australian network of environmental defender's offices

Submission on the Aboriginal and Torres Strait Islander Heritage Protection Act 1984

November 2009

The Australian Network of Environmental Defender's Offices (ANEDO) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

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Executive Summary

The Australian Network of Environmental Defender's Offices Inc (ANEDO) is a network of nine community legal centres in each state and territory, specialising in public interest environmental law and policy. ANEDO welcomes the opportunity to provide comment on the proposed reforms to the Commonwealth legislative arrangements for protecting traditional areas and objects under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act).

ANEDO has an extensive history of engagement with Aboriginal and Torres Strait Islander (Indigenous) peoples in Australia in relation to cultural heritage issues. Various EDO offices have provided legal advice, policy support and represented Indigenous clients in cases before the courts.[1] From these interactions and from ANEDO's own research and experience, we submit that the existing Commonwealth legislative arrangements for the protection of Indigenous cultural heritage are failing to achieve the objects of the ATSIHP Act, which include the 'preservation and protection from injury or desecration of areas and objects in Australia...being areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition.'[2] Indeed the Act has not been amended since it commenced operation in 1984 even despite the recommendations made by the Evatt Review in 1996 which included, *inter alia*, a recommendation that a national policy should be adopted as the basis for laws and programmes relating to Aboriginal cultural heritage at all levels of government.[3]

We understand that the ATSIHP Act was intended to be a temporary measure when introduced in anticipation of a more comprehensive Act with greater protections.[4] ANEDO submits that in light of the current legislative regimes for cultural heritage across Australia, which are disjointed and provide only ad hoc protection, a comprehensive Act should be finalised as a matter of urgency. We therefore support the Australian Government's resolve to amend and strengthen the ATSIHP Act.

We strongly support the plan to introduce a nationally consistent set of best practice standards to be implemented and enforced across all states and territories. The adoption of a national scheme for the protection of Indigenous cultural

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[1] EDO offices in NSW, South Australia, Victoria, and the Northern Territory have provided advice or undertaken policy and law reform work on Indigenous environmental law issues. EDO NSW has conducted a number of cases on behalf of Aboriginal clients seeking to challenge consents to destroy Indigenous cultural heritage (see *Anderson & Anor v D-G, Department of Environment and Climate Change* [2008] NSWLEC 182; *Munro & Nean v Minister for Planning & Moree Plains Shire Council*).

[2] *ATSIHP Act*, Section 4.

[3] Evatt, E. 1996, 'Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984', *Australian Indigenous Law Reporter*, Vol 2, No. 3, pgs 433-450.

[4] Evatt, E. 1996, 'Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984', *Australian Indigenous Law Reporter*, Vol 2, No. 3, pgs 433-450.

heritage has been a consistent recommendation from ANEDO.[5] We submit that it is imperative that the Commonwealth takes a proactive and coordinated nationwide approach to cultural heritage. The proposals in *Indigenous heritage law reform*: *Possible reforms to the legislative arrangements for protecting traditional areas and objects* ('Discussion Paper') will go some way to achieving this, but the reforms need to go further. ANEDO provides comment on the standards proposed for accreditation and makes general recommendations on how to improve the ATSIHP Act.

We address the following key issues:

1. The accreditation process

    1.1. Could the proposed method of accreditation be improved?
    1.2. Granting and revoking accreditation

2. Accreditation standards

    2.1. The early identification of Indigenous heritage issues
    2.2. Appropriate consultation processes
    2.3. Opportunities to reach agreements
    2.4. Independent assessments based on the advice of Indigenous people
    2.5. Separating cultural heritage 'significance' from protection decisions
    2.6. Establishing Aboriginal advisory bodies
    2.7. Protection of sensitive information
    2.8. Transparent decision-making
    2.9. An ability for the Australian Government to provide input
    2.10. An ability for Indigenous Australians and others to seek legal reviews

3. Reviewing the effectiveness of the legislation

    3.1. What specific aspects of accreditation would need to be reviewed

4. Repatriation of objects and ancestral remains

    4.1. Repatriation as an obligation under international law
    4.2. Repatriation under the ATSIHP Act
    4.3. 'Best practice' legal regime for repatriation: NAGPRA (USA)

5. Ownership of cultural items

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[5] See 'ANEDO Submission to the 10 year review of the Environment Protection and Biodiversity Conservation Act 1999 – interim report', p 81, available at http://www.edo.org.au/policy/090810epbc_interim_report.pdf

Our key comments and recommendations are:

1. The accreditation process

- The accreditation process should provide for public consultation on the initial decision to accredit a state or territory's cultural heritage legislation;
- A process allowing for direct application to the federal Minister for protection should be retained even where a state or territory's cultural heritage laws are accredited;
- Accreditation must not occur where a state or territory law currently operates to exempt areas from cultural heritage assessment processes.

2. The standards proposed for accreditation

Standard 1: The early identification of Indigenous heritage issues

- The early identification of heritage issues should be integrated with state and territory development assessment processes.

Standard 2: Appropriate consultation and opportunities to reach agreement

- Indigenous peoples should have a prominent role in determining what constitutes 'appropriate consultation';
- The ATSIHP Act should include a legislative requirement and legislative process for best practice consultation as a standard for accreditation;
- Appropriate consultation under the ATSIHP Act should include processes for the identification of the relevant Indigenous people who have a right to be consulted;
- The ATSIHP Act should provide for the registration of agreements secured through consultation processes;
- Resources and funding should be made available to Indigenous parties to enable them to participate in the proposed conference mechanism under the Act;
- The possibility of conferences being held 'on country' should be prescribed as a relevant factor when deciding the nature and structure of conferences; and
- Interim protection should be afforded to areas that are the subject of a protection application, where that protection is disputed and undergoing mediation as prescribed by the Act.

Standard 3: Independent assessments based on the advice of Indigenous people

- Whether an item or place is a cultural heritage item or place should be an Indigenous determination;
- Decisions regarding heritage 'significance' should be determined separately to questions regarding the protection of those sites and objects;

- A federal Aboriginal cultural heritage advisory body should be established under the ATSIHP Act for the purposes of determining cultural heritage areas and objects according to Aboriginal tradition, providing advice on applications to interfere with Indigenous heritage and providing advice to the Minister on whether state or territory regimes should be accredited;
- Such an Aboriginal cultural heritage advisory body should be Indigenous-controlled and have an equal distribution of genders, mirroring the committee established under section 7 of South Australia's *Aboriginal Heritage Act 1988*; and
- The establishment of an Aboriginal cultural heritage advisory committee of the same nature should be a standard of accreditation for states and territories.

Standard 4: Protection for sensitive information

- The introduction of a standard for accreditation that sensitive, secret or sacred traditional information is protected;
- Sensitive information should not be disclosed to parties other than the Minister without the consent of the Indigenous people providing that information;
- Where the information required for a protection application is specified, information requirements should be minimal and not retained by the decision-maker any longer than necessary for the purposes of making a decision;
- Protection under the ATSIHP Act should be extended to cover objects which record, describe, or portray secret or sacred aspects of Aboriginal culture or tradition; and
- Protection for Indigenous traditional ecological knowledge (TEK) should be included within the scope of the ATSIHP Act. Provisions should ensure that where TEK is provided as part of an application for cultural heritage protection, this knowledge is not used without the permission of the knowledge holders.

