



Australian Government  
Department of Agriculture,  
Water and the Environment

# ***The Aboriginal and Torres Strait Islander Heritage Protection Act 1984: General guide***



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Department of Agriculture, Water and the Environment

GPO Box 858 Canberra ACT 2601

Telephone 1800 900 090

Web [awe.gov.au](http://awe.gov.au)

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# 1 Aboriginal and Torres Strait Islander Heritage Protection Act 1984

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act) is Commonwealth legislation that can be used by Aboriginal and Torres Strait Islander people to make applications to protect places and objects from injury or desecration. The places or objects in question must be of particular significance in accordance with Aboriginal tradition.

## 2 How the ATSIHP Act protects a place or object

In response to an application, the Commonwealth Minister for the Environment can use the ATSIHP Act to make a declaration to protect an area or object for a specified period of time. A declaration is a legislative instrument and it is an offence to breach a declaration. Declarations cannot be used to order people to repair any damage they might have already caused.

## 3 Interaction with state and territory laws

Before making a declaration, the minister is required to consult with states and territories about whether their laws provide effective protection for an area or objects. The minister can decide to protect a place using the ATSIHP Act if state or territory laws have not provided effective protection for the particular area or object in question. Where the minister is satisfied that a state or territory law does provide effective protection for the area, object or objects, the minister is required to revoke any declaration they have made.

## 4 Processing timeframes are indicative only

Every effort is made to process applications as quickly as possible, and the timeframes set out in this document are estimates only. In practice, processing times vary due to the information provided in an application, the time taken to respond to requests for further information and the time needed to consult with affected parties.

Providing a complete application will assist with processing. See [Applying for protection under the ATSIHP Act](#) and the [application form](#) to understand all the information you should provide in your application.

It will be difficult for the department to progress your application if we have not received sufficient information from you to identify the specified area or object and the alleged threat of injury or desecration.

## 5 Types of declarations

The ATSIHP Act provides for 4 different types of declarations.

### 5.1 Section 18 applications (48-hour emergency declarations)

These are:

- for emergency protection of areas or objects
- protection up to 48 hours (cannot be extended)
- used when injury or desecration is imminent

- decided by an authorised officer (a departmental officer)
- usually processed within days of receipt, if the threat is imminent.

Before making a declaration, the authorised officer must be satisfied that another section 18 declaration has not been made in the previous 3 months.

## **5.2 Section 9 applications (30-day emergency declarations)**

These are:

- for emergency protection of areas
- protection up to 30 days (which may be extended to a maximum of 60 days)
- used when the threat of injury or desecration is serious and immediate
- decided by the minister.

These applications can take a minimum of 1-2 months to process, depending on the urgency of the application.

## **5.3 Section 10 applications (long-term declarations)**

These are:

- for protection of areas
- protection for a period of time specified by the minister
- used when a significant Aboriginal area is under threat of injury or desecration
- decided by the minister.

These applications can take a minimum of 6-9 months to process. This is because the minister must ask for a detailed report on the application to be developed by an independent reporter. Time required is also dependent on the completeness of the application and starts from when all necessary information has been provided by the applicant.

## **5.4 Section 12 applications (long-term declarations)**

These are:

- for protection of an object or class of objects (which can be a fixed object, such as particular trees)
- protection for a period of time specified by the minister
- used when an object is under threat of injury or desecration
- decided by the minister.

These applications can take a minimum of 4-6 months to process. Time required is also dependent on the completeness of the application and starts from when an application is finalised.

## 6 Applying for protection under the ATSIHP Act

To apply for protection of a place or object, you must first explain why protection is required by outlining the issue in an application. The application form outlines what information we require. This includes information on:

- where the place or object is and its boundaries
- what the particular significance of the place or object is – for example, what are the traditions or customs associated with the place or object, and the nature and source of the threat and when the threat is likely to happen
- how the threat impacts the particular significance
- what other options for protection you have explored, such as with the state or territory government.

Once you've made your case, email your form to [ATSIHPA@awe.gov.au](mailto:ATSIHPA@awe.gov.au).

## 7 Contact us for assistance

If your matter is urgent and you don't feel you have time to fill out the form, or you are finding the form hard to fill out, you can call us and make your application verbally. If your information is culturally sensitive, you can ask to talk to a male or female officer or one of our Indigenous staff members. We can also help by organising for an interpreter or translator to assist.

Our number is 02 6275 9450 and you can call any time.

## 8 Next steps

### 8.1 Confirming your application

We will review your application before COB on the next business day from receiving it and email or call you to confirm it has been received.

#### Calling you

We may then call you to discuss your application. We might ask you:

- for more information on things such as:
  - the threat and when it might occur
  - who is posing the threat – this could be a government body like a roads crew or a development company – and to ask for any contact details you might have
- to discuss the location and boundaries of the place/object
- to confirm that the application has been made by an Aboriginal or Torres Strait Islander person or representative organisation
- to discuss the importance or particular significance of the place or object and how the threat might cause harm to the place or object
- to discuss the different protection pathways available for you to use in the circumstances you describe – that is, which section/s of the ATSIHP Act to use



- for permission to share details of your application verbally and in writing with the proponent you have identified.

