

Guide to the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)*

2014

Department of the Environment

www.environment.gov.au/heritage

Contents

Introduction.....	3
Current administrative arrangements.....	4
Contact details.....	4
Purpose of the Act.....	5
What heritage does the Act protect?.....	5
How does the Act protect heritage?.....	5
How is an application made?.....	6
What information should be included in an application?	6
What is ‘injury or desecration?’	7
Information needed to make a declaration.....	8
Other useful information	10
How are applications decided?.....	11
Criteria for making declarations	11
Requirements for procedural fairness.....	12
Consultation on section 9 and 12 applications.....	12
Consultation on section 10 applications.....	13
Optional section 13 consultation to resolve matters.....	14
Section 13 consultation with the State or Territory.....	15
The effect of a declaration	15
Form of declarations.....	15
Interaction with state and territory heritage laws.....	16
Interaction with Commonwealth heritage laws.....	16
Interaction with native title and land rights laws	16
Appendix: List of cases under the ATSIHP Act.....	18

Introduction

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (the **ATSIHP Act**) is a Commonwealth law that assists in the preservation and protection of areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal traditions. The ATSIHP Act defines the term **Aboriginal** to mean a member of the Aboriginal race of Australia, including a descendant of the indigenous inhabitants of the Torres Strait Islands.

The Australian Government minister responsible for administering the ATSIHP Act (the **Minister**) is able to make declarations to protect such areas and objects from specific threats of injury or desecration for defined periods of time. Declarations can stop activities and override other approvals, but cannot order people to carry out activities such as conservation or repairs to damaged areas. When the ATSIHP Act was introduced, it was intended that the Minister would make declarations as a last resort in cases when state or territory laws do not provide effective protection.

To consider making a declaration the Minister must first receive an application from or on behalf of an Aboriginal or group of Aboriginals seeking the preservation or protection of an area or an object from injury or desecration. The Minister cannot make a declaration unless he has received a complete application. For the Minister to consider making a declaration, applicants need to provide evidence of the relevant Aboriginal tradition and explain how the activity which threatens the area or object is inconsistent with that tradition.

The ATSIHP Act was introduced in the early 1980s, before the recognition of native title in Australian law. Originally the ATSIHP Act was meant to be replaced after two years by a national land rights law. The ATSIHP Act was meant to protect particularly sacred sites and objects as a 'last resort' if protection under State or Territory law was inadequate.¹

Since the 1980s various issues with the effectiveness of this 'last resort' approach have been identified. More than 90 per cent of applications received have sought to protect areas, but fewer than five per cent of those applications have resulted in declarations.² Only five long term declarations have been made to protect areas and, of those declarations, two were overturned by Federal Court decisions. An independent review completed in 1996 identified numerous specific problems with the ATSIHP Act.³

¹ Second reading speech by the Hon A Clyde Holding, Minister for Aboriginal Affairs, House Hansard, 9 May 1984, p.2129; Graeme Neate, 'Power, Politics, Policy and Persuasion – Protecting Aboriginal Heritage under Federal Laws', *Environmental and Planning Law Journal*, September 1989, p.225.

² Indigenous Heritage Law Reform, Department of the Environment, Water, Heritage and the Arts, 2009, p.4.

³ The Hon Elizabeth Evatt AC, Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984, 22 August 1996, p.xiii.

Current administrative arrangements

The Minister for the Environment, the Hon Greg Hunt MP, is responsible for making decisions under the ATSIHP Act. The Department of the Environment (the **Department**) assists the Minister with these responsibilities. The authorized officers under section 17 of the ATSIHP Act are senior executives of the Department.

Contact details

Applications should be addressed to:

The Hon Greg Hunt MP
Minister for the Environment
PO Box 6022
House of Representatives
Parliament House
Canberra ACT 2600

Questions on the administration of the ATSIHP Act can be directed to:

The Assistant Secretary
Heritage Branch
Department of the Environment
GPO Box 787
Canberra ACT 2601
(02) 6274 2015

Purpose of the Act

Section 4 of the ATSIHP Act states the purpose of the Act is the 'preservation and protection from injury or desecration of areas and objects in Australia and in Australian waters, being areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition.'

