be recognised and respected.

For more information about NSWALC's submission visit www.alc.org.au.

Australian Government response to submissions

In June 2010, the Australian Government held a round of meetings to clarify issues that had been raised in the submissions that had been received. However to date, the Government has not made a formal response public. In addition, no indication has been given as to the next step the Federal law reform process may take.

PLEASE NOTE: The Federal *Environmental Protection and Biodiversity Act 1999* was reviewed in 2009, which also made recommendations in relation to Indigenous heritage. The Review notes that:

"The outcomes of the proposed reforms to the Commonwealth Indigenous heritage protection laws should be considered in tandem with the outcomes of this Review, and its recommendation for the ATSIHP Act to be incorporated into the Australian Environment Act."^x

Where can I get more information?

Visit the 'Culture and Heritage' pages of the NSWALC website at www.alc.org.au or contact the NSWALC Policy and Research Unit on 02 9689 4444.

ⁱ A current version of the *ATSIHP Act* can be accessed at: http://www.austlii.edu.au/au/legis/cth/consol_act/aatsihpa1984549

ⁱⁱ Department of Environment and Heritage, 'The Aboriginal and Torres Strait Islander Heritage Protection Act 1984: Guide to purposes, applications and decision-making'.

ⁱⁱⁱ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*; s4

^{iv} See page 4 of the Discussion Paper: '*Indigenous heritage law reform*'

^v See sections 9 & 18 of the ATSIHP Act.

^{vi} ATSIHP Act, s 9.

^{vii} Justice Elizabeth Evatt's 1996 Review of the ATSIHP Act outlines a range of reasons why the Act is considered ineffective, including its lack of detail, lack of Aboriginal involvement and lack of respect for Aboriginal customs. A summary of the Evatt Review can be accessed at: <http://www.austlii.edu.au/au/journals/AILR/1997/38.html>

^{viii} See page 4 of the Discussion Paper: '*Indigenous heritage law reform*'

^{ix} NSWALC's submission *Respect and Protect* is available online at <http://www.alc.org.au/issues/cmwth-heritage-law-reforms.aspx>

^x See p.294, Report of the Independent Review of the Environment Protection and Biodiversity Act 1999, October 2009, Dr Alan Hawke, available at www.environment.gov.au/epbc/review/publications/final-report.html