Standard 5: Transparent decision-making

- The statutory definition of Indigenous cultural heritage should be consistent across all jurisdictions;
- The ATSIHP Act contain explicit criteria which a decision-maker is required to consider when making decisions under the Act;
- The objects of the ATSIHP Act should be expressed as an overriding factor for consideration by decision-makers;
- The results of any consultation with Indigenous people regarding a specific object or area should be expressed in the ATSIHP Act as a relevant factor for consideration in a decision for the protection of that cultural heritage;
- Determinations by Indigenous people that an item or place is a 'traditional object' or 'traditional area' under the Act's definitions should be a binding

factor for consideration by a decision-maker regarding whether that cultural heritage is to be granted protection; and
- The ATSIHP Act should require a decision-maker to provide reasons to Indigenous people where an application for protection is refused.

Standard 6: An ability for the Australian Government to provide input

- The ATSIHP Act must ensure a 'call-in' power over decisions referred to an accredited state or territory assessment process is retained by the decision-maker at the federal level;
- The federal Minister should retain the ability to impose conditions or requirements on a determination made at any level, including under an accredited state or territory process; and
- An Aboriginal advisory body, with a similar function to the Indigenous Advisory Committee established under the EPBC Act, should be established to provide advice to the Minister. The Minister should be bound to take the opinion of this body into account.

Standard 7: An ability for Indigenous Australians and others to seek legal reviews

- Merits review rights for Indigenous parties be established as a best-practice standard for accreditation of state and territory cultural heritage legislation; and
- Where there is overlap between cultural heritage legislation and planning and development laws, review rights available under planning and laws should also be relevant when considering whether a state or territory should be accredited.

3. Reviewing the effectiveness of the legislation

- Reviews of the accreditation scheme should be carried out by independent bodies and or persons;
- Reviews should consider whether current standards are appropriate, if additional standards are needed and if the current scheme is resulting in adverse outcomes for Indigenous people; and
- The first review of the national accreditation scheme take place 5 years after its implementation;

4. Repatriation of objects and ancestral remains

- A legislative scheme for the repatriation of cultural heritage objects and ancestral remains should be established under the ATSIHP Act;
- The legislative scheme for repatriation adopt similar provisions to the *Native American Graves Protection and Repatriation Act (USA)*;
- Under a legislative scheme for repatriation, the definition of objects and remains to be repatriated should be broad and determined by Indigenous people;

- The ATSIHP Act should provide for a register of all collections of cultural items held by museums, universities and government agencies, to be published and made publicly available; and
- Any independent Indigenous advisory committee established under the ATSIHP Act could advise on appropriate repatriation amendments;

5. Ownership of cultural items

- The objects or purposes of the ATSIHP Act contain explicit reference to the ownership rights of Indigenous peoples to their cultural heritage. Provisions adopted should mirror those in Part 2 of the Queensland *Aboriginal Cultural Heritage Act 2003*.

1. The Accreditation Process

ANEDO strongly supports the establishment of a legislative process whereby state and territory cultural heritage legislation can be accredited by the Minister administering the ATSIHP Act if the legislation meets specified 'best-practice' standards that ensure effective protection of Indigenous cultural heritage. We also support the proposal to grant the Minister the discretion to add to the list of standards at any stage. In this respect, we submit that the list of 'effective' protection standards needs to be adaptable, as threats to cultural heritage will undoubtedly change as a result of evolving environmental, social and political factors. Therefore, the Act must be flexible enough to ensure protection against future pressures.

1.1. Could the proposed method of accreditation be improved?

ANEDO submits that the proposed accreditation process could be improved by allowing for public consultation on the initial decision to accredit a state or territory's cultural heritage legislation. The Discussion Paper suggests it is entirely a decision for the Minister that can be made without input from an independent assessor, the public or an Aboriginal advisory body. Accreditation will result in all applications for protection in that state or territory to be referred to the relevant state or territory Minister. It is therefore essential that the initial decision to accredit that state's or territory's laws be transparent and that it follows a genuine and open process of consultation, particularly with Indigenous peoples who will be most affected by the decision.

Moreover, we submit that even where a state of territory regime is accredited, an ability for Indigenous people to apply directly to the federal Minister for assistance in emergency situations should be retained in the Act to facilitate effective and timely protection of Aboriginal cultural heritage. This avoids the situation where state and territory laws that are adverse to cultural heritage protection or particular sites are passed before the federal Minister is able to act to revoke that state or territory's accreditation. Allowing these emergency applications directly to the federal Minister would therefore enhance and improve protection under the accreditation scheme proposed.

1.2 Granting and revoking accreditation

ANEDO supports the proposal to allow the Minister to cancel accreditation where a state or territory enacts a law that exempts an area or activity from the normal assessment and approval processes. However, the corollary of this is that state or territory laws that *currently* exempt areas from cultural heritage assessment processes should not have its cultural heritage legislation accredited in the first place.

An example of this is the *Environmental Planning and Assessment Act 1979* in NSW (EPA Act) which currently operates to exempt development projects under Part

3A of that Act ('major projects') from the need to obtain an Aboriginal Heritage Impact Permit (AHIP) under the *National Parks and Wildlife Act 1974* (NPW Act).[6] AHIPs allow activities which are likely to adversely affect cultural heritage, with the approval of the Director-General, to go ahead. As a result of this provision, Indigenous people seeking to protect a cultural heritage site or object are unable to provide comment or seek to prevent damage to or the destruction of their heritage, where it falls within an area subject to a Part 3A development approval. The proponent of such a project is able to proceed with development activity, without implementing any cultural heritage protection measures, undertaking a comprehensive cultural heritage assessment or needing to obtain an approval to destroy or impact upon cultural heritage.

The operation of Part 3A of the EPA Act and the consequent inability of the NPW Act to capture major projects, makes it difficult, and arguably impossible, to achieve effective protection of Indigenous cultural heritage in NSW. The NPW Act would therefore not meet the standards necessary to be accredited under the proposed scheme. For this reason, the initial decision to accredit a state or territory's laws must involve a consideration of other laws that potentially exempt cultural heritage areas or objects from assessment processes under those laws.

1.3 Public consultation during accreditation reviews

ANEDO supports the proposal to allow for public consultation during independent reviews of a state or territory's accreditation. In accordance with the proposed amendments to the purposes of the ATSIHP Act, that 'acknowledge that Indigenous Australians are the primary source of knowledge of their traditional laws and customs and have a responsibility to protect their traditional areas and objects',[7] we submit that Indigenous input be sought at every stage of the review process.

Any independent reviewer must therefore seek the views of Indigenous people and this engagement should involve more than an invitation to make written submissions. Indigenous people need to be engaged in a manner that enables their views regarding protection of their heritage to be substantively considered and implemented to achieve effective protection in accordance with traditional laws and customs.