What heritage does the Act protect?

The ATSIHP Act can protect areas and objects that are of particular significance to Aboriginal people in accordance with Aboriginal tradition. The expression 'of particular significance' etc. was modelled on the definition of the term 'sacred site' in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).⁴

The ATSIHP Act does not protect all forms of Indigenous heritage. For example, the Act does not protect:

- areas and objects whose heritage significance is due to their archaeological, scientific or historical interest, such as areas of past Aboriginal occupation, traditionally made tools, or old records
- rock art or contemporary art that has no particular significance in Aboriginal tradition
- natural heritage (including wildlife or biodiversity)
- intangible heritage (such as intellectual property and language).

How does the Act protect heritage?

The ATSIHP Act allows the Minister to make a declaration to protect an area, object or class of objects from a threat of injury or desecration.

Four sections of the ATSIHP Act provide for declarations:

- under **section 9**, the Minister can make an emergency declaration to protect an area from a serious and immediate threat of injury or desecration for up to 30 days. The Minister can extend an emergency declaration for up to an additional 30 days. Hence, an emergency declaration for an area can provide up to 60 days of protection.
- under **section 10**, the Minister can make a declaration to protect an area from a threat of injury or desecration for any period of time specified in the declaration, subject to the repeal provisions of the *Legislative Instruments Act 2003* (Cth).

⁴ Graeme Neate, 'Power, Politics, Policy and Persuasion – Protecting Aboriginal Heritage under Federal Laws', *Environmental and Planning Law Journal*, September 1989, p.225. See also the explanation of the adoption of the term 'area' given in the second reading speech by the Hon A Clyde Holding, Minister for Aboriginal Affairs (House Hansard, 9 May 1984, p.2129).

- under **section 12**, the Minister can make a declaration to protect an object or class of objects from a threat of injury or desecration for any period of time specified in the declaration, subject to the repeal provisions of the *Legislative Instruments Act 2003* (Cth).
- under **section 18**, an authorized officer can make an emergency declaration to protect an area, object or class of objects from a threat of injury or desecration for up to 48 hours.

The Minister can vary or revoke a declaration where they are satisfied that the law of a State or Territory effectively protects an area or an object (section 13).

Declarations under sections 9, 10 or 12 are legislative instruments that come into operation on the day after registration under the *Legislative Instruments Act 2003* unless the declaration itself specifies a later date. Most legislative instruments are automatically repealed after 10 years, which limits the duration of long term declarations.

How is an application made?

An Aboriginal person or group can make an oral or written application to the Minister under section 9 (emergency declarations in relation to areas), section 10 (declarations in relation to areas) or section 12 (declarations in relation to objects and classes of objects). Applications do not in themselves protect an area or object.

An application can be made orally or in writing, and should be addressed to the Minister. Written applications can be sent to the Minister's office at the address shown previously. An application can be made or withdrawn (and potentially re-submitted) at any time.

There are minimal formal requirements for applications and no formal application form. However the application must contain certain information and be complete for the Minister to be able to consider making a declaration. Oral information may need to be transcribed for the Minister to be able to consider the information when responding to an application under the ATSIHP Act. The information in an application can be submitted in stages but once the Minister begins to consider the application it the content of the application is fixed.⁵

Potential applicants should be aware of the information requirements, procedural fairness requirements, and issues with the effectiveness of the legislation, and may wish to contact the Department before submitting an application to the Minister (see contact details above).

What information should be included in an application?

At a minimum, the Act requires that an application should include the following information:

⁵ *Chapman v Luminis Pty Ltd (No 5)* [2001] FCA 1106 per Von Doussa J at 272.

- The identity and Aboriginality of the **Aboriginal person or group of Aboriginals** who are making the application, or on whose behalf the application is being made.
- A **request to preserve or protect an area** under sections 9 or 10, or a **request to protect or preserve an object** or class of objects under section 12.
- Specification of the **area, object or class of objects** to be protected, including the location, features and boundaries of the area. The area or objects must be specified with level of precision that enables the Minister and others to understand the application, and, if the Minister decides to make a declaration, to make a declaration that is enforceable. It is advisable to specify locations using clearly marked high-resolution maps and geospatial coordinates.
- Specification of the **source of injury or desecration to the area**, object or class of objects, including the location and a description of the object or class of objects, any common distinguishing characteristic of the class of objects, and, if possible, all of the objects in any class of objects.