Our aim in talking to you is to ensure that your application is valid and that we have all the information we need to progress it.

### **Calling the proponent**

Often we will also call the proponent or the person or company you have indicated is causing the threat.

In that conversation we:

- notify them that we have received an application for protection of a particular place or object
- clarify what their plans are – will their activity impact on the place/object, when are they planning to do the work?
- may ask them to pause their activities to allow time for us to evaluate the application and for the minister to consider making a declaration – we cannot compel the proponent to stop their activities while an application is in progress.

## **8.2 Assigning an officer**

A departmental officer will be assigned to manage your application. They will be your key contact in the department while your application is being evaluated and decided on by the minister. They will be available to you by phone and email.

## **8.3 Evaluating your application**

For all 4 types of applications, our first task is to conduct an evaluation of your application against the relevant decision criteria (see [Decision criteria](#)). This enables us to determine whether you have provided sufficient information for a decision to be made or whether we need to seek further information from you in order to present the case to the decision-maker.

If appropriate, we may also provide information to the minister (or an authorised officer in the case of applications under section 18) about the applications that have been made and the likely timeframes for decisions.

### **Mediation**

In some circumstances, rather than progressing an application through the processes outlined below, the minister can nominate a person to consult with parties with a view to resolving the matter to the satisfaction of the applicant and the minister. This is provided for in section 13(3) of the ATSIHP Act.

This option may be useful in situations where a proponent is not aware of the Aboriginal or Torres Strait Islander significance of the area or object or is at a stage in planning where they could readily amend their proposal to take into account community concerns.

### **Applications under section 10**

The ATSIHP Act requires that the minister appoint a person to provide a report on your application. The reporter must:

- publish a notice in the Government Gazette and in a local newspaper, stating that an application has been made to protect an area and invite interested parties to make representations on the matter within a specified period of time
- alert interested parties, where known, such as a developer, the local Aboriginal land council, landowner(s) or the regional council to the notice
- consider any information received through this process in the report to the minister.

The ATSIHP Act stipulates 8 matters that must be considered by the reporter in their report:

- the particular significance of the area to Aboriginal or Torres Strait Islander people
- 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 a declaration may have on the proprietary or pecuniary interests of persons other than the applicant
- the duration of any declaration
- the extent to which the area is or may be protected by or under state or territory laws and the effectiveness of any remedies available under any such law
- such other matters (if any) as are prescribed.

In most cases and, if possible, the reporter will visit the area in question and meet with the applicant and affected parties as relevant.

### **8.4 Advice to the minister**

The department then provides advice to the minister or authorised officer on the application and its merits. This includes providing a summary of the application, a map of the area and its boundary, a detailed analysis of the available evidence, an assessment of the evidence against the relevant criteria and any other matters of relevance. Submissions from the applicant and those received from any other interested party throughout the course of the evaluation period are also summarised and presented to the minister.

[Procedural fairness](#) is carefully observed in the processing of applications made under the ATSIHP Act. In advice to the minister, the department will also outline how the principles of procedural fairness have been upheld in relation to the matter.

### **8.5 The decision**

The minister is required to make decisions in line with the ATSIHP Act and legal principles such as procedural fairness (see [Decision criteria](#)). The minister may use their discretion in making a decision and can consider matters such as the effects of making a declaration on the proprietary or pecuniary interests of persons other than the applicant.



Once a decision is made, the applicant and affected parties will be notified of the decision. If a decision has been made to provide protection under sections 9, 10 or 12 of the ATSIHP Act, the department will arrange for the signed declaration to be published on the federal register of legislation and in a local newspaper, if any, circulating in the region. The declaration will come into effect the day following registration but can come into effect at a later date where the declaration provides for this.

## 9 Decision criteria

The decision-making criteria for making declarations of protection under the ATSIHP Act are as detailed in this section.

### 9.1 Section 9 applications

The minister can make an emergency declaration in relation to an area where the minister:

- has received an application for protection from, or on behalf of, an Aboriginal person or group
- is satisfied that
  - the area is a significant Aboriginal area, and
  - the area is under serious and immediate threat of injury or desecration
- has consulted with the appropriate state or territory minister as to whether there is effective protection offered to the area in question under state or territory law.

If those requirements are met, the minister is able to use their discretion to make a declaration under section 9 of the ATSIHP Act.

### 9.2 Section 10 applications

The minister can make a declaration in relation to an area where the minister:

- has received
  - an application for protection from, or on behalf of, an Aboriginal person or group
  - a report in relation to the area from a person they have nominated
- is satisfied that
  - the area is a significant Aboriginal area
  - the area is under threat of injury or desecration
- has consulted with the appropriate state or territory minister as to whether there is effective protection offered to the area in question under state or territory law.
- has considered
  - the report they have received and any representations attached to it
  - any other matters they consider relevant.

If those requirements are met, the minister is able to use their discretion to make a declaration under section 10 of the ATSIHP Act.

