Yamatji Marlpa
ABORIGINAL CORPORATION

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SUBMISSION TO THE REVIEW OF THE ABORIGINAL HERITAGE ACT 1972

Please find attached Yamatji Marlpa Aboriginal Corporation's (YMAC's) submission to the Review of the *Aboriginal Heritage Act 1972*, responding to the proposals contained in the Discussion Paper: *Seven proposals to regulate and amend the Aboriginal Heritage Act 1972 for improved clarity, compliance, effectiveness, efficiency and certainty*.

YMAC is the Native Title Representative Body (NTRB) for the Pilbara and Geraldton representative regions of Western Australia, areas which have and continue to experience unprecedented exploration, mining and development activity.

YMAC is the nominated Heritage Service Provider for many Native Title Claim Groups in the Pilbara and Geraldton regions and provides cultural heritage protection advice and support to Native Title claimants as a significant aspect of native title.

Unfortunately, our experience shows that where protection of Aboriginal cultural heritage is available, it is predominantly facilitated by the *Native Title Act 1993* through negotiated agreements, rather than the operation of the *Aboriginal Heritage Act* (AHA), despite the fact that primary responsibility for heritage protection exists at the State Government level.

In relation to the conduct of the review of the AHA, we would like to express our extreme disappointment with the limited timeframe for comment and the lack of proper consultation with Traditional Owners and heritage service providers such as YMAC.

We are aware that industry has been afforded a level of information about the review and opportunity for input not afforded to Traditional Owners, who are not merely stakeholders, but the custodians of Aboriginal heritage in WA. This level of access afforded to industry has been confirmed in their submissions to this review, including opportunities for direct input.

We are also aware of the development of internal departmental and other guidelines that have not been provided to YMAC, and are deeply concerned about other developments such as the Government Standard Heritage Agreement - combined with a proposed capacity for DIA to conduct its own surveys - to have a questionable level of control of heritage approvals.

It would be timely for the Minister and DIA, in light of this overdue review, to conduct and facilitate a dialogue between Traditional Owners and stakeholders to determine, on an informed basis, the appropriate means of ensuring the appropriate protection and preservation of Aboriginal cultural heritage in the context of increased development demands and requirements. We would also like to see heritage protection reforms informed by developments in other jurisdictions.

We consider that the preservation and protection of Aboriginal Heritage is of significant interest not only to Traditional Owners, but to the broader population given WA's significant and valuable Aboriginal Cultural Heritage holding. This is a heritage of social, historical and scientific value, worthy of proper protection and preservation underpinned by an effective and transparent regime which provides greater clarity and certainty to all parties.

Like many other stakeholders, YMAC considers that the proposals are not sufficiently developed nor evidenced to provide detailed comment. The document itself is unclear to the point that it is difficult to fully understand what it proposed, instead seemingly attempting to placate the range of non-Indigenous interests.

We have provided comments on the seven proposals to the extent that any informed comment can be made. We have also outlined what we see as the necessary changes to the Act and heritage administration to ensure the protection of Aboriginal heritage - which is under increasing pressure of further loss and desecration from mining and development - including:

- Improved standards of protection
- Independence
- Transparent assessment and decision-making processes
- Improved monitoring and compliance of section 18 decisions and conditions
- Public education awareness and heritage preservation
- An increased role for Traditional Owners in decision-making; monitoring and compliance; and the protection, preservation and management of their heritage

These suggested improvements seek to improve the current imbalance of the system, to allow Traditional Owners a legitimate role in the protection, preservation and management of Aboriginal cultural heritage.

I do hope that the Government reconsiders the need to expand the scope of the review and the requirement to properly engage Traditional Owners in this process, who are best placed to advise on the current state and operation of Aboriginal heritage protection in WA, as it relates to their current and future culture heritage, so that this opportunity is not lost.

Should you require any further information in relation to this Submission, please contact Melissa Moore, Director of Research and Heritage.