Applications that lack this key information are incomplete and cannot be processed. An application may specify more than one area, object or class of objects to be protected. There is no need to make a separate application under section 12 to protect objects that are part of an area for which an application has been made under section 9 or 10.

In addition to these minimum requirements, applications should include supporting evidence of Aboriginal tradition relevant to the particular significance of the area, object or class of objects and the source of injury or desecration.

What is ‘injury or desecration?’

It is important that any application seeks to protect an area, object or class of objects from injury or desecration. Section 3(2) of the ATSIHP Act sets out when an object shall be taken to be injured or desecrated:

‘For the purposes of this Act, an area or object shall be taken to be injured or desecrated if:

- (a) in the case of an area:
 - (i) it is used or treated in a manner inconsistent with Aboriginal tradition;
 - (ii) by reason of anything done in, on or near the area, the use or significance of the area in accordance with Aboriginal tradition is adversely affected; or
 - (iii) passage through or over, or entry upon, the area by any person occurs in a manner inconsistent with Aboriginal tradition; or

- (b) in the case of an object – it is used or treated in a manner inconsistent with Aboriginal tradition;

and references in this Act to injury or desecration shall be construed accordingly.’

Hence, an action must be inconsistent with the relevant Aboriginal tradition or must adversely affect the traditional use or significance of an area or object to cause injury or desecration. For example, depending on the relevant Aboriginal tradition, the act of entering an area could injure or desecrate it. Some actions (e.g. a proposed change in zoning) are not uses or treatments of an area, or things done in or near an area under section 3(2)(a) or (b) and such actions would not be defined as a cause of injury or desecration. Applications that specify such actions as the source of injury or desecration cannot be processed.

Information needed to make a declaration

The Minister may require additional information to consider making a declaration (see criteria for making declarations listed below). It is in the applicant’s interest to provide all necessary relevant information upon application. To assist in the Minister’s consideration of an application, applicants should provide additional information about the following interrelated matters:

- Evidence of the *body of traditions, observances, customs and beliefs relevant to the protection of the area or object* from the source of injury or desecration, including the traditions etc. that explain the particular significance of the area or object, and the nature of the injury or desecration.

To consider making a declaration the Minister must be satisfied that Aboriginal tradition requires the protection of the specified area or object from the specified activity:

‘Whilst the power of the Minister under s[ection]s 9 and 10 is conditioned on the Minister being satisfied that an area is a significant Aboriginal area, it is the content of Aboriginal tradition which renders the area significant.’⁶

Section 3 of the ATSIHP Act defines Aboriginal tradition as ‘the body of traditions, observances, customs and beliefs of Aborigines generally or of a particular community or group of Aborigines, and includes such traditions, observances, customs or beliefs relating to persons, areas, objects or relationships’. The Federal Court has stated:

‘... the definition does require *a degree of antiquity* to the traditions, observances, customs and beliefs ... the words in the expression “tradition, observances, customs or beliefs” carry with them the notion that there has been *a handing down from generation to generation* in accordance with the accepted understanding of the way in which Aboriginal history, laws, observances and practices have been transmitted through the aeons.....’⁷

⁶ *Chapman v Luminis Pty Ltd (No 5)* [2001] FCA 1106 per Von Doussa J at 252.

⁷ *Ibid.* per Von Doussa J at 275. Emphasis added.

- Evidence that explains *why the area or object is of particular significance to Aboriginals in accordance with Aboriginal tradition.*

Section 3 of the ATSIHP Act defines a significant Aboriginal area as an area of land or water that is of particular significance to Aboriginals in accordance with Aboriginal tradition and an Aboriginal object as an object (including Aboriginal remains) of particular significance to Aboriginals in accordance with Aboriginal tradition.

