INTRODUCTION TO THE ABORIGINAL AND TORRES STRAIT ISLANDER HERITAGE PROTECTION ACT

2010

Heritage Division
Department of Sustainability, Environment, Water, Population and Communities
www.environment.gov.au/heritage

CONTENTS

KEY POINTS

- The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (the ATSIHP Act) assists in the preservation and protection of places, areas and objects of particular significance to Indigenous Australians.
- The ATSIHP Act does not apply to all Indigenous heritage, but only to areas and objects that are of particular significance to Indigenous Australians in accordance with their Indigenous traditions.
- The Commonwealth Minister who is responsible for administering the ATSIHP Act can make declarations to protect these areas and objects from specific threats of injury or desecration.
- From a policy perspective, the Australian Government's view is that Australia's state and territory governments have the primary responsibility for laws to protect these areas and objects. When the ATSIHP Act was introduced, it was intended that Commonwealth declarations would be made as a last resort in cases when state or territory laws do not provide effective protection.
- Declarations can stop activities and override other approvals, but cannot order people to carry out activities such as conservation or repairs to damaged areas.
- The Minister cannot make a declaration unless he or she has received a legally valid application.
- The Minister cannot make a declaration unless he or she is personally satisfied that the area or object is: (a) of particular significance to Indigenous Australians in accordance with their traditions; and (b) under a threat of injury or desecration.
- Applicants need to explain the relevant Aboriginal tradition and how the activity which threatens the area or object is inconsistent with the traditions.
- The Minister must provide procedural fairness to all parties, including anyone who could be adversely affected by a declaration.
- The Minister must consider a report before deciding whether to protect an area for longer than 60 days.
- These requirements can delay the Minister's decision, sometimes by months.

CURRENT ADMINISTRATIVE ARRANGEMENTS

The Minister for Sustainability, Environment, Water, Population and Communities (the Minister) is responsible for making decisions under the ATSIHP Act. Currently the Minister is the Hon Tony Burke MP.

The Department of the Sustainability, Environment, Water, Population and Communities (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 are provided at the end of this publication.

PURPOSE AND SCOPE OF THE ATSIHP ACT

The ATSIHP Act enables Indigenous Australians to make requests to protect their traditional areas and objects from threats of injury or desecration.

The purpose of the ATSIHP 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' (section 4).

In the ATSIHP Act, ‘Aboriginal’ has a broad meaning that includes descendants of the Indigenous inhabitants of the Torres Strait Islands. This document also uses the term ‘Aboriginal’ in this broad sense.

Unlike other Commonwealth heritage laws, protection under the ATSIHP Act is not limited to places and objects that are nationally significant or places on Commonwealth property.

Heritage beyond the scope of the ATSIHP Act

Unlike most state and territory legislation, the ATSIHP Act is not designed to protect areas and objects of scientific or historical interest, such as rock art, archaeological sites or areas of past Aboriginal occupation. Areas and objects can only be protected under the ATSIHP Act if they are of particular significance to living Aboriginal people in accordance with Aboriginal traditions.

Similarly, the ATSIHP Act cannot be used to protect contemporary art that has no particular significance in Aboriginal tradition.

Also, the ATSIHP Act cannot be used for the purpose of protecting wildlife or biodiversity as natural heritage, nor intangible heritage, such as intellectual property and language.

RELATIONSHIP TO STATE AND TERRITORY HERITAGE LAWS

The ATSIHP Act can override state and territory laws in situations where a state or territory has approved an activity, but the Commonwealth Minister prevents the

activity from occurring by making a declaration to protect an area or object. For example, a declaration can stop a development that has been approved or any other activity that has been approved under a state or territory law.

The Minister can only make a decision after receiving a legally valid application under the ATSIHP Act and, in the case of long term protection, after considering a report (discussed further below). Before making a declaration to protect an area or object in a state or territory, the Commonwealth Minister must consult the appropriate minister of that state or territory (section 13).

The ATSIHP Act was meant to encourage the states and territories to use their existing laws in the interests of Indigenous Australians and, where those laws were inadequate, to change them. Also, the ATSIHP Act was meant to provide a last resort for Indigenous Australians to seek protection of their traditional areas and objects, if there is no effective protection of the areas or objects under the laws of their state or territory. These purposes are not stated in the ATSIHP Act, but were stated in the 1984 second reading speech when the Act was introduced (House Hansard, 9 May 1984, p.2129ff; second reading speeches are made in the Parliament to explain why new laws are needed; these speeches can be used by courts and administrators as an aid in interpreting legislation).