SIMON HAWKINS
CHIEF EXECUTIVE OFFICER

YMAC SUBMISSION TO THE REVIEW OF THE ABORIGINAL HERITAGE ACT

YMAC is concerned that these proposed changes, in responding to state development pressures, are seeking to expedite heritage "clearance" processes at the expense of the protection and preservation of Aboriginal cultural heritage for current and future generations. YMAC is of the view that the system already provides inadequate protection and that these proposals only exacerbate this problem.

YMAC is also deeply concerned about the review exercise being subsumed into the political and economic process rather than being a legitimate, balanced and objective review of the requirements of all stakeholders in the preservation and protection of Aboriginal cultural heritage.

This is strongly evidenced by the lack of consultation with stakeholders, and in particular, Traditional Owners, regarding heritage for which they are culturally responsible, and which this legislation purports to protect and preserve. DIA indicated to YMAC early in the review that it would conduct a formal consultation process throughout WA, and provide review documentation on the DIA website. This has not happened, and no explanation has been provided.

YMAC engaged in "informal conversations" with the reviewer, Dr Avery, early in the review process, but has not had the opportunity to properly consult with its members and represented Native Title groups on these proposals. Some of the proposals, such as the certificate proposal, are a direct transfer of the Northern Territory model, which have merit, but also significant shortcomings which were flagged by YMAC as areas of concern given the very different context and better legislative and statutory arrangements in the NT.

YMAC is at a loss to understand how such an important and timely review could be conducted in such a non-transparent manner and miss the critical opportunity to reframe the legislation to ensure that its stated objectives can be met in the face of unprecedented development.

We consider that such a review could only be effective if conducted in a manner in which proposals for reform were sought from all stakeholders, and opportunities for robust discussion and debate were afforded to all parties.

YMAC is concerned that Dr. Avery's report on which the proposals are presumably based has not been made available, nor has any other documentation underlying the logic of the proposals. It is unclear what stakeholders' views are and what stakeholder concerns are being addressed, other than those of the Department. Indeed, the review primarily constitutes a review of DIA itself, as the proposals appear to be largely aimed at administrative reforms necessary due to past poor administrative practice and under resourcing of the heritage system.

YMAC has also observed a number of internal departmental changes being made to heritage administration during the review process, including the development of Cultural Heritage Due Diligence Guidelines and Ministerial Guidelines. DIA has not informed YMAC of any of these changes - nor included YMAC as a key heritage stakeholder - in any discussions about these reforms. Indeed the Cultural Heritage Due Diligence Guidelines omit any reference to the role of Native Title Representative Bodies, despite the Guidelines including guidance on consultation with Aboriginal people, including native title holders and claimants.

YMAC's reading of these Guidelines is that they provide minimum standards and a rudimentary Heritage Risk Assessment Matrix to assist land users to avoid or minimise harm to Aboriginal sites, rather than promoting appropriate standards for the protection and

preservation of sites, including proper surveying and consultation with Aboriginal people to determine the cultural value(s) of sites.

YMAC is also aware of proposals and actions to deregister Aboriginal sites and places from the Aboriginal Heritage Register. YMAC questions whether such actions were contemplated by the Act. We assume and hope the Government is following a procedure to notify and explain any such 'deregistrations', given the natural justice legalities which will exist in such a course.

The preservation of Aboriginal Cultural Heritage is essential to the sustainable futures of Aboriginal people, which assists in the affirmation of cultural pride and identity and the ongoing exercise of native title rights and interests in land, recognised at law. Unfortunately, it is clear that Aboriginal heritage is not afforded the same level of respect or importance as mainstream heritage.