The word ‘particular’ indicates the area must hold significance to Aboriginal people in accordance with Aboriginal tradition that is separate, special, apart, above or different from the significance that areas generally have to them. The area must be of a special kind and not just any area of some significance.⁸ In a different context the High Court has stated that the phrase ‘particular significance’ cannot be precisely defined, and that ‘[a]ll that can be said is that the site must be of a significance which is neither minimal nor ephemeral.’⁹

- Evidence that explains *why an action specified as the source of injury or desecration is inconsistent with Aboriginal tradition or will adversely affect the traditional use or significance of an area or object.*
- Evidence that the *injury or desecration is occurring or is likely to occur.* Section 3(3) of the ATSIHP Act states that ‘... an area or object shall be taken to be under threat of injury or desecration if it is, or is likely to be, injured or desecrated’. Before making an application, it is advisable to contact the State or Territory government agency responsible for the protection of Aboriginal heritage to establish whether the area or object is protected under state or territory law and hence not under threat of injury or desecration.
- In the case of an application under section 9, evidence that the threat is both *serious and immediate*, since this is a prerequisite for a declaration to be made under section 9.

It is not sufficient for applicants to simply state that an area or an object is important or significant to them and under threat of injury or desecration. The Minister must satisfy himself or herself about the Aboriginal tradition and other facts that are the basis of these claims within the meaning of the ATSIHP Act:

‘The Minister must gain an appreciation of relevant Aboriginal tradition, must discern and consider the basis upon which [the area or objects] is claimed by the applicants to be an area of particular significance to Aboriginals in accordance with

⁸ *Tickner v Chapman* (1995) 133 ALR 226 per Burchett J at 252 and Kiefel J at 265.

⁹ *Commonwealth of Australia v Tasmania* (the Tasmanian Dam Case) [1983] HCA 21, 158 CLR 1, per Brennan J at 86.

that tradition...and ultimately come to a view as to whether he is satisfied that [the area or objects] is a significant Aboriginal area within the meaning of the Act.¹⁰

The evidence provided to the Minister must have a high level of precision and detail, similar to what a court would require. A recent study of court decisions relating to the protection of sacred sites suggested:

‘... Australian courts and tribunals have little time for Aboriginal evidence based on generalities and broad assertions concerning a site’s spiritual significance or apprehended adverse impacts to the asserted spiritual values of the place. Most importantly, the evidence of traditional owners must include a clear statement of the site’s spiritual significance and precise detail concerning the ways in which the proposed activities will impact those values.’¹¹

The onus is on the applicant to provide relevant factual evidence for consideration by the Minister.

Other useful information

In addition to the information listed above, the following information may assist with processing an application:

- The identity of the traditional owners of the area or object, including any group of registered native title claimants of an area. It is advisable to indicate whether the actions that are said to cause injury or desecration are the subject of an agreement to which the traditional owners are a party.
- The identity of the party responsible for carrying out the action said to cause injury or desecration, including contact details if possible.
- Evidence that the area or object is not protected from the threat under State or Territory law.
- Identification of any confidential material included in the application and why that material is confidential.

The Minister may not be able to consider confidential information in making a decision under the ATSIHP Act unless other interested persons have been afforded reasonable opportunity to respond to the information:

‘It would be wrong then to permit one group to raise a ground of significance, which might very well influence the Minister’s view on that critical issue, and yet deny those to be affected seriously by such a decision knowledge of what is relied upon in part to support the claim ...’¹²

¹⁰ *Anderson v Minister for the Environment, Heritage and the Arts* [2010] FCA 57 per Foster J, at 96 and 99.

¹¹ Dr Andrew Sneddon, ‘Aboriginal objections to development and mining activities on the grounds of adverse impacts to sites of spiritual significance: Australian judicial and quasi-judicial responses’, *Environmental and Planning Law Journal*, Vol. 29, 2012, pp.217–238.

¹² *Minister of Aboriginal and Torres Strait Islander Affairs v Douglas* [1996] FCA 1509 per Black CJ, Burchett, and Kiefel JJ at 42.

If necessary the Minister (or reporter for a section 10 application – see below) can specify conditions or provide a summary of information to prevent the broad disclosure of sensitive information.

How are applications decided?

The Minister makes his decision based on all of the available relevant evidence before him at that time. The Minister relies on the relevant factual information presented by the applicant, interested parties and the relevant state or territory governments.

