



Request for Expressions of Interest for Reporters and Consulting Agents under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*

The Department of Agriculture, Water and the Environment (**department**) is seeking expressions of interest from suitably experienced and skilled individuals or entities interested in carrying out reporting or consultation duties under the *Aboriginal Torres Strait Islander Heritage Protection Act 1984* (Cth) (**REOI**).

The *Aboriginal Torres Strait Islander Heritage Protection Act 1984* (Cth)

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (**the ATSIHP Act**) is a Commonwealth law that assists in the preservation and protection of areas and objects that are of particular significance to Aboriginal and Torres Strait Islanders in accordance with Aboriginal and Torres Strait Islander traditions.

Before deciding whether to make a declaration to preserve or protect an area under section 10(1)(c) of the ATSIHP Act, the responsible Minister is required to consider a report developed by their nominee about an area. Under section 13(3), the responsible Minister may appoint an appropriate nominee to consult with about an application.

To improve its efficiency in administering the ATSIHP Act and in supporting the responsible Minister to make timely decisions, the department wishes to establish a pool of service providers (**Provider List**). The Provider List will be used to fill reporting and consulting agent roles under sections 10(1)(c) and 13(3) (Section 10 Reporter and Section 13 Consulting Agents).

Summary descriptions of the services to be provided by Section 10 Reporters and Section 13 Consulting Agents can be found at **Attachment A**. An overview of the Act is provided at **Attachment B**.

Requirements and Criteria

The department is looking for individuals and specified personnel within entities with the following personal and professional qualities:

Professional qualities:

- ability to communicate respectfully and sensitively with Aboriginal and Torres Strait Islander people and a range of other parties
- ability to interpret and apply legislation
- demonstrated experience in, or aptitude for, complex analysis, including an understanding of the rules of procedural fairness
- proficient oral and written communication skills, including the ability to provide well-reasoned conclusions
- demonstrated experience dealing with complex stakeholder issues, and
- demonstrated experience in undertaking mediation or facilitating other consultative processes.

Personal qualities:

- accountability and diligence, and
- sound judgement, impartiality, integrity, and respect for the law.

The department also requires potential service providers to provide a **fee structure** including hourly and/or daily rates for individuals or nominated personnel, the rates of any assistants and any overhead or administrative charges.

Section 10 Reporters and Section 13 Consulting Agents must also be willing to travel to the application area and/or other relevant locations, subject to any government-imposed restrictions or public health orders e.g., due to the current COVID-19 pandemic.

How to express interest

Please complete the **Expression of Interest form** and submit to ATSIHPA@awe.gov.au by 26 April 2021 February 2021. Expressions of interest provided after this time may or may not be accepted at the sole discretion of the department.

The department may amend the closing date or terminate this REOI for any reason. For example, if it determines that none of the responses are appropriate or that it is otherwise in the public interest. The department is not liable for any costs or compensation for preparation or lodgement of a response.

The department will not accept expressions of interest submitted in a different format or applications that have been faxed, posted or hand delivered.

Individuals and entities are welcome to submit expressions of interest. Entities submitting expressions of interest need to nominate specific personnel and provide the information about each person.

All documents submitted in response to this REOI shall become the property of the department. The department may use, reproduce, communicate or modify any expression of interest for assessment, but will keep responses confidential, unless required by law to disclose information.

The department may also disclose any information contained in or regarding an expression of interest without prior consent to:

- (a) Parliamentary Committees
- (b) Employees and advisers engaged by the Commonwealth, and
- (c) Commonwealth departments, agencies, bodies, enterprises, authorities and Ministers, for this REOI and any legal, policy or other department accountability requirements

The *Freedom of Information Act 1982* (Cth) provides access to information in the possession of the Commonwealth to members of the public, that may include the response to the REOI, any subsequent contract and related documents.

Respondents must also declare any actual, potential or perceived conflict of interest in their expression of interest. A conflict of interest may exist, for example, if an individual or entity has an existing relationship (whether professional, commercial or personal) with the department's personnel involved in the evaluation of the REOI. The department may, if an actual, potential or perceived conflict of interest arises, at its sole and absolute discretion:

- exclude the expression of interest from further consideration
- enter into discussions to seek to resolve the conflict of interest, or
- take any other action it considers appropriate

Potential service providers should also familiarise themselves with all relevant Commonwealth legislation and policies relating to this REOI and the provision of the services including:

- the ATSIHP Act
- Division 137 of the Criminal Code

- the *Freedom of Information Act 1982*
- the *Ombudsman Act 1976*
- the *Privacy Act 1988*
- the *Public Governance, Performance and Accountability Act 2013*
- the *Work Health and Safety Act 2011*
- the *Workplace Gender Equality Act 2012*

How the Provider List will operate

The department will evaluate expressions of interest received against criteria of Professional and Personal qualities listed above as well as value for money and relevance and depth of skills and experience. The department may also conduct appropriate financial checks as part of the due diligence or seek clarification or additional information for the purpose of evaluation.