2. Accreditation Standards

ANEDO has argued previously for the establishment of a nationally-consistent set of cultural heritage standards. We submit that the legislative regimes at the state and

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[6] Section 75U(1)(d), *Environmental Planning and Assessment Act 1979*.

[7] *Indigenous heritage law reform*: *Possible reforms to the legislative arrangements for protecting traditional areas and objects*, produced by the Department of Environment, Water, Heritage and the Arts, August 2009, p 11, available at http://www.environment.gov.au/heritage/laws/indigenous/lawreform/pubs/discussion-paper/pubs/discussion-paper.pdf

territory level have created an ad hoc and disjointed approach to the protection of cultural heritage across Australia. The absence of a consistent best practice approach to protection has caused uncertainty for many Indigenous peoples seeking to protect their heritage and left them feeling that they have no control over their cultural heritage, engendering disillusionment regarding the Government's ability to protect their heritage.

Proposal 4 of the Discussion Paper outlines various standards upon which the accreditation of state and territory cultural heritage laws can occur. The potential for these standards to improve protection of Indigenous cultural heritage at the state and territory level is considered below. For each standard, ANEDO has addressed these two questions:

i) Would these standards, if adopted, help to improve the ways that Indigenous traditional areas or objects are protected in your state or territory?
ii) Do the standards need to be specified differently or in any more detail?

2.1 The early identification of Indigenous heritage issues

ANEDO strongly supports the early identification of Indigenous heritage issues. Elizabeth Evatt noted in her review of the ATSIHP Act (the Evatt Review) that 'the main threat to significant Aboriginal areas comes from construction and development of all kinds.'[8] Similarly, the UN Human Rights Committee commented in July 2000, in considering Australia's adherence to the *International Convention on Civil and Political Rights 1966* (ICCPR), that:

> *The Committee expresses its concern that...protection of sites of religious or cultural significance for such minorities, which must be protected under article 27, are not always a major factor in determining land use.*[9]

Under the current operation of the ATSIHP Act, where state and territory cultural heritage legislation is largely relied upon to secure protection, development approval processes have not been effectively integrated with cultural heritage laws. ANEDO submits that the early identification of heritage issues as a standard for accreditation (where integrated with state and territory development assessment processes) is considered the most appropriate way to ensure development activities are limited in their impact on cultural heritage objects and areas.

The more recent changes to the operation of cultural heritage legislation in certain states and territories have to some extent sought to provide for early engagement with Indigenous people by development proponents for the purposes of identifying cultural heritage. The Victorian *Aboriginal Heritage Act 2006* (AH Act) is the most

[8] Evatt, E. 1996, 'Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984', *Australian Indigenous Law Reporter*, Vol 2, No. 3, pgs 433-450.
[9] Quoted in 'Reforming NSW Laws for the Protection of Aboriginal Cultural Heritage – Discussion Paper', May 2009, produced by Environmental Defender's Office (NSW), p 44.

recent cultural heritage legislation to be enacted in Australia. The Act's objectives are comprehensive and include, 'to establish processes for the timely and efficient assessment of activities that have the potential to harm Aboriginal cultural heritage'.[10] This overarching objective suggests a requirement that cultural heritage issues are quickly identified and addressed prior to the commencement of activities that threaten this heritage. Cultural Heritage Management Plans under the Act provide for an assessment as to potential cultural heritage present in the area, and these must be in place prior to any activity being carried out and require that a sponsor of the plan (which may be a development proponent) 'make all reasonable efforts' to consult with Registered Aboriginal Parties.[11] ANEDO supports these provisions in their ability to promote and enforce early engagement with the relevant Indigenous people, and proposes the adoption of similar requirements as a standard for accreditation of state and territory cultural heritage laws.

2.2 Appropriate consultation and opportunities to reach agreements

ANEDO submits that appropriate and meaningful consultation with Indigenous groups is crucial to achieving effective protection for Indigenous cultural heritage across Australia. We therefore recommend that robust community consultation practices should be included in the ATSIHP Act as a minimum standard required for accreditation. Indigenous peoples should have a prominent role in determining what constitutes 'appropriate consultation'. This recommendation is considered consistent with the principles expressed in the *Draft Declaration of the Rights of Indigenous peoples*.[12]

ANEDO submits that there are three elements of appropriate consultation that should be included in the ATSIHP Act.

First, appropriate consultation should involve an explicit statutory requirement and legislated process for consultation. The establishment of a legislative requirement under the ATSIHP Act for consultation would greatly improve the cultural heritage assessment processes at the state and territory level, especially where states have not implemented statutory consultation requirements. For example, in NSW there is currently no statutory requirement for a proponent to consult with Indigenous people in NSW. The Department of Environment and Climate Change (DECC) has introduced 'Interim Community Consultation Requirements for Applicants' (Guidelines). However, these Guidelines are not binding and come into operation only once an Aboriginal Heritage Impact Permit (AHIP) is applied for

[10] Section 3(g),.*Aboriginal Heritage Act 2006* (Vic).
[11] Section 59(2), *Aboriginal Heritage Act 2006* (Vic).
[12] *The Draft Declaration of Indigenous people*, Article 19 states: '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 legislative matters that may affect them.'

by the proponent. Consulting with Indigenous people at this stage, when the development application is quite advanced in the assessment process, leaves little room for Indigenous peoples to negotiate an alternative development design, or have conditions imposed on the development consent to avoid adverse impacts to cultural heritage. Moreover, the guidelines state that DECC, not the Indigenous community, is the decision-maker in the AHIP process.[13] Hence, the implementation of a requirement for appropriate consultation in NSW would greatly improve the capacity of Indigenous peoples to determine the protection afforded to their cultural heritage.

Second, robust consultation processes involve *early* engagement with Indigenous people and groups. Engagement with Indigenous groups must take place under the Act at the earliest opportunity and well before activities likely to adversely affect cultural heritage commence. This allows for the activity to be altered or an alternative development option to be considered and negotiated with Indigenous people in a way that enables them to play a determinative role in the protection of their heritage.

Third, ANEDO submits that the identification of the relevant Indigenous people who have a right to be consulted is a crucial element of appropriate consultation. It is noted that Indigenous peoples' views and perceptions of the roles and responsibilities of the multiple Indigenous representative bodies around Australia are often varied. For this reason, it is important that a determination regarding the relevant Indigenous body to consult with where an activity is likely to affect cultural heritage does not rely upon existing institutional structures. The ACT's *Heritage Act 2004* recognises this, establishing a process whereby the Minister can declare any entity a Registered Aboriginal Organisation (RAO), and must consult with the Heritage Council and the Aboriginal people who have a traditional affiliation with the land on the criteria for selecting these entities.[14] Any Council considering whether to approve a development is bound by a requirement to consult with RAOs on decisions affecting Aboriginal cultural heritage objects and places. ANEDO supports this approach as well as the broad definitions of those whose legal interests may be affected by a decision on an application for protection.