Criteria for making declarations

The decision whether to make a declaration is at the Minister's discretion. Before the Minister can decide whether to make a declaration he must consider the following matters:

- whether the area, object or class of objects is a significant Aboriginal area, object or class of objects
- whether the area, object or class of objects is under threat of injury or desecration
- whether there is, under a law of the relevant state or territory, effective protection of the area, object or objects from the threat of injury or desecration
- for a declaration under section 9: whether the threat is both serious and immediate
- for a declaration under section 10, a report prepared in accordance with the requirements of section 10, and any representations attached to the report
- for a declaration under section 12, the effects a declaration may have on the proprietary or pecuniary interests of anyone other than the Aboriginal people to whom the object or class of objects is of particular significance
- for a declaration under sections 10 or 12, any such other matters as the Minister thinks relevant.

The Minister's decision is personal and discretionary. The ATSIHP Act does not enable the Minister to delegate his power to make declarations under section 9, 10 and 12 of the Act. The courts have held that the Minister must make the decision of whether to make a declaration personally after considering all the relevant material before him or her, observing that:

'It is this feature of the scheme of the Act – the explicit requirement that the Minister consider the representations [attached to a section 10 report] – that removes the process under s.10 from the general rule that a Minister is not expected to do everything personally ...'¹³

¹³ *Tickner v Chapman*, [1995] FCA 1726 per Black CJ at 40.

The Minister is not required to make a declaration, even if he is satisfied that a significant area or object is under threat of injury or desecration. The Minister must consider a range of matters, including the views of people who would be affected adversely by a declaration and any relevant matters, such as the financial effects of a declaration. The Federal Court has emphasised that the effect of declarations on private or public interests is a matter for the Minister:

‘The question whether a declaration should be made which would adversely affect public or private interests is a matter within the discretion of the Minister who is required to evaluate the competing considerations and make a decision accordingly.’¹⁴

As soon as practicable after making a declaration the Minister must take reasonable steps to notify persons likely to be substantially affected by the declaration (section 14) or, where the Minister refuses to make a declaration, he must take reasonable steps to notify the applicant (section 16).

Requirements for procedural fairness

When making decisions the Commonwealth must provide procedural fairness (or natural justice) to any person whose interests might be adversely affected by the decisions. ‘Interests’ are those interests recognised by the courts, such as ownership of land. Interested parties to applications under the ATSIHP Act typically include Aboriginal people other than the applicants, government agencies, land owners and developers.

A key aspect of procedural fairness is that interested parties have a reasonable opportunity to comment on the information on which a decision will be based. This includes information that an applicant has provided about the location of an area or object, and why the area or object is of particular significance to Aboriginals in accordance with Aboriginal tradition. Equally, the Minister (and any reporter nominated under section 10 – see below) must provide relevant information or comments from these interested parties to the applicant. If these opportunities are not provided, a person who is adversely affected may seek judicial review of the Minister’s decision.

Various consultation processes must be completed before the Minister can consider whether to make a declaration under the ATSIHP Act. Where appropriate the Department may consult persons on behalf of the Minister.

Consultation on section 9 and 12 applications

After the Minister has received a complete application under sections 9 or 12, the Minister or Department will contact and inform interested parties about the application. Typically, this would include:

¹⁴ *Tickner v Chapman*, [1995] FCA 1726 per French J at 30.

- the owners and occupiers and any other person with a legal right to carry out an activity in the area, including persons entitled to explore for minerals in the area
- if relevant, owners of the object (or class of objects)
- Aboriginal persons, other than the applicant, who have rights and interests in the area or object, including any registered native title claimants
- relevant Commonwealth, state or territory agencies.

It is important to note this process may take considerable time to enable adequate consideration of the material.

Consultation on section 10 applications

Applications under section 10 of the Act have different consultation requirements. In accordance with section 10(1)(c) the Minister must nominate a person to prepare a report on the matter (a **reporter**). The Minister considers the report provided by the reporter and any representations attached to the report before deciding whether to make a declaration under section 10.

Before preparing the report, the reporter must publish a notice in the Commonwealth Gazette and in any suitable local newspapers. The notice must:

- state the purpose of the application made under section 10 and the matters required to be dealt with in the report (see below)
- invite interested persons to provide representations in connection with the report by a specified date (which must be 14 or more days from the date of the Gazette notice)
- specify an address to which such representations may be provided.