In his 23 September 2011 address to the National Environmental Law Association WA State Conference, The Honourable Wayne Martin, Chief Justice of Western Australia, noted that:

> "It seems inevitable that many of those places (protected by the AHA) are being degraded in contravention of the Act without anyone's knowledge. It is very difficult to obtain reliable data on the number of prosecutions that have been brought for contravention of the AHA. However...it seems likely that the number of successful prosecutions could be counted on the fingers of two hands, even though the Act has been in force for almost 40 years. This suggests to me that prosecution and punishment is not likely to be a particularly effective way of protecting Aboriginal heritage... However, given the practical problems which confront law enforcement in this area, it seems to me that Aboriginal heritage is more likely to be effectively protected by public awareness of the value of Aboriginal heritage...so that protection of Aboriginal heritage will become a cultural norm".

We would like to see DIA play a more active role in promoting heritage as a valuable community asset worthy of protection rather than an impediment to development.

YMAC considers that the necessary improvements to the protection of Aboriginal heritage require significant reform of current arrangements, particularly in relation to Ministerial and Departmental assessments of significance and related decision-making processes.

Within the current system, decision-making processes are not transparent to the public, and the process is subsumed into bureaucratic and political processes, processes which lend themselves to suspicion by Traditional Owners.

The AHA only becomes visible at the stage of land owners seeking consent to certain uses under section 18, to which the Minister consents in the vast majority of cases, with or without conditions. The basis for these decisions are not clear, nor are the decisions or associated conditions communicated to Traditional Owners to enable any on the ground monitoring, which the Department of Indigenous Affairs has limited capacity to perform effectively.

Of particular concern is a recent meeting of the ACMC, which considered at least 13 section 18 applications and over 4,200 pages of evidence, in just over one hour. We are very concerned about the apparent lack of scrutiny being applied to decisions that are so important to Traditional Owners and Western Australia's Aboriginal Cultural Heritage.

We also understand that the ACMC is now recommending a large number of section 18 approvals to the Minister without any conditions, which we are concerned may be an efficiency measure given the concerns raised by the Auditor-General in 2011 about DIA's monitoring of compliance of section 18 conditions.

Given this, and the fact of the small number of prosecutions under the AHA since its inception, the AHA has not proven to be effective in protecting or preserving Aboriginal heritage, and has not given Traditional Owners confidence in its operation.

The review process falls well short of the comprehensive heritage review processes that have occurred or are occurring in other jurisdictions, a poor reflection of the level of importance of Aboriginal heritage protection to the Government of WA.

We are also concerned about the nature and limited scope of the Discussion Paper, which falls well short of a comprehensive review of the AHA; a review which Traditional Owners regard as warranted in terms of improved clarity, compliance, effectiveness, efficiency and certainty to provide for the proper protection and preservation of Aboriginal Cultural Heritage in WA.

YMAC does not agree with the limited scope of the proposals, in that they do not achieve the stated objectives of the review, including "better protection for Aboriginal cultural heritage in WA" and improved clarity and certainty for especially for Traditional Owners.

The proposals appear to be largely directed at addressing industry concerns about the length and complexity of heritage approvals processes, and the review itself has not been balanced or undertaken in a transparent manner. Indeed the basis for the proposals is not evidenced or established in the Discussion Paper.

Also noteworthy are the unfounded assertions contained in the document. For example, including that "Western Australia can be proud of its record in having had legislation as comprehensive as the Aboriginal Heritage Act for nearly 40 years". We would draw to the Government's attention to the following noteworthy cases which demonstrate a record of which the Government should *not* be proud of its efforts to protect and preserve Aboriginal heritage:

a. *Bropho-v-WA* (1990)[1],
b. *Marandoo Act* (1992)[2],
c. WA Auditor's Report (2011)[3] which notes failure to enforce the Act,
d. State Agreement Acts (1963-2010)[4], which had to be modified to clarify that they didn't exempt the company from the Heritage Act,
e. the small number of prosecutions since it began operations[5], and
f. decisions of the National Native Title Tribunal that compliance with the AHA is insufficient to avoid companies' interference with areas or sites of particular significance[6].

[1] *Bropho v Western Australia* [1990] HCA 24; (1990) 171 CLR 1
[2] *Aboriginal Heritage (Marandoo) Act 1992* (WA), s 3.
[3] Auditor General for Western Australia, *