2.3. Opportunities to reach agreements

ANEDO has previously recommended that agreements should be encouraged through established processes for mediation and negotiation, as alternatives to litigation.[15] Such processes, where provided for under cultural heritage legislation, allow for greater flexibility and wider scope for an agreement to be reached where

[13] Interim Community Consultation Requirements for Applicants, produced by DECC, available at http://www.environment.nsw.gov.au/resources/parks/interimConsultationGuidelines.pdf, p 3.
[14] Section 14, *Heritage Act 2004* (ACT).
[15] See 'ANEDO Submission to the 10 year review of the Environment Protection and Biodiversity Conservation Act 1999 – interim report', p 84, available at http://www.edo.org.au/policy/090810epbc_interim_report.pdf

there is conflict regarding an application for protection of an area or object. ANEDO therefore supports the proposal for conferences between proponents and Indigenous people to be used to resolve conflict issues regarding applications for protection. We further submit that where agreements are reached the ATSIHP Act must provide for their registration to ensure that the rights of Indigenous peoples in protecting their heritage are secured. Registration of agreements would also allow for Indigenous people to enforce these rights to protect their heritage and seek legal remedies where a proponent acted in contravention of any terms of the agreement. This recommendation was also made by the Evatt Review.

A minority of states and territories have chosen to incorporate mediation and negotiation provisions into their cultural heritage legislation.[16] In Victoria, the AH Act seeks as one of the objects of the Act, 'to establish mechanisms that enable the resolution of disputes relating to the protection of Aboriginal cultural heritage',[17] Part 8 also then provides for appeals to the Victorian Civil and Administrative Tribunal (VCAT) where persons have been adversely affected by a protection declaration,[18] the issue of a cultural heritage permit (allowing for certain activities affecting cultural heritage to be carried out),[19] or where a Registered Aboriginal Party (RAP) refuses to approve a Cultural Heritage Management Plan.[20] Mechanisms for alternative dispute resolution where disputes arise between two or more RAPs regarding a CHMP are also provided under the Act.[21]

In Queensland, the *Aboriginal Cultural Heritage Act 2003* (ACH Act) expressly encourages agreement through negotiation by the parties,[22] and additionally provides for mediation processes where agreement regarding a Cultural Heritage Management Plan cannot be reached. The Land Court adopts the role of mediator in these circumstances.[23]

The remaining states and territories lack any provision for negotiation and mediation procedures. The absence of such procedures means that the interests of Indigenous people are under-represented and leaves Indigenous people with no opportunity under cultural heritage legislation for objections or challenges to decisions likely to adversely affect their heritage.

For this reason, ANEDO supports the adoption of robust dispute resolution processes as a minimum standard for accreditation under the ATSIHP Act. It has been argued that such a requirement 'is essential if Indigenous peoples are to enjoy a meaningful role in the identification, conservation and management of their

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[16] See *Aboriginal Heritage Act 2006* (Vic) and *Aboriginal Cultural Heritage Act 2003* (Qld).
[17] Section 3, *Aboriginal Heritage Act 2006* (Vic).
[18] Part 8, Division 3, *Aboriginal Heritage Act 2006* (Vic).
[19] Part 8, Division 2, *Aboriginal Heritage Act 2006* (Vic).
[20] Section 116, *Aboriginal Heritage Act 2006* (Vic).
[21] Section 111, *Aboriginal Heritage Act 2006* (Vic).
[22] Section 105, *Aboriginal Cultural Heritage Act 2003* (Qld).
[23] Section 106, *Aboriginal Cultural Heritage Act 2003* (Qld).

cultural heritage... [and] critical for land owners and users who seek certainty in the approvals procedure and a timely approach to decision-making.'[24]

If conferences are to be introduced, ANEDO submits that associated resources and funding must be made available to Indigenous parties to enable them to participate. If the government is seeking an 'efficient and fair way'[25] to deal with disputes regarding protection applications, then Indigenous peoples should not be required to attend conferences without financial assistance. In short, the social and economic disadvantage experienced by Indigenous Australians must be addressed to ensure accessibility issues do not hinder the ability of these forums to resolve conflict.

The possibility of conferences being held 'on country' should also be a factor for consideration when determining the nature of conferences to take place. The power balance in conferences and negotiations between a government or industry body and an Indigenous party most often significantly favours the government or industry body. Conferences held 'on country', in a place familiar to Indigenous participants, may help to tilt this balance closer towards the achievement of an equal bargaining power between the parties.

The recommendation made in the Evatt Review for interim protection to be provided for areas the subject of disputes currently undergoing mediation is also supported by ANEDO as promoting opportunities to reach agreement.

2.4 Independent assessments based on the advice of Indigenous people

The proposal for independent cultural heritage assessments based on the advice of Indigenous people is strongly supported by ANEDO.

It is noted that in many states and territories, whether cultural heritage is protected is determined by subjective ministerial discretion. An example is the NSW *National Parks and Wildlife Act 1984*, where the Director-General (D-G) of National Parks and Wildlife is granted primary responsibility for the protection of Aboriginal cultural heritage.[26] Under the NPW Act, the D-G also has the authority to issue an Aboriginal heritage impact permit (AHIP), allowing for the destruction of or damage to Aboriginal cultural heritage.[27] The failure to acknowledge the expert advice and knowledge of Indigenous people in regards to their own cultural heritage is demonstrated in the operation of section 84 of the NPW Act, which

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[24] Shearing, S. 'One step forward? Recent developments in Australian state and territory Indigenous Cultural Heritage Laws', *Macquarie Journal of International and Comparative Environmental Law* (2006) Vol 3, p 57.

[25] *Indigenous heritage law reform*: *Possible reforms to the legislative arrangements for protecting traditional areas and objects*, produced by the Department of Environment, Water, Heritage and the Arts, August 2009, p 35, available at http://www.environment.gov.au/heritage/laws/indigenous/lawreform/pubs/discussion-paper/pubs/discussion-paper.pdf

[26] Section 85(1), *National Parks and Wildlife Act 1974* (NSW).

[27] Section 90, *National Parks and Wildlife Act 1974* (NSW).

relies upon the opinion of the D-G to determine whether a place is, or was of 'special significance' to Aboriginal persons. There is no additional requirement in the operation of any of these provisions that the D-G seek the advice or input of the Indigenous people to whom a place or object may possess significant values or qualities. Clearly, the introduction of a standard of accreditation requiring the existence of an independent assessment process based on the advice of Indigenous people would greatly improve the current situation in NSW.

2.5. Separating cultural heritage 'significance' from protection decisions

ANEDO supports the recommendation made in the Evatt Review that questions of heritage 'significance' should be separated from the question of protection of those sites and objects. Furthermore, questions of significance should be determined using Indigenous information as the central basis of the assessment with limited third party intervention.[28] The Evatt Review recommendation also provided that a finding of significance by Indigenous peoples should be binding on the Minister in determining whether to provide protection.

ANEDO supports the proposed amendments to the definitions of cultural heritage as these remedy to some extent the ambiguity caused by the existing definition.[29] However, ANEDO submits that there remains a need to establish processes which allow for Indigenous information to form the basis of any assessment of whether items or places are of cultural heritage value.