The department will notify service providers found suitable to fulfil the roles of the Section 10 Reporter or the Section 13 Consulting Agent by email to form the Provider List. Potential service providers not found suitable will also be notified and, on request, the department will provide reasons for its decision.

Inclusion in the Provider List does not guarantee a potential service provider will be engaged to undertake work.

The department may, at its discretion, approach a number of service providers or a single service provider from the Provider List as nominees to undertake duties for the responsible Minister.

Service providers nominated by the responsible Minister to undertake work will be engaged through a [Commonwealth Contract for Services](#) (“**Contract**”). Nothing in this REOI shall be construed to give rise to any contract between the department and any potential service provider until a contract is entered into.

It is anticipated that the Provider List will remain active for up to 3 years and be updated on a periodic basis depending on, for example, any significant change in the number or circumstances of providers or the department’s requirements.

The department may at any time after establishing the Provider List, exercise its discretion to remove a service provider from the Provider List if it becomes aware that the service provider ceases to meet the criteria.

The Provider List is nonexclusive, and the department may, at its discretion, engage providers that are not on the Provider List. The department may also, at its discretion, invite potential service providers at any time to submit an Expression of Interest if it becomes aware that potential service provider meets the criteria.

Further information

Please submit any queries regarding this REOI to atsihpa@awe.gov.au.

Summary descriptions of section 10 reporter and section 13 consulting agent services

The material below provides a high-level outline of the services to be provided by section 10 reporters and section 13 consulting agents. Detailed materials providing guidance on fulfilling the obligations of the Act and requirements of the department will be provided to those nominated by the Minister to deliver services.

Section 10 Reporter Services

An ATSIHP Act reporter is to investigate the merits of an application made under the ATSIHP Act and to form an opinion about the existence of Aboriginal or Torres Strait Islander tradition, the nature of the particular significance of the area to Aboriginal or Torres Strait Islander people and about the nature and extent of the threat of injury to, or desecration of, the area.

Subsection 10(3) of the ATSIHP Act sets out the obligations of the reporter in the initial stages of their report development. They are to:

- (a) Publish a notice in the Government Gazette and in a newspaper:
 - (i) Outlining that an application for an area has been received and they are developing a report on the matter
 - (ii) Inviting interested parties to make a submission on the matter
- (b) Visit the area in question if able to do so. Liaise with the applicant/s and other interested parties as appropriate
- (c) Consider submissions received through the liaison and public notice process and develop a report and in so doing ensure they:
 - (i) Uphold principles of procedural fairness
 - (ii) Handle any confidential or culturally sensitive material in an appropriate manner
- (d) The matters which must be dealt with in the reporter's report are set out in subsection 10(4) of the ATSHIP Act:
 - (i) the particular significance of the area to Aboriginal or Torres Strait Islander people
 - (ii) the nature and extent of the threat of injury to, or desecration of, the area
 - (iii) the extent of the area that should be protected
 - (iv) the prohibitions and restrictions to be made with respect to the area
 - (v) the effects the making of a declaration may have on the proprietary or pecuniary interests of persons other than the applicants
 - (vi) the duration of any declaration
 - (vii) 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
 - (viii) such other matters (if any) as are prescribed (currently there are no prescribed matters).

The reporter is not required to undertake independent research into each claim made in the application or the representations though may do so if they believe it necessary to appropriately address the matters specified above.