After publication of the notice, the reporter may attempt to identify and contact interested parties to inform them that the reporting process has commenced. At the end of the period allowed for representations, typically the reporter will give the interested parties all material to be considered by the Minister, including the application, any representations received, and any substantive new material. After that point, the process of consultation typically is similar to the process for section 9 and 12 applications described above, although the reporter may allow additional time or additional rounds of consultation.

The report must deal with the matters set out in section 10(4) of the Act, i.e.:

- the particular significance of the area to Aboriginals
- the nature and extent of the threat of injury to, or desecration of, the area
- the extent of the area that should be protected
- the prohibitions and restrictions to be made with respect to the area

- the effects the making of a declaration may have on the proprietary or pecuniary interests of persons other than the Aboriginal or Aboriginals referred to in paragraph (1)(a)
- the duration of any declaration
- the extent to which the area is or may be protected by or under a law of a State or Territory, and the effectiveness of any remedies available under any such law
- any other matters (if any) as are prescribed.

The reporter must not expand the scope of the report to consider broader questions, such as whether other threats exist or whether other areas need to be protected.

The ATSIHP Act does not specify that representations to a report need to be made in writing, although it requires the reporter's notice to specify an address to which representations may be provided. If required reporters can consider reasonable requests to provide an opportunity for representations to be given orally and transcribed.

The reporter must ensure that interested parties are afforded procedural fairness. There may be contested issues of fact that are relevant to the matters on which the reporter should report. In these circumstances, the reporter's role is to outline the position of the different parties and the evidence in support of those positions, and to advise which position the reporter prefers. The reporter does not have the power to try to resolve contested issues of fact through an open-ended inquiry.

Specifically the reporter cannot:

- seek out persons who have not made representations
- take evidence on oath
- conduct a hearing with cross-examination of witnesses
- call and question witnesses.

The reporter may seek clarification or more information from the applicant or persons who have made representations. In some instances, it may not be possible for the reporter to draw definite conclusions about certain contested issues. The reporter must consider any representations and attach them to the report. The reporter is not required to undertake independent research into each claim made in the application or the representations.

Optional section 13 consultation to resolve matters

Under section 13 of the ATSIHP Act, the Minister can ask a person (e.g. a professional mediator) to assist in resolving matters related to an application. This process can assist in situations where it appears that the applicant and other parties are able to negotiate a satisfactory outcome and the negotiation process would benefit from formal mediation.

Section 13 consultation with the State or Territory

Section 13(2) of the ATSIHP Act provides that the Minister must not make a declaration unless he has consulted with the appropriate State or Territory minister as to whether there is, under a law of that State or Territory, effective protection of the area, object or objects, from the threat of injury or desecration. However a failure to consult the State or Territory minister would not necessarily invalidate a declaration.

Typically this consultation would occur if the available evidence indicates it is possible to make a declaration, and the Minister is inclined to make a declaration. The consultation may take the form of a letter to the appropriate State or Territory minister, seeking guidance on the effectiveness of any protection provided by the State or Territory.

The Minister must consider whether there is 'effective protection' in relation to the specific area or object and threat. It is not enough that the State or Territory law provides a generally effective protective regime.

If the Minister is satisfied that the State or Territory law provides effective protection of the area or object, he must not make a declaration. Under section 13(5), if the Minister makes a declaration and the Minister is satisfied at a later point that the State or Territory has effectively protected the area or object, the Minister must revoke the declaration.

The effect of a declaration

A declaration can stop on-ground activities and override approvals given under relevant planning and environment laws. However a declaration cannot:

- order people to carry out activities such as conservation or repairs to damaged areas
- undo an activity that has already been carried out
- deal with threats that may or may not occur at some unknown time in the future
- deal with the impact of or control natural events, such as the movement of wildlife.

Under section 22 of the ATSIHP Act, a person who contravenes a declaration made under section 9 or 10 of the Act can face criminal penalties of up to \$10 000 or imprisonment for 5 years, or both. A person who contravenes a declaration made under section 12 of the Act can face criminal penalties of up to \$5000 or imprisonment for 2 years, or both. Higher penalties apply to corporations.

Form of declarations

In accordance with section 11 of the Act, a declaration must:

- describe the area, object or class of objects with sufficient particulars to enable it to be identified
- contain provisions to protect and preserve the area, object or class of objects from injury or desecration; and specify the period over which the declaration has effect.

Interaction with state and territory heritage laws

Australia's State and Territory governments are primarily responsible for laws to protect areas and objects that are significant or sacred to Indigenous Australians. When the Minister makes a declaration under the ATSIHP Act it can act to override State and Territory laws in situations where a State or Territory has approved an activity. The ATSIHP Act was designed to encourage the States and Territories to use their existing heritage laws in the interests of Indigenous Australians and, where those laws were inadequate, to change them.¹⁵

Interaction with Commonwealth heritage laws

Other Commonwealth legislation can be used to protect areas and objects of heritage significance to Indigenous Australians. The *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act) provides comprehensive protection for Indigenous heritage places of national environmental significance and on Commonwealth land. However a declaration under the ATSIHP Act could override an approval given under the EPBC Act.

The *Protection of Movable Cultural Heritage Act 1986* (the PMCH Act) prohibits the export of prescribed Indigenous objects including sacred objects, human remains, bark and log coffins used as traditional burial objects, rock art and carved trees (dendroglyphs). The PMCH Act provides ways for persons to obtain permits to export such materials. Amendments to the ATSIHP Act (sections 12 and 18) prevent the ATSIHP Act from overriding these export permits.

Interaction with native title and land rights laws

The *Native Title Act 1993* (Cth) and land rights laws in each state and territory allow Indigenous Australians to seek formal legal recognition of their traditional entitlements to land, often expressed as a 'right to speak for country'. The ATSIHP Act was introduced before native title was recognised in Australian law, and, as noted previously, is based on land rights concepts of sacred site protection. The ATSIHP Act originally included a 'sunsetting' clause to repeal the Act after two years, following the expected introduction of national land rights laws modelled on the Northern Territory system. However the project to introduce national land rights

¹⁵ Second reading speech by the Hon A Clyde Holding, Minister for Aboriginal Affairs, House Hansard, 9 May 1984, p.2129.

laws was abandoned and the sunset clause in the ATSIHP Act was repealed in 1986.¹⁶ The ATSIHP Act was retained as a 'reserve power'.¹⁷

It is possible for a person to make an application under the ATSIHP Act to protect an area that is on Aboriginal land or on land that is subject to native title claims or determinations. Declarations made under the ATSIHP Act can override Indigenous land use agreements (ILUAs) or other agreements based on native title or land rights.

Applicants do not have to be traditional owners of the land specified in their applications, i.e. persons who hold native title (whether or not that title has been recognised through a Federal Court determination) who may also have been granted land rights. For the purposes of the ATSIHP Act it is not necessary to resolve whether the applicant, or other Aboriginal persons who comment on any application, are the traditional owners of the land.

If an applicant is not a traditional owner, it is likely the Minister would need to consult the recognised traditional owners before deciding whether to make a declaration under the ATSIHP Act. For example, as noted previously, it is likely the Minister would need to consult any registered native title claimants through the appropriate representative body.

¹⁶ Graeme Neate, 'Power, Politics, Policy and Persuasion – Protecting Aboriginal Heritage under Federal Laws', *Environmental and Planning Law Journal*, September 1989, pp.217, 219–20, 222, 227–8.

¹⁷ Second reading speech by the Hon A Clyde Holding, Minister for Aboriginal Affairs, House Hansard, 16 April 1986, p.2419.