2.6. Establishing Aboriginal advisory bodies

ANEDO notes that the Discussion Paper does not consider the introduction of Aboriginal advisory body or committee at any level of government. Whilst most states and territories have provided for such bodies under their respective cultural heritage legislation,[30] their role is restricted to a mere advisory role where a matter is able to be referred to that body by a Minister or decision-maker. Across all jurisdictions, there is an absence of a requirement that the decision-maker be bound by that advice in making a determination under the relevant Act.[31]

ANEDO submits that in order to obtain the expert knowledge and advice necessary to inform assessments, there is a critical role – at the state and territory level and at the Commonwealth level – for an Aboriginal cultural heritage advisory body or committee. It is recommended that these bodies serve the function of determining cultural heritage areas and objects according to Aboriginal tradition

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[28] See 'ANEDO Submission to the 10 year review of the Environment Protection and Biodiversity Conservation Act 1999 – interim report', p 84, available at http://www.edo.org.au/policy/090810epbc_interim_report.pdf

[29] See section 4, *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, where cultural heritage is defined as areas and objects 'of particular significance' to Aboriginal peoples.

[30] For example, NSW has the Aboriginal Cultural Heritage Advisory Committee, Victoria has established the Aboriginal Heritage Committee, and the ACT has established the Heritage Council.

[31] See for example sections 27 and 28 of the *National Parks and Wildlife Act 1974* (NSW).

and providing advice to the relevant Minister on applications to interfere with Indigenous cultural heritage. For the body established under the ATSIHP Act, an additional role would be to advise the Minister on whether a state or territory regime should be accredited. In making determinations on whether an item or place is of heritage significance, such bodies should establish comprehensive and culturally-appropriate consultation processes, with the relevant Indigenous people.

ANEDO submits that such a body should be an independent Indigenous body with an equal distribution of genders, as proposed by the Evatt Review. South Australia's *Aboriginal Heritage Act 1988* has incorporated this best practice committee structure by providing that all members appointed by the Minister are to be Indigenous, with an equal distribution of genders and from a broad geographical spread within the state.[32] We agree that the introduction of such a body will represent a true recognition that Indigenous people are the primary source of knowledge of their traditional laws and customs and have responsibilities to protect their traditional areas and objects'.[33]

In addition to the establishment of a federal committee, ANEDO strongly recommends that the Act require the creation of these bodies at the state and territory level as a standard for the accreditation of cultural heritage laws. It is argued that the introduction of this standard would largely improve current cultural heritage assessment processes in the states and territories, and that by basing protection decisions on Aboriginal information and expertise, the capacity of Indigenous peoples to play a meaningful role in the protection of their heritage is greatly enhanced.

2.7 Protection for sensitive information

ANEDO strongly supports the introduction of a standard for accreditation under the ATSIHP Act that requires the protection of sensitive, including secret or sacred, traditional information. In particular, we support the recommendation that the 'Act should reflect the principle that the government is not obliged to provide interested persons with information used to support an application,'[34] and submit that this principle should operate in all circumstances where information has been identified by Indigenous people in an application for heritage protection as being sensitive or restricted in accordance with Aboriginal culture and tradition. It is therefore essential that the process or template that is established for the purpose of applying for Indigenous cultural heritage protection includes clauses or provisions whereby Indigenous applicants can identify and mark certain information as sensitive.

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[32] Section 7, *Aboriginal Heritage Act 1988* (SA).

[33] See *Indigenous heritage law reform*: *Possible reforms to the legislative arrangements for protecting traditional areas and objects*, produced by the Department of Environment, Water, Heritage and the Arts, August 2009, p 11.

[34] See *Indigenous heritage law reform*: *Possible reforms to the legislative arrangements for protecting traditional areas and objects*, produced by the Department of Environment, Water, Heritage and the Arts, August 2009, p 36.

2.7.1. Requirement for traditional owner consent

ANEDO submits that prior notice of the sensitive nature of the information should prevent its disclosure to parties other than the Minister without the consent of the Indigenous people providing that information. Whilst there may be situations where the principles of fairness and transparency require that the information contained in an application is transferred to another party, ANEDO is of the opinion that the decision to release this information should be guided by the requirement that the 'free, prior and informed consent' of Indigenous people is obtained.

Additionally, ANEDO submits that under proposal 9 of the Discussion Paper, where the information for an application is to be specified, the information requirements should be minimal and available only to the decision-maker. The information should not be retained any longer than necessary for the purposes of making a decision and recorded only as required.

2.7.2. Extension of protection to records recording an aspect of culture or tradition

ANEDO submits that protection should not only be provided for secret or sacred Indigenous knowledge, but extended to objects which record, describe or portray a secret or sacred aspect of Aboriginal culture or tradition. This recommendation follows that made in the Evatt Review, which suggested that the definitions of objects to be protected should be expanded to cover this type of record. The definition of a cultural heritage object proposed, where 'the object is protected under traditional laws and customs',[35] could be considered to include these records. However the ATSIHP Act should explicitly refer to records containing aspects of Aboriginal culture to ensure any sensitive information receives blanket protection under the Act.

2.7.3. Enforcing protection of sensitive information

The proposed powers of the Minister to issue directions about protecting information are strongly supported by ANEDO, as is the creation of offences where a direction is breached.[36] There is a critical need for Indigenous people to be notified of, and educated about, these procedures and informed of their rights where they have provided information that is sensitive.

2.7.4. Protection for non-sensitive Indigenous knowledge

The protection of Indigenous knowledge, even where such knowledge is not considered secret or sacred according to Indigenous tradition is an issue that should be considered within the scope of the ATSIHP Act. Protection should not only be

[35] Ibid, p 14.
[36] Ibid, p 36.

provided for sensitive information, including records portraying or containing an aspect of Aboriginal tradition, but should also be provided for traditional ecological knowledge (TEK), with the purpose of ensuring this knowledge is not misused or misapplied without the consent of the holders of that knowledge.

The Australian Government has acknowledged the importance of TEK in the context of conserving Australia's biodiversity, and has committed to meeting its obligations under the *Convention on Biological Diversity* (CBD) through the implementation of the *National Strategy for the Conservation of Australia's Biological Diversity* (the National Strategy).[37] Objective 1.8.2 of the National Strategy states it will 'ensure that the use of traditional biological knowledge in the scientific, commercial and public domains proceeds only with the cooperation and control of the Indigenous people of that knowledge and ensure that the use and collection of such knowledge results in social and economic benefits to the Indigenous people.' The Australian government has to some extent provided a legislative regime for the treatment of TEK in the form of access and benefit sharing agreements under the *EPBC Act* and Regulations, but this only applies to Commonwealth lands.

