



Australian Government

Department of the Environment and Energy

Submission

Reforms to the Native Title Act 1993 (Cth)

Department of the Environment and Energy

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CONTENTS

Introduction3
Emissions Reduction Fund3
Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)4
 The Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) in practice...4
 Enactment.....4
 Native Title Act 1993 (Cth) intersect.....4
Conclusion.....5

Introduction

The Department of the Environment and Energy (Department) welcomes the opportunity to provide this submission to the Attorney–General’s Department on reforms to the *Native Title Act 1993* (Cth) (Native Title Act).

The role of the Department of the Environment and Energy is to advise on and implement environment and energy policy to support the Government in achieving a healthy environment, strong economy and thriving community now, and for the future. We deliver major Government initiatives to promote the conservation and sustainable use of Australia’s natural resources and to maintain a competitive and reliable energy system as we transition to a lower emissions future.

In doing so, the Department is responsible for the the Emissions Reduction Fund and the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (ATSHP Act), providing a regulatory function that intersects with the Native Title Act. This submission provides a summary of the Department’s work and how this could relate to the Native Title Act, broadly structured around the content of the Options Paper (options paper) for reforms to the *Native Title Act 1993* (Cth) released in November 2017.

Emissions Reduction Fund

The Emissions Reduction Fund provides for the crediting and purchasing of carbon abatement from activities which reduce or store emissions in Australia. This includes projects which store carbon in vegetation and projects that reduce emissions from wildfires in Northern Australia. A significant number of these projects are run by native title holders or conducted on land subject to native title. The legislation underpinning the Emissions Reduction Fund, the *Carbon Credits (Carbon Farming Initiative) Act 2011* (CFI Act), includes a number of mechanisms to protect the interest of native title holders and facilitate Indigenous participation.

Of particular importance are the eligible interest holder consent requirements where determined native title holders must provide consent for certain projects to be credited. These consents are often reflected in Indigenous Land Use Agreements. The consent requirements are important to the Commonwealth’s ability to enforce the permanence of projects that store carbon through the imposition of carbon maintenance obligations which may affect the interests of native title holders. Section 301 of the CFI Act also provides that the Act does not affect the operation of the Native Title Act.

Another important requirement for the Emissions Reduction Fund is that project proponents need to have the legal right to carry out the project. This can necessitate actions under State or Territory law which are subject to the Native Title Act.

The Clean Energy Regulator, who administers the Emissions Reduction Fund, has published guidance for stakeholders on the interactions between the Fund and the Native Title Act. This may need updating if the reform proposals in the options paper are implemented.

The Department is happy to work with the Attorney–General’s Department on any interactions between the options and legislation for the Emissions Reduction Fund to ensure they continue to achieve the policy intent of both frameworks. In particular, participants in the Emissions Reduction Fund have an interest in minimising the costs associated with consent and eligibility

requirements and native title holders have an interest in ensuring that consent is informed and freely given.

Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)

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 or objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition'. Terms are defined in the Act.

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

- The identity and Aboriginality of the Aboriginal person or group of Aboriginal people who are making the application, or on whose behalf the application is being made.
- A request to preserve or protect an area.
- Specification of the area, objects or class of objects to be protected, including the location, features and boundaries of the area or areas.
- Specification of the source of injury or desecration of the area, objects or class of objects to be protected, including the location and a description.

The Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) in practice

The Department believes that the legislative intent of the ATSIHP Act, when drafted, was that the Minister would make declarations as a last resort where state or territory laws do not provide adequate protection. The ATSIHP Act itself lacks specific guidance on formal application requirements and legislative administration.

The Minister is the sole decision-maker with power to declare under the ATSIHP Act. Declarations are discretionary. Under section 17 of the ATSIHP Act, the capacity to make declarations is able to be designated to other persons, known as Authorized Officers. Authorized Officers can be any person, but are usually senior departmental officers.

Authorized Officers can make emergency declarations to protect significant Aboriginal areas or objects from serious and immediate threats of injury or desecration for up to 48 hours. This declaration is made when the Minister is unavailable, and they are satisfied that an injury or desecration is likely to occur prior to the Minister making a declaration.

Enactment

The Department's legal advice concludes that declarations under the ATSIHP Act could stop activities and override other approvals, including those given by other State and Commonwealth Ministers for major developments as well as approvals made under the *Environment and Protection and Biodiversity Protection Act 1999 (Cth)*.

Native Title Act 1993 (Cth) intersect

There are several key points that should be considered when reforming the Native Title Act. These are:

- The ATSIHP Act does not recognise Native Title.

- The ATSIHP Act enables any 'Aboriginal' person or group (or someone acting on their behalf) to make an oral or written application to the Minister.
- It is also possible for any Aboriginal person to make further applications at any time in relation to a matter that the Minister has already decided under the ATSIHP Act.
- As stated above, declarations could override other approvals.

Conclusion

The Department of the Environment and Energy recognises its auxiliary role in the administration and reformation of the *Native Title Act 1993* (Cth). As options for reform are considered in areas such as agreement-making, streamlining and determinations under the Native Title Act, the Department of the Environment and Energy would like to commit to working with the Attorney-General's Department to ensure that our advice and frameworks accurately reflect the reformed Native Title Act.

The Department is grateful for the opportunity to make a submission.