Appendix: List of cases related to the ATSIHP Act

No	Case name	Court
1	<i>Re Wamba Wamba Local Aboriginal Land Council and Murray River Regional Aboriginal Land Council v The Minister Administering the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 and Murray Downs Golf & Country Club Limited</i> [1989] FCA 169 (12 May 1989)	Federal Court Lockhart J
2	<i>Re Robert Bropho v Robert Tickner and Bluegate Nominees Pty Ltd</i> [1993] FCA 25; (1993) 40 FCR 165 (10 February 1993)	Federal Court Wilcox J
3	<i>Robert Tickner v Robert Bropho</i> [1993] FCA 208; (1993) 114 ALR 409 (1993) 40 FCR 183 (30 April 1993)	Federal Court Black CJ Lockhart French JJ
4	<i>Malcolm McDonald Douglas and Valerie Anne Douglas v the Hon Robert Tickner, Minister of Aboriginal and Torres Strait Islander Affairs Western Australia, Minister of Lands of Western Australia and Minister of Aboriginal Affairs</i> [1994] FCA 1066 (5 May 1994)	Federal Court Carr J
5	<i>Western Australia, Minister of Lands of Western Australia and Another v Minister of Aboriginal and Torres Strait Islander Affairs of the Commonwealth of Australia</i> [1995] FCA 1052 (7 February 1995)	Federal Court Carr J
6	<i>Thomas Lincoln Chapman, Wendy Jennifer Chapman and Andrew Lincoln Chapman v the Honourable Robert Tickner, Minister of Aboriginal and Torres Strait Islander Affairs, Cheryl Anne Saunders and Isabella Alice Norvill and Douglas Milera</i> [1995] FCA 1068 (15 February 1995)	Federal Court O'Loughlin J
7	<i>The Honourable Robert Tickner, Minister of Aboriginal and Torres Strait Islander Affairs, Isabella Alice Norvill and Douglas Milera v Thomas Lincoln Chapman, Wendy Jennifer Chapman, Andrew Lincoln Chapman, Graham Francis Barton, Gary Stephen Knott and Che</i>	Federal Court Black CJ, Burchett and Kiefel JJ

	[1995] FCA 1726 (7 December 1995)	
8	<i>Minister of Aboriginal and Torres Strait Islander Affairs of the Commonwealth of Australia v Malcolm McDonald Douglas and Valerie Anne Douglas and Francis Djaigween, Frank Sebastian, Mathew Gilbert and Joe Bernard</i> [1996] FCA 1509 (28 May 1996)	Federal Court Black CJ, Burchett and Kiefel JJ
9	<i>Wilson v Minister for Aboriginal & Torres Strait Islander Affairs</i> ("Hindmarsh Island Bridge case") [1996] HCA 18; (1996) 189 CLR 1 (6 September 1996)	High Court Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ
10	<i>Toomelah Boggabilla Local Aboriginal Land Council v Minister for Aboriginal and Torres Strait Islander Affairs</i> [1996] FCA 924 (17 October 1996)	Federal Court Foster J
11	<i>Kartinyeri v Commonwealth</i> [1998] HCA 52; (1998) 156 ALR 300; (1998) 72 ALJR 1334 (5 February 1998)	High Court Brennan CJ Gaudron, McHugh, Gummow, Kirby and Hayne JJ
12	<i>Kartinyeri v The Commonwealth</i> [1998] HCA 22 (1 April 1998)	High Court Brennan CJ Gaudron, McHugh, Gummow, Kirby and Hayne JJ
13	<i>Chapman v Luminis Pty Ltd [No 2]</i> (includes corrigenda of 4 August 2000) [2000] FCA 1010 (28 July 2000)	Federal Court Doussa J
14	<i>Chapman v Luminis Pty Ltd (No 5)</i> [2001] FCA 1106 (21 August 2001)	Federal Court Doussa J
15	<i>Williams v Minister for the Environment and Heritage</i> [2003] FCA 535 (30 May 2003)	Federal Court Wilcox J
15	<i>Williams v Minister for the Environment & Heritage</i> [2003] FCA 627 (3 June 2003)	Federal Court

		Lindgren J
16	<i>Williams v Minister for Environment & Heritage</i> [2004] FCAFC 58 (19 March 2004)	Federal Court Gray, Tamberlin and Lander JJ
17	<i>Dates v Minister for the Environment, Heritage and the Arts</i> [2009] FCA 1156 (2 October 2009)	Federal Court Bennett J
18	<i>Anderson v Minister for the Environment, Heritage and the Arts</i> [2010] FCA 57 (10 February 2010)	Federal Court Foster J
19	<i>Dates v Minister for Environment, Heritage and the Arts (No 2)</i> [2010] FCA 256 (24 March 2010)	Federal Court Bennett J