The *EPBC Act* requires any party seeking access to a biological resource to enter an access and benefit sharing agreement with the access provider. The definition of 'access provider' under the *Environment Protection and Biodiversity Conservation Regulations 2000* (EPBC Regulations) includes the Commonwealth, a Commonwealth agency with the responsibility for an area, an Indigenous land owner or a native title holder.[38] ANEDO expresses concern that in most circumstances, it is not Indigenous people who will hold the land or rights of access to the biological resource sought. This creates the potential for TEK to be used for commercial gain by a third party without the consent of the holders of that knowledge.

As the *EPBC Act* only provides limited protection for traditional ecological or biological knowledge (as it relates to Aboriginal heritage or tradition) ANEDO submits that the ATSIHP Act needs to address the vulnerability of this knowledge where it forms part of the information provided by Indigenous people under a heritage protection application. The ATSIHP Act should extend protection to TEK to ensure such knowledge is not used without the prior and informed consent of the holders of that knowledge. The recommendation to provide this protection under the ATSIHP Act is in accordance with Australia's obligations under the CBD to:

> *'respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity [and] encourage the*

[37] Available at http://www.environment.gov.au/biodiversity/publications/strategy/index.html
[38] Clause 8A.08, *Environment Protection and Biodiversity Conservation Regulations 2000.*

equitable benefit sharing of the benefits arising from the utilisation of such knowledge, innovations and practices.[39]

Finally, we note that Australia's intellectual property laws have similarly failed to address the protection of TEK within their scope and this provides a further argument for its inclusion under the ATSIHP Act.

2.8 Transparent decision-making

2.8.1 Revised and clarified definitions of cultural heritage

ANEDO has previously recommended 'a clear definition of heritage items be included in the EPBC Act.[40] ANEDO therefore supports the proposal to provide further clarification of the definition of Indigenous cultural heritage.[41] It is noted that the proposed definition has been adopted from the Commonwealth *Evidence Act 1995*. However, we submit that the definitions of Indigenous cultural heritage across all jurisdictions and legislation should be brought into line with the proposed definition.

Currently, the definition of 'Indigenous tradition' under the *EPBC Act* differs to the definitions adopted under the reforms proposed for the ATSIHP Act.[42] Aligning the statutory definition of Indigenous cultural heritage across all jurisdictions will achieve greater consistency and facilitate the achievement of a national approach, rather than the existing ad hoc approach under various state and territory laws. Such consistency will significantly assist Indigenous groups and individuals to understand the basis for, and to some extent demystify, decisions regarding protection of Aboriginal cultural heritage.

2.8.2. Factors for consideration in decisions for protection

ANEDO submits that a key means of ensuring transparency of decision-making under the ATSIHP Act is the provision of explicit criteria to be considered by a decision-maker in whether to grant or refuse an application. ANEDO has previously called for the inclusion of such matters for consideration in relation to other state and federal cultural heritage laws.[43] We are of the view that this should be an explicit standard for accreditation.

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[39] Article 8(j), *Convention on Biological Diversity*.
[40] See 'ANEDO Submission to the 10 year review of the Environment Protection and Biodiversity Conservation Act 1999 – interim report', p 82, available at http://www.edo.org.au/policy/090810epbc_interim_report.pdf
[41] See proposal 2, *Indigenous heritage law reform*: *Possible reforms to the legislative arrangements for protecting traditional areas and objects*, produced by the Department of Environment, Water, Heritage and the Arts, August 2009, p 13.
[42] Ibid, p 87.
[43] Ibid, 88; EDO (NSW) Submission on the National Parks and Wildlife Amendment Bill 2009, July 2009, p 4, available at http://www.edo.org.au/edonsw/site/pdf/subs09/090713npw_amend.pdf

Proposal 4 of the Discussion Paper provides that the following matters will need to be included as factors for consideration under the relevant state and territory cultural heritage legislation, where that legislation is to be accredited:

- whether the activity, if it proceeded, would be likely to have an adverse impact on a traditional area or traditional object
- 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[44]
- the views of the proponent and the Indigenous people about practical options to avoid or minimise the likely impact; and
- the likely affect of giving or withholding approval on:
    i. the interests of the proponent
    ii. the interests of persons other than the proponent and the Indigenous people who may be affected by a decision
    iii. the cultural, social, economic and environmental welfare of the community.[45]

Whilst we support these proposed relevant considerations, ANEDO recommends that the ATSIHP Act should also explicitly include the result of any consultation with Indigenous people as a factor for consideration, as well as the outcomes and conditions of any agreement made through the conferences proposed in the Discussion Paper (proposal 10). Moreover, where there is a determination by Indigenous people that a place or item is a 'traditional area' or 'traditional object', this finding must also be a relevant consideration for a decision-maker regarding protection of that item or place. This 'best-practice' approach is seen in the operation of the South Australian *Aboriginal Heritage Act 1988*, where the Minister 'must accept' the views of the Indigenous people of the place or object regarding whether that place or object is of significance to Aboriginal tradition.[46]

Finally, we are of the view that the objects of the ATSIHP Act should be a crucial, and indeed overriding, consideration in any decision made under that Act. The objects have an important role to play in securing positive protection outcomes for Indigenous peoples and should therefore be at the forefront of a decision-makers mind when making a decision. This will ensure that the protection and preservation of cultural heritage is the primary consideration in all decisions that may potentially affect that heritage.

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[44] See *Indigenous heritage law reform*: *Possible reforms to the legislative arrangements for protecting traditional areas and objects*, produced by the Department of Environment, Water, Heritage and the Arts, August 2009, p 20.
[45] Ibid, p 21.
[46] Section 13(2), *Aboriginal Heritage Act 1988* (SA).

2.8.3. Provision of reasons to applicants

Another mechanism that would enhance transparent and accountable decision making under the ATSIHP Act is a requirement that clear and comprehensive written reasons be provided by a decision-maker for all decisions made under the Act. Moreover, requiring the provision of written reasons as a standard for accreditation of state and territory cultural heritage laws, would assist in achieving greater accountability and consistency in the application of Indigenous cultural heritage protection provisions across all jurisdictions. This would assist Indigenous people understanding the underlying principles relied upon in the making of determinations and therefore increase the transparency of decisions under the ATSIHP Act.

2.9 An ability for the Australian Government to provide input

ANEDO strongly supports the retention by the Australian Government of an ability to provide input on any decision referred to a state or territory cultural heritage assessment process under the proposed accreditation scheme. However, we submit that there are three elements to this.

First, ANEDO submits that the ATSIHP Act must ensure that a 'call-in' power is retained by the Government. This power should enable the Australian Government to 'call-in' any decision regarding the protection of heritage where it has been referred to an accredited state or territory process. The Minister should be granted the discretion to intervene and veto projects that are likely to have significant negative impacts on cultural heritage.

Second, the Minister should retain the ability to impose conditions or requirements as he or she deems necessary on any approval or protection declaration made under the ATSIHP Act. The Minister should have the power to review any assessment process documentation or records, to vary any approval or decision under the Act or to impose conditions upon the relevant activity.