Section 13 Consulting Agent Services

- (e) Develop and receive endorsement from the Department of a consultation plan that:
 - (iii) outlines the section 13 Consulting Agent's understanding of the Minister's objectives in directing that a consultation occurs
 - (iv) identifies the parties to be involved in the consultation and known matters of concern to them, and
 - (v) maps out the consultation approach to be used to achieve the objectives of section 13(3) of the Act.
- (f) Engage with parties identified in the consultation plan by:
 - (vi) communicating with them to explain the role of a section 13 Consulting Agent and the objectives of the task at hand
 - (vii) outlining the planned process of consultation, what the range of outcomes may be, the confidentiality of discussions and gaining their agreement to participate in the planned process
 - (viii) conducting consultations according to the consultation plan
 - (ix) securing acknowledgement of the outcomes of the consultation and formalizing any agreements reached by, for example, drafting a document for parties to sign.
- (g) Draft and submit to the Minister a report that includes each of the matters set out below:
 - (x) The parties involved in the consultation
 - (xi) How the consultation was conducted
 - (xii) Any measures taken to ensure that information or the mediation process was appropriate to the audience
 - (xiii) Confirmation that consulted parties understood and agreed to participate in the consultation process
 - (xiv) The issues or barriers to resolution
 - (xv) Options developed for resolution
 - (xvi) The outcome or resolution achieved through the consultation, including a copy of any signed agreement between the parties
 - (xvii) The conduct of the parties during consultation, for example did they engage in good faith.

Overview: The Aboriginal and Torres Strait Islander Heritage Protection Act

Current Administrative Arrangements

The Minister for the Environment (the Minister) is responsible for making decisions under the ATSIHP Act.

The Department of the Agriculture, Water and the Environment 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.

Purposes of the ATSIHP Act

The purposes of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* ([the ATSIHP Act](#)) are to preserve and protect from injury or desecration areas and objects in Australia and Australian waters that are of particular significance to Aboriginals in accordance with Aboriginal traditions (Section 4).

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 department acknowledges that the language used in the ATSIHP Act to refer to Indigenous Australians isn't current. However, in discussing the ATSIHP Act and its application, the ATSIHP Act's terminology is retained to ensure consistency.

What heritage does the ATSIHP Act protect?

The ATSIHP Act can protect areas and objects that are of particular significance to Aboriginal people in accordance with Aboriginal tradition, that are under threat of injury or desecration.

The ATSIHP Act sets out specific definitions for terms including 'Aboriginal tradition', which are used when implementing the ATSIHP Act. Australian case law also contributes to the legal understanding of the definitions under the ATSIHP Act.

How does the ATSIHP 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 where they are found to be 'significant Aboriginal areas' or a 'significant Aboriginal object' as defined by the ATSIHP Act. These declarations are for a specified period of time.

To make 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 a specified area or an object from injury or desecration. In deciding whether to make a declaration the Minister will consider evidence provided by the applicants of the relevant Aboriginal tradition and how the identified threat may result in injury or desecration of the area or object.

Once a declaration is made it is an offence under the ATSIHP Act to contravene the declaration. Declarations cannot order people to carry out activities such as conservation or repairs to damaged areas.

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 an additional 30 days. Hence, an emergency declaration 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 the time specified in the declaration.
- 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 the time specified in the declaration.
- 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(5)).

Declarations under sections 9, 10 and 12 are legislative instruments that come into operation on the day after registration under the *Legislation Act 2003* (Cth) unless the declaration itself specifies a later date. Most legislative instruments are automatically repealed after 10 years.

History of the ATSHIP Act and interactions with other laws

The ATSHIP Act was developed and introduced in the early 1980s, before the recognition of native title in Australian law, and was to allow the Minister to make declarations as a last resort in cases when state or territory laws did not provide effective protection.¹

The *Native Title Act 1993* (Cth) and land rights laws in each state and territory now support Indigenous Australians to seek formal legal recognition of their traditional entitlements to land, often expressed as a 'right to speak for country'. The ATSHIP Act originally included a sunset clause to repeal the ATSHIP 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 laws was abandoned and the sunset clause in the ATSHIP Act was repealed in 1986.² The ATSHIP Act was retained as a 'reserve power'.³

It is possible for a person to make an application under the ATSHIP Act to protect an area that is on Aboriginal land or on land that is subject to native title claims or determinations.

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. The ATSHIP Act was designed to encourage the states and territories to use their existing heritage laws in the interests of Indigenous Australians and to change any inadequate laws.⁴

Other 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* (Cth)

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 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.

³ Second reading speech by the Hon A Clyde Holding, Minister for Aboriginal Affairs, House Hansard, 16 April 1986, p.2419.

⁴ Second reading speech by the Hon A Clyde Holding, Minister for Aboriginal Affairs, House Hansard, 9 May 1984, p.2129.

(EPBC Act) provides protection for Indigenous heritage places of national environmental significance and those on Commonwealth land.

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. 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.

Further information

If you have further questions about how to make an application you can contact ATSIHPA@awe.gov.au or 02 6275 9450.