RELATIONSHIP TO COMMONWEALTH HERITAGE LAWS

Other Commonwealth heritage legislation, which was enacted after the ATSIHP Act, can be used to protect traditional areas and objects.

The *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act) is the principal Commonwealth legislation for providing comprehensive protection for Indigenous heritage places. The EPBC Act protects matters of national environmental significance. Since 2003, it has protected places that are in the National Heritage List and the Commonwealth Heritage List. These include places that have Indigenous heritage values, including some traditional areas.

The *Protection of Movable Cultural Heritage Act 1986* (the PMCH Act) is the principal Commonwealth legislation for protecting heritage objects, including Indigenous heritage objects, from being exported illegally. The PMCH Act prohibits the export of prescribed Indigenous objects, such as sacred objects and human remains, bark and log coffins used as traditional burial objects, rock art, and carved trees (dendroglyphs). The power in the ATSIHP Act to protect objects cannot be used to override export permits granted under the PMCH Act (sections 12 and 18 of the ATSIHP Act).

RELATIONSHIP TO NATIVE TITLE AND LAND RIGHTS

In many parts of Australia, Indigenous Australians are seeking or have gained formal legal recognition of their traditional entitlements to be the custodians of their land, which is often expressed as their ‘right to speak for country’. This legal recognition happens under the Commonwealth *Native Title Act 1993* and under land rights legislation applicable in each state and territory. The second reading

speech stated that the ATSIHP Act is 'not intended to be an alternative to land claim procedures' and is 'not meant to close off huge areas' (House Hansard, 9 May 1984, p.2129ff).

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. In this situation:

- The applicant does not have to be a traditional owner of the land, or a native title holder or claimant.
- It is not necessary for the purposes of the ATSIHP Act to resolve whether the applicant, or other Aboriginal persons who make comments on an application, are traditional owners of the land, or native title holders or claimants.
- Declarations made under the ATSIHP Act can override Indigenous land use agreements or other agreements that are based on native title or land rights.

APPLICATIONS

The power to make declarations is triggered by people making applications to the Commonwealth Minister. The Minister cannot make a declaration unless an Aboriginal person (or a person representing an Aboriginal person) has asked the Minister to protect an area or object. This request is referred to as an application.

Applicants must provide enough information to satisfy the Minister that a declaration is needed. The Department can explain the information requirements to anyone who is thinking about making an application. It is advisable to contact the Department before submitting an application (see contact details at the end of this publication).

How applications can be made

An application can be made orally or in writing, and should be addressed to the Minister. The application can be sent to the Minister's office or directly to the Department for immediate processing (see contact details below).

An application can be made or withdrawn at any time. If an application has been made and withdrawn, another can be made, provided it is not frivolous and vexatious.

Information that must be included in an application

An application should include the following information:

- Information that shows the application is **made by (or on behalf of) an Aboriginal or Torres Strait Islander person or group**, preferably identifying the Aboriginal or Torres Strait Islander applicants.
- A **request to preserve or protect** an area or object, preferably specifying whether the applicant is seeking emergency (section 9) or long-term

(section 10) protection for an area, or both, or protection for an object (section 12). It is unnecessary to seek to protect objects under section 12 of the ATSIHP Act if the objects are part of an area for which protection is sought under sections 9 or 10 of the ATSIHP Act.

- The **identity of the area or object** for which preservation or protection is sought, preferably specifying the location of the area (including its boundaries) or object, so that it can be reasonably identified by the Minister, the reporter (section 10) and interested persons.
- The **nature of the activity that poses the threat of injury or desecration** to the specified area or object, preferably including information about how the area or object will be affected by the activity, and whether the threat is serious and immediate (section 9).
- The **Aboriginal tradition** associated with the area or object.
- An explanation of **why the area or object is a significant Aboriginal area or object** based on the Aboriginal tradition associated with the area or object.
- An explanation of **why the activity poses a threat of injury or desecration** to the area or object based on the Aboriginal tradition associated with the area or object.

Importantly, before making a declaration, the Minister must be satisfied that the area or object is a significant Aboriginal area or object which is under a threat of injury or desecration (sections 9, 10 and 12). The meanings of 'significant Aboriginal area' or 'significant Aboriginal object' and 'threat of injury or desecration' depend on the meaning of 'Aboriginal tradition'. These terms have specific meanings in the ATSIHP Act (see below). In the ATSIHP Act, it is the tradition about an area or object that explains to the Minister why it is of particular significance to Aboriginal people and why it needs to be protected from the activity that poses the threat of injury or desecration.