Third, in order to assist the Minister in exercising their role under the Act, an Aboriginal advisory body should be constituted under the Act as discussed above. This is consistent with the recommendation of the Evatt Review, to establish an independent Aboriginal Heritage Advisory Agency.[47] The Minister should be required to seek the advice of such a body when exercising any of the Minister's decision-making functions. The role of the body would include ensuring that any recommendations and input provided to the state or territory decision-maker reflect Indigenous interests and traditions.

[47] Evatt, E. 1996, 'Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984', *Australian Indigenous Law Reporter*, Vol 2, No. 3, pgs 433-450.

ANEDO submits that the body may operate in a similar manner to the Indigenous Advisory Committee established under the *EPBC Act*.[48] However we submit that the Minister should be bound to take into account the opinion of the committee or body, unlike the EPBC Act provisions.

2.10. An ability for Indigenous Australians and others to seek legal reviews

EDO offices have consistently recommended that merits appeal rights for Indigenous Australians should be introduced.[49] The absence of merits appeal rights means Indigenous people have no avenue for review of decisions that may effectively approve the destruction of their heritage. This is particularly problematic where consultation requirements are insufficient and where the decision-maker retains a substantial discretion. Moreover, the ability to commence judicial review proceedings, where only a procedural error creates an avenue to challenge a decision under cultural heritage legislation, is inadequate and does not address the impact of Indigenous communities, culture and tradition.

The three most recently enacted pieces of state and territory cultural heritage legislation provide for merits review of decisions affecting cultural heritage.[50] ANEDO therefore recommends that merits review rights for Indigenous parties be established as a best-practice standard for accreditation of state and territory cultural heritage legislation, ensuring consistency across all jurisdictions. An example is Victoria's *Aboriginal Heritage Act 2006* as it allows merits appeals to the Victorian Civil and Administrative Tribunal (VCAT) where a party (Indigenous or other) has been affected by a decision regarding the protection of cultural heritage or the granting of a permit to destroy heritage. The Act specifies a number of matters that VCAT must be satisfied of in making a decision, including 'that the activity in respect of which the application for the permit was made will be managed by the applicant so as to minimise harm to Aboriginal cultural heritage.'[51] ANEDO strongly supports the approach whereby the VCAT is required to consider the minimisation of harm to cultural heritage in any review.

ANEDO is particularly concerned at the limited merits appeal rights in NSW available to Indigenous people seeking to protect cultural heritage under the operation of the *Environmental Planning and Assessment Act 1979* (EPA Act). For example, under Part 4 (where local councils make the decision), merits appeal rights are only available in relation to designated development. For Part 3A projects, merits appeal rights for third parties are only available if the project would otherwise have been designated development, if there has been no concept plan approved and if no public hearing or assessment has been conducted by the

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[48] See section 505, *Environment Protection and Biodiversity Conservation Act 1999*.
[49] EDO (NSW) Submission on the National Parks and Wildlife Amendment Bill 2009, July 2009, p 5, available at http://www.edo.org.au/edonsw/site/pdf/subs09/090713npw_amend.pdf
[50] See *Aboriginal Heritage Act 2006* (Vic); *Aboriginal Cultural Heritage Act 2003* (Qld); *Heritage Act 2004* (ACT).
[51] Section 124(2), *Aboriginal Heritage Act 2006* (Vic).

Planning Assessment Commission. Moreover, for 'Critical Infrastructure' projects, which are projects that the Minister considers 'essential for the State for economic, environmental, or social reasons,'[52] all appeal rights - both merits and judicial review- are removed. Hence, Indigenous people in NSW have very limited capacity to challenge decisions which threaten the enjoyment and maintenance of their heritage and culture.

In light of the NSW example above, ANEDO submits that in considering whether to accredit a state regime, planning laws should also be considered. That is, where there is significant overlap between any state and territory cultural heritage laws and planning and development laws, both need to be considered against the standards for accreditation.

3. Reviewing the effectiveness of the legislation

ANEDO supports the proposal for the legislation and the accreditation of state and territory schemes to be reviewed at regular intervals. It is strongly recommended that these reviews are carried out by independent bodies or persons[53] and that the terms of reference include an analysis of whether current standards are appropriate, if additional standards are needed, and if the current scheme is resulting in adverse outcomes for Indigenous people.

Consistent with the periodical repeal of statutory Regulations, ANEDO recommends that the first review occur five years after the implementation of the national scheme, rather than the proposed seven years. ANEDO submits that it may be necessary to make adjustments following the initial 'teething' stages of the accreditation scheme and for that reason, the first review should occur within a shorter, rather than longer, time frame.

3.1. What specific aspects of accreditation would need to be reviewed?

Whilst the Discussion Paper proposes that 'accreditation may cease automatically if the relevant state and territory enacts a law that exempts an area or activity from the normal assessment and approval processes',[54] this does not ensure that existing laws will be considered in a decision to accredit a state or territory. ANEDO submits that protection of cultural heritage cannot be achieved if other laws exist which allow damage to and destruction of cultural heritage by circumventing accredited cultural heritage assessment processes. For this reason, the interactions and overlap between cultural heritage laws and other laws approving activities

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[52] Section 75C(1), *Environmental Planning and Assessment Act 1979* (NSW).

[53] See the independent review of the EPBC Act for a good example of this. Link: http://www.environment.gov.au/epbc/review/index.html (6Novermber 2009)

[54] See *Indigenous heritage law reform*: *Possible reforms to the legislative arrangements for protecting traditional areas and objects*, produced by the Department of Environment, Water, Heritage and the Arts, August 2009, p 16.

which threaten cultural heritage must be considered as part of any legislated review of the ATSIHP Act.

4. Repatriation of objects and ancestral remains

ANEDO notes that there is no current legislative regime in Australia for the repatriation of cultural heritage items and Indigenous remains. The Evatt Review suggested the need for 'repatriation as a national responsibility'.[55] Indigenous clients have expressed a strong desire for a statement from the Australian Government of their commitment to repatriation, including the implementation of appropriate processes and mechanisms.

4.1. Repatriation as an obligation under international law

The *Declaration of the Rights of Indigenous peoples*, which Australia has endorsed, explicitly upholds 'the right [of Indigenous peoples] to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.'[56] The *International Convention on Civil and Political Rights 1966* (ICCPR), to which Australia is a party, also provides that ethnic, religious or linguistic minority groups should not be denied the right, in community with other members of their group, to 'enjoy their own culture'.[57] The *International Covenant on Economic, Social and Cultural Rights 1966* (ICESCR) relevantly requires that state parties (including Australia) recognise the right of everyone to 'take part in cultural life'.[58] Cultural heritage objects and ancestral remains play an important role in the maintenance of strong healthy Aboriginal cultural communities. ANEDO submits that the lack of a legislative regime for repatriation of cultural objects and ancestral remains in Australia effectively denies Indigenous people the ability to practice and maintain their culture and which is inconsistent with Australia's obligations under international law.