### 9.3 Section 12 applications

The minister can make a declaration in relation to an object or class of objects where the minister:

- has received an application for protection from, or on behalf of, an Aboriginal person or group
- is satisfied that
  - the object, or class of objects, is a significant Aboriginal object or the class of objects is a class of significant Aboriginal objects
  - the object is, or the whole or part of the class of objects are, under threat of injury or desecration
- has consulted with the appropriate state or territory minister as to whether there is effective protection offered to the object, or objects, in question under state or territory law
- has considered
  - any effects a declaration may have on the proprietary or pecuniary interests of persons other than the applicant or the Aboriginal person or people on behalf of whom the application was made
  - any other matters they think relevant.

If those requirements are met, the minister is able to use their discretion to make a declaration under section 12 of the ATSIHP Act.

### 9.4 Section 18 applications

An authorised officer can make a declaration where they are satisfied that:

- the area is a significant Aboriginal area or the object is, or a class of objects are, significant Aboriginal objects
- the area or object is, or objects are, under serious and immediate threat of injury or desecration
- (in the case of an area) a declaration under section 9 would be justified, but the injury or desecration is likely to occur before such a declaration can be made
- no other section 18 declarations have been made about the same area, object or objects in the preceding 3 months due to substantially the same threat.

## 10 Confidential and culturally sensitive information

Your application may contain confidential and/or culturally sensitive information or you may wish to provide such information during the course of the evaluation process. We will work with you to ensure that culturally sensitive information is handled appropriately – this may mean allocating you a male or female officer to your case or an Indigenous officer, it may mean recommending the minister appoint a reporter that is culturally appropriate for your section 10 application, or it may mean working with us to develop a culturally appropriate summary of the information.

Due to procedural fairness requirements, if confidential information cannot be shared with an adversely affected party, this may affect the weight the minister is able to give that information.

You should carefully consider the possible implications of providing confidential information or requesting that information be treated confidentially.

We are aware that in each instance such an issue will be unique. The department will work flexibly and sensitively to ensure procedural fairness is observed and cultural sensitivities are respected. If necessary, the minister can specify conditions to prevent the broad disclosure of sensitive information.

## **11 Key terms**

### **11.1 Injury or desecration**

The ATSIHP Act states that an area will be taken to be injured or desecrated if:

- it is used or treated in a manner inconsistent with Aboriginal tradition
- 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
- passage through or over, or entry upon, the area by any person occurs in a manner inconsistent with Aboriginal tradition.

An object will be taken to be injured or desecrated if it is used or treated in a manner inconsistent with Aboriginal tradition.

### **11.2 Aboriginal**

‘Aboriginal’ is defined in ATSIHP Act to mean ‘a member of the Aboriginal race of Australia, and includes a descendent of the indigenous inhabitants of the Torres Strait Islands.’

### **11.3 Aboriginal tradition**

‘Aboriginal tradition’ is defined in the ATSIHP Act as ‘the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships’.

### **11.4 Under threat**

The ATSIHP Act states that an area or object will be taken to be under threat of injury or desecration if it is, or is likely to be, injured or desecrated.

### **11.5 Significant Aboriginal area**

The ATSIHP Act defines a significant Aboriginal area as:

- an area of land in Australia or in or beneath Australian waters
- an area of water in Australia, or
- an area of Australian waters
- being an area of particular significance to Aboriginals in accordance with Aboriginal tradition.

### **11.6 Significant Aboriginal object**

The ATSIHP Act defines a significant Aboriginal object as ‘an object (including Aboriginal remains) of particular significance to Aboriginals in accordance with Aboriginal tradition’.

### **11.7 Particular significance**

The ATSIHP Act requires, as part of the definitions of 'significant Aboriginal area' and 'significant Aboriginal object' that the particular significance of areas or objects be explained in terms of Aboriginal tradition to Aboriginal people in their traditions, observances, customs or beliefs.

### **11.8 Affected party**

An affected party is anyone whose rights, interests and legitimate expectations might be affected by the minister making a declaration. In the case of ATSIHP Act applications this always includes the applicant/s (or the Aboriginal person or people on behalf of whom the application was made) as well as the proponent of the activity which is said to represent a threat. In some cases, other people may also have rights, interests and expectations affected by the decision, for example a landowner whose property is within the 'specified area' or a member of an Aboriginal group with ties to the area.

### **11.9 Procedural fairness**

As the consequences of a decision to make or not make a declaration of protection can be significant to a range of people, procedural fairness is carefully observed in the processing of ATSIHP Act applications. Sometimes called 'natural justice', procedural fairness requires that any person who might be affected by a decision is given a reasonable opportunity to comment on the information on which a decision will be based.

This means, especially in the processing of applications under section 10, information contained in the application, any supplementary information provided in follow up and information submitted by affected parties may be exchanged either in part, in whole or in summary form with other affected parties. In addition, the section 10 reporter's final report to the minister may also be shared with affected parties.

Affected parties and applicants will be given time to consider and respond to the materials that have been shared with them. In determining the length of time that will be allowed, the department will consider the complexity of the material being shared, the urgency of the matter and any other factors they consider relevant.