Some applicants may believe that if they say that an area or an object is important or significant to them and the area or object is under threat of injury or desecration, then that is all that is required for the Minister to be satisfied that the area or object is of significance and is under a threat. This is not the case. It is not sufficient to merely claim that an area or object is significant or 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 the claim within the meaning of the ATSIHP Act. Generally, the Minister must have sufficient evidence to be satisfied about these matters and, without such evidence, a declaration cannot be made. The onus is on the applicant to provide this evidence.[1]

[1] In a 2010 Federal Court case about the Minister's decision not to protect a site in Ballina, New South Wales, referred to as Lot 208, the judge found that '… the subject matter of the Minister's satisfaction under s10(1)(c)(i) of the Act is essentially factual. The Minister must gain an appreciation of relevant Aboriginal tradition, must discern and consider the basis upon which Lot 208 is claimed by the applicants to be an area of particular significance to Aboriginals in accordance with that tradition, must evaluate that evidence and ultimately come to a view as to

Meaning of 'significant Aboriginal area' or 'object'

A *significant Aboriginal area* is 'an area of land in Australia or in or beneath Australian waters; an area of water in Australia; or an area of Australian waters, which is of particular significance to Aboriginals in accordance with Aboriginal tradition' (section 3). 'Area' includes a site (section 3). The second reading speech explained that the use of the term 'area' rather than 'site' was meant to accommodate situations where there is an area immediately adjacent to a particularly secret or sacred site 'where people ought not to go', and that the ATSIHP Act 'is not meant to close off huge areas'.[2]

A *significant Aboriginal object* is 'an object (including Aboriginal remains) of particular significance to Aboriginals in accordance with Aboriginal tradition' (section 3).

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'.[3]

Meaning of 'Aboriginal tradition'

Aboriginal tradition means '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' (section 3).

The Federal Court has stated that the definition of 'Aboriginal tradition' requires a 'degree of antiquity in the traditions, observances, customs and beliefs' while acknowledging that the concept of transmission from generation to generation does not exclude the possibility of change within Aboriginal tradition.[4]

whether he is satisfied that Lot 208 is a significant Aboriginal area within the meaning of the Act.' See Foster J in *Anderson v Minister for the Environment, Heritage and the Arts* [2010] FCA 57, paragraph 99.
Also in her 1996 expert review of the ATSIHP Act, the Hon Elizabeth Evatt AC observed that 'It does not follow that mere assertion by an Aboriginal that a site is of particular significance according to tradition should be sufficient to establish that fact.'

[2] 'The use of the word 'area' rather than site will allow flexibility in recognising what Aboriginals believe to be significant. It will save a narrow and artificial approach being taken to sites, for example, to discrete geological formations. Where a site is particularly secret and sacred there may be an area immediately adjacent to it where people ought not to go. Transgression of that space may be as offensive as entry to the site. It may also be thought to place people going there in physical danger. This Bill is worded to enable those situations to be accommodated. It is not meant to close off huge areas. It will not be administered in that way.' House Hansard, 9 May 1984, p.2129ff.

[3] See Brennan J in *Commonwealth of Australia v Tasmania (the Tasmanian Dam Case)* (1983) HCA 21, 158 CLR 1, paragraph 86.

[4] See von Doussa J in *Chapman v Luminis Pty Ltd (No 5)* [2001] FCA 1106, paragraph 398.

Meaning of 'threat of injury or desecration'

One of the most important aspects of the ATSIHP Act is that protection is given on the basis of a threat of injury or desecration. Section 3(2) of the ATSIHP Act states that:

> 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, to cause injury or desecration, an activity must be inconsistent with the relevant Aboriginal tradition or must adversely affect the traditional use or significance of an area or object. The act of entering an area could injure or desecrate it, depending on the relevant Aboriginal tradition.

To be a threat, the activity must be occurring or be likely to occur. Section 3(3) of the ATSIHP Act states that: 'For the purposes of this Act, 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.'

A person who is considering whether to make an application needs to be aware that a declaration cannot deal with anything except a specific, material threat due to a planned or current activity. For example a declaration cannot undo an activity that has already been carried out. It cannot deal with threats that may or may not occur at some unknown time in the future. It cannot require a person to carry out a new activity, such as preparing a plan to manage an area. It cannot control natural events, such as the movement of wildlife.