4.2. Repatriation under the ATSIHP Act

The inclusion of a legislative repatriation regime within the scope of the ATSIHP Act has not been considered by the Discussion Paper. ANEDO submits that as the proposed reforms to the Act are concerned with the maintenance of Aboriginal culture,[59] through the management and protection of cultural heritage, repatriation is particularly relevant. Repatriation seeks to return items of cultural significance to

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[55] See section 12.4, Evatt, E. 1996, 'Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984', *Australian Indigenous Law Reporter*, Vol 2, No. 3, pgs 433-450.
[56] *Declaration of the Rights of Indigenous peoples*, Article 12.
[57] *International Convention on Civil and Political Rights 1966*, Article 27.
[58] *International Covenant on Economic, Social and Cultural Rights 1966*, Article 15.
[59] See *Indigenous heritage law reform*: *Possible reforms to the legislative arrangements for protecting traditional areas and objects*, produced by the Department of Environment, Water, Heritage and the Arts, August 2009, p 11.

Aboriginal lineal descendents, so that they can practice and culture, maintaining it for transmission to younger generations.

4.3. 'Best practice' legal regime for repatriation: NAGPRA (USA)

Legislative regimes for the repatriation of Indigenous cultural heritage items and ancestral remains have been successfully established in other jurisdictions. The *Native American Graves Protection and Repatriation Act* (NAGPRA) in the United States is considered a best-practice example. NAGPRA was established with the purpose of enabling the repatriation of Native American human remains and items of cultural significance, and is supported by a federal grants program. Under the Act, claimants must have a 'cultural affiliation' with cultural items to be entitled to their repatriation. There are a number of positive mechanisms within NAGPRA:

- Museums, federal agencies and universities are all required to prepare an inventory of their collections and, in consultation with Indigenous representatives and groups, determine cultural affiliation in all situations where possible;
- Financial assistance in the form of federal grants is made available for the various institutions seeking to compose inventories and return items;
- Completed inventories and intended repatriations must be published in the *Federal Register*;
- Deadlines for museums and agencies to distribute inventories and summaries are provided under the Act;
- There is no deadline for culturally affiliated tribes and organisations to make a claim;
- Lineal descendents have the highest priority as claimants where they can be identified;
- Ownership or control is vested in a culturally affiliated tribe where it makes a claim;
- A Review Committee is established, responsible for hearing disputes, making recommendations for their resolution, and determining an action plan for the disposition of unidentifiable human remains and cultural items.

ANEDO supports these provisions of NAGPRA and submits that they should be adopted as elements of a legislative repatriation regime under the ATSIHP Act. In addition, as a result of consultation with Indigenous people, ANEDO also makes the following recommendations:

- The definition of cultural items and ancestral remains should remain broad and should be determined by Indigenous peoples, with reference to objects and remains that they are entitled to in accordance with their laws and customs, and that are of significance to the maintenance of their culture;
- Similarly to NAGPRA, the Act should provide for a register of all information relating to collections held by museums and agencies, to be published and made publicly available;

- Any independent Indigenous advisory committee established under the ATSIHP Act could advise on appropriate repatriation amendments similar to the NAGPRA;
- The provision of resources, staff support and funding to enable the effective implementation of recommended procedures.

5. Ownership of cultural items

Inherently linked to the issue of repatriation is the issue of ownership and control of Indigenous cultural heritage. The Aboriginal and Torres Strait Islander Commission (ATSIC) Report, *Our Culture Our Future: A Report on Australian Indigenous Cultural Rights and Intellectual Property Rights* identified that one of the rights most desired for recognition by Indigenous Australians was the right to own and control indigenous cultural and intellectual property.[60] Currently, the ATSIHP Act fails to attribute ownership of cultural heritage to Indigenous peoples. The Discussion Paper similarly fails to provide for the recognition of ownership as part of the legislative reform proposals.

To date, Queensland is the only jurisdiction that has allowed Indigenous peoples ownership rights over their cultural heritage objects and remains. The *Aboriginal Cultural Heritage Act 2003* refers to a supporting intent that, 'as far as practicable, Aboriginal cultural heritage should be owned and protected by Aboriginal people with traditional or familial links to the cultural heritage if it is comprised of any of the following:

> (a) Aboriginal human remains;
> (b) secret or sacred objects; or
> (c) Aboriginal cultural heritage lawfully taken away from an area'.[61]

The Act contains provisions specifically granting or restoring ownership of these aspects of cultural heritage to those Indigenous persons with a traditional or familial link, even where those objects are the custody of the State.[62] ANEDO submits that these provisions and the supporting intent of the legislation significantly enhance the capacity of Indigenous peoples to own and control their own heritage. It is recommended that similar provisions be adopted within the ATSIHP Act, and as a standard for the accreditation of state and territory cultural heritage laws.

Where state and territory legislation does not acknowledge ownership rights, it has been left to the courts to intervene. The landmark ruling by the Tasmanian Supreme Court in 2007, granting the Tasmanian Aboriginal Centre (TAC) the role of administrator of the estates of 17 deceased Aboriginal persons, including the remains themselves held in London's Natural History Museum (NHM), is the only

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[60] Available at http://www.austlii.edu.au/au/journals/AILR/1999/51.html
[61] Section 14(3), *Aboriginal Cultural Heritage Act 2003* (Qld).
[62] Part 2, *Aboriginal Cultural Heritage Act 2003* (Qld).

example of such intervention.[63] The ruling followed an announcement by the NHM that it intended to undertake scientific DNA testing on the Aboriginal remains. The order allowed TAC to seek an interim injunction in the British High Court, preventing the NHM from carrying out the tests. There was no recourse available to TAC under state or Commonwealth statutory provisions and the Centre relied entirely on the common law in seeking the administrative order. The decision of the Tasmanian Supreme Court was the first time Indigenous peoples were granted the right to control an object (ancestral remains) of their own heritage, where those remains had been illegally obtained and in contravention of customary law and tradition. It is arguable that the result in the above case was achieved largely due to the urgency of the situation, where DNA testing by the NHM was imminent. ANEDO submits that it is not sufficient to rely on the common law to give rise to Indigenous persons rights to own and control their cultural heritage and that the objects of the ATSIHP Act should contain explicit reference to these rights.

Additionally, ANEDO is of the view that the current failure of the ATSIHP Act to acknowledge Indigenous ownership rights is symptomatic of a broader failure of the existing Australian legal system to formally recognise the presence of a parallel legal system in Aboriginal customary law. Consequently, the customary rights and obligations applicable to Indigenous persons under that parallel system fail to be adequately upheld or protected by the introduced common law system. It has been argued elsewhere, in reference to the operation of the ATSIHP Act, that until this broader recognition is achieved, 'the Act can never guarantee the right of Indigenous Australians to protect and preserve their cultural property according to their traditional laws.'[64]

** For more information about this submission please contact Neva Collings or Robert Ghanem on (02) 9262 6989*

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[63] *In re An Application by the Tasmanian Aboriginal Centre Inc* [2007] TASSC 5, available at http://www.austlii.edu.au/au/cases/tas/TASSC/2007/5.html.

[64] Goldflam, R. 'Noble Salvage: Aboriginal Heritage Protection and the Evatt Review', *Indigenous Law Bulletin* [1997] 2(3) p 4.