DECISION-MAKING PROCESS

The Minister must respond to a legally valid application. The Minister makes his or her decision based on all of the available relevant evidence before him or her. The Minister relies on the relevant information presented by the applicant, affected parties and the relevant state or territory government.

Procedural fairness

The government must provide procedural fairness (or natural justice) when making decisions. Any person whose interests might be adversely affected by a declaration must have a reasonable opportunity to comment on the information on which the decision will be based.[5] If this opportunity is not provided, a person who is adversely affected may seek judicial review of the Minister's decision in the Federal Court. In the past, the Federal Court has set aside decisions that were not made properly on this basis.

In practice, this means that the Minister and reporters who are nominated under section 10 of the ATSIHP Act must provide information that is relevant to making a declaration to anyone whose interests are likely to be adversely affected by a declaration. 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 the reporter must provide information or comments from these interested parties to the applicant.

Interested parties to applications under the ATSIHP Act typically include other Aboriginal Australians, government agencies, land owners and developers. After the Minister has received an application that contains all of the required information, the Department will work on behalf of the Minister to attempt to contact and inform interested parties about the application. Typically, this would include contacting the following people:

- 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
- the owners of the objects
- Aboriginal persons, other than the applicant(s), who have rights and interests in the area or objects
- the relevant Commonwealth, state or territory minister, or their delegates.

This can take time, as people need to be given a reasonable opportunity to comment. Usually parties are allowed approximately two weeks to respond. Less time is available for comment in an emergency. For example, parties may be given only a few hours to comment when an activity that could affect an area or object is about to start or is already being carried out.

If a party provides a statement that simply repeats previously made claims, the statement will not be circulated to the other parties. The Minister is provided with copies of all of the relevant statements from the applicant and the affected parties.

An applicant and others making statements to the Minister may ask that their statements be kept confidential because, for example, the statements contain information that is culturally or commercially sensitive. However, if, at least, the nature of the claims cannot be disclosed to other parties for their comment, the

[5] 'Interests' must be interests recognised by the courts, such as ownership of land.

Minister cannot consider the confidential claims in making a decision under the ATSIHP Act.

Consultation to resolve matters

The Minister can ask a person (e.g. a professional mediator) to assist in resolving matters related to the application (section 13). The aim is to ensure that the applicant and the Minister are satisfied with the resolution of matters relating to the application.

This option can be useful 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.

If this option is not possible, or if mediation fails to resolve all of the matters related to an application, the Minister must decide whether to make a declaration.

Requirement to consult a state or territory about effective protection

Section 13(2) of the ATSIHP Act provides that the Minister must not make a declaration unless he or she 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 invalidate a declaration.

Typically, the Commonwealth Minister will write to the appropriate state or territory minister. The exchange of correspondence may take several weeks, unless the matter is urgent.

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 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 or she must not make a declaration.

Under section 13(5) of the ATSIHP Act, if the Minister makes a declaration and the state or territory later protects the area or object, the Minister must revoke the declaration.

Types of declarations

Under section 9 of the ATSIHP Act 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 of the ATSIHP Act, the Minister can make a declaration to protect an area from a threat of injury or desecration for any period of time or indefinitely.

An emergency declaration under section 9 can protect an area from a serious and immediate threat while the Minister makes a decision under section 10 about the long-term protection of the area from that threat. In this situation, the Minister will have a maximum of 60 days to complete the decision-making processes under section 10 before the period of emergency protection ends. In practice, however, it can take longer than 60 days for the Minister to make a decision under section 10, especially if the matters relating to the application are complex.

Under section 12 of the ATSIHP Act, 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.

Under section 18 of the ATSIHP Act, 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.

Declarations must describe the relevant area, object or objects with sufficient particulars to enable the area, object or objects to be identified. Declarations must contain provisions to protect and preserve the area, object or objects from injury or desecration. In the case of a declaration under section 12, these can include provisions for returning human remains to Aboriginal people who are entitled to accept the remains in accordance with Aboriginal tradition.

Criteria for making a section 9 declaration

Before the Minister can decide whether to make an emergency declaration under section 9, ALL of the following criteria must be met:

- The Minister must have received an application made by, or on behalf, of an Aboriginal person or group requesting that a specified area be protected from injury or desecration.
- The Minister must be satisfied that the area is a significant Aboriginal area.
- The Minister must be satisfied that the area is under serious and immediate threat of injury or desecration.

Criteria for making a section 10 declaration

Before the Minister can decide whether to make a declaration under section 10, ALL of the following criteria must be met:

- The Minister must have received an application made by, or on behalf of, an Aboriginal person or group requesting that a specified area be protected from injury or desecration.
- The Minister must have received and considered a report (discussed below) and any representations attached to it.
- The Minister must be satisfied that the area is a significant Aboriginal area.
- The Minister must be satisfied that the area is under threat of injury or desecration.

- The Minister must have considered such other matters as he or she thinks relevant.

Reports under section 10

Before deciding whether to make a declaration under section 10, the Minister must nominate a person to prepare a report on the matter. 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 (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.

The report must deal with the matters set out under section 10(4). These are:

- 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 Aboriginals to whom the area is of particular significance
- 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.

The reporter's role is limited to reporting on matters specified under section 10(4). The reporter is also limited to reporting on the specific claims made in the application about the significance of the area and the threat to it. That is, the reporter may 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.

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 ATSIHP Act does not specify that representations to a report need to be made in writing. Some Aboriginal persons may have difficulties in providing their views in writing. Therefore, reporters should provide opportunities for representations to be made orally, where appropriate.

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. While the reporter may draw on his or her particular knowledge or expertise to assess the claims, he or she would need to state the factual basis for any observations or judgements. The reporter may refer to, and make comments about, an authoritative paper or other material, but he or she must circulate this to the applicant and the affected parties for comment.

The reporting process can take several months to complete. There may be delays if parties submit additional information late in the reporting process.

Criteria for making a section 12 declaration

Before the Minister can decide whether to make a declaration under section 12, ALL of the following criteria must be met:

- The Minister must have received an application made by, or on behalf of, an Aboriginal person or group requesting that a specified object or class of objects be protected from injury or desecration.
- The Minister must be satisfied that the object or class of objects is a significant Aboriginal object or class of significant Aboriginal objects.
- The Minister must be satisfied that the object or class of objects is under threat of injury or desecration.
- The Minister must have considered 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.
- The Minister must have considered such other matters as he or she thinks relevant.

Minister's decision is personal and discretionary

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.[6]

In making section 9, section 10 and section 12 declarations, the Minister has discretion as to whether to make a declaration. The Minister is not required to make a declaration, even if he or she is satisfied that a significant area or object is under threat of injury or desecration. In making that decision, the Minister must consider a range of matters, including the views of people who would be affected adversely by a declaration. The Minister can take into account any relevant matters, such as the financial effects to other persons if a declaration is made and what is in the national interest.

However, the courts have emphasised the 'high value' the ATSIHP Act places on the protection of Aboriginal heritage threatened with injury or desecration, and have stated that this is a factor to be given substantial weight by the Minister in exercising his or her discretion.[7]

Penalties for contravening declarations

Under section 22 of the ATSIHP Act, a person who contravenes a declaration to protect an area faces criminal penalties of up to $10,000 or imprisonment for 5 years, or both. A person who contravenes a declaration to protect an object faces criminal penalties of up to $5,000 or imprisonment for 2 years, or both. Higher penalties apply to corporations.

ABORIGINAL REMAINS[8]

Anyone who discovers anything reasonably suspected to be Aboriginal remains has a legal obligation to report the finding to the Minister. If the Minister is satisfied that they are Aboriginal remains, the Minister is required to take reasonable steps to consult any Aboriginals that he or considers may have an interest in the remains before deciding what action to take (section 20).

Where Aboriginal remains are delivered to the Minister, he or she must (section 21):

[6] Black CJ in *Tickner v Chapman* (1995) 57 FCR 451

[7] French J in *Tickner v Bropho* (1993) 40 FCR 183 at 223-225.

[8] In section 3 of the ATSIHP Act, 'Aboriginal remains' means the whole or part of the bodily remains of an Aboriginal, but does not include:

(a) a body or the remains of a body that is:
  (i) buried in accordance with the law of a State or Territory; or
  (ii) buried in land that is, in accordance with Aboriginal tradition, used or recognised as a burial ground;

(b) an object made from human hair or from any other bodily material that is not readily recognisable as being bodily material; or

(c) a body or the remains of a body dealt with or to be dealt with in accordance with a law of a State or Territory relating to medical treatment or post-mortem examinations.

- return the remains to an Aboriginal or Aboriginals entitled to, and willing to accept, possession, custody or control of the remains in accordance with Aboriginal tradition
- otherwise deal with the remains in accordance with any reasonable directions of an Aboriginal or Aboriginals referred to above
- if there is or are no such Aboriginal or Aboriginals – transfer the remains to a prescribed authority for safekeeping.

The obvious step for people who discover human remains is to contact the local police.

State and territory laws require the reporting of discovered Aboriginal remains, although they do this in different ways. In general, protocols within the states and territories determine whether police or coroners have responsibilities and set out how to determine whether the remains are Aboriginal remains.

CONTACT FOR FURTHER INFORMATION

For additional information on the ATSIHP Act, please contact:

Dr John Avery
Director, Indigenous Heritage Law Reform
Department of Sustainability, Environment, Water, Population and Communities
GPO Box 787
Canberra ACT 2601

Ph: (02) 6274 1788
Fax: (02) 6274 2095
Email: john.avery@environment.gov.au

LIST OF CASES UNDER THE ATSIHP ACT

No	Case name	Court
1	*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* [1989] FCA 169 (**12 May 1989**)	**FCA** Lockhart J
2	*Re Robert Bropho v Robert Tickner and Bluegate Nominees Pty Ltd* [1993] FCA 25; (1993) 40 FCR 165 (**10 February 1993**)	**FCA** Wilcox J
3	*Robert Tickner v Robert Bropho* [1993] FCA 208; (1993) 114 ALR 409 (1993) 40 FCR 183 (**30 April 1993**)	**FCFCA** Black CJ Lockhart French JJ
4	*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* [1994] FCA 1066 (**5 May 1994**)	**FCA** Carr J
5	*Western Australia, Minister of Lands of Western Australia and Another v Minister of Aboriginal and Torres Strait Islander Affairs of the Commonwealth of Australia* [1995] FCA 1052 (**7 February 1995**)	**FCA** Carr J
6	*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* [1995] FCA 1068 (**15 February 1995**)	**FCA** O'Loughlin J
7	*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* [1995] FCA 1726 (**7 December 1995**)	**FCFCA** Black CJ, Burchett and Kiefel JJ
8	*Minister of Aboriginal and Torres Strait Islander Affairs of the Commonwealth of Australia v Malcolm Mcdonald Douglas and*	**FCFCA** Black CJ, Burchett and

	Valerie Anne Douglas and Francis Djaigween, Frank Sebastian, Mathew Gilbert and Joe Bernard [1996] FCA 1509 (**28 May 1996**)	Kiefel JJ
9	*Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* ("Hindmarsh Island Bridge case") [1996] HCA 18; (1996) 189 CLR 1 (**6 September 1996**)	**HCA** Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ
10	*Toomelah Boggabilla Local Aboriginal Land Council v Minister for Aboriginal and Torres Strait Islander Affairs* [1996] FCA 924 (**17 October 1996**)	**FCA** Foster J
11	*Kartinyeri v Commonwealth* [1998] HCA 52; (1998) 156 ALR 300; (1998) 72 ALJR 1334 (**5 February 1998**)	**HCA** Brennan CJ Gaudron, McHugh, Gummow, Kirby and Hayne JJ
12	*Kartinyeri v The Commonwealth* [1998] HCA 22 **(1 April 1998)**	**HCA** Brennan CJ Gaudron, McHugh, Gummow, Kirby and Hayne JJ
13	*Chapman v Luminis Pty Ltd [No 2]* (includes corrigenda of 4 August 2000) [2000] FCA 1010 (**28 July 2000**)	**FCA** Doussa J
14	*Chapman v Luminis Pty Ltd (No 5)* [2001] FCA 1106 (**21 August 2001**)	**FCA** Doussa J
15	*Williams v Minister for the Environment and Heritage* [2003] FCA 535 (**30 May 2003**)	**FCA** Wilcox J
15	*Williams v Minister for the Environment & Heritage* [2003] FCA 627 (**3 June 2003**)	**FCA** Lindgren J
16	*Williams v Minister for Environment & Heritage* [2004] FCAFC 58 (**19 March 2004**)	**FCFCA** Gray, Tamberlin and Lander JJ
17	*Dates v Minister for the Environment, Heritage and the Arts* [2009] FCA 1156 (**2 October 2009**)	**FCA**

		Bennett J
18	*Anderson v Minister for the Environment, Heritage and the Arts* [2010] FCA 57 (**10 February 2010**)	**FCA** Foster J
19	*Dates v Minister for Environment, Heritage and the Arts (No 2)* [2010] FCA 256 (**24 March 2010**)	**FCA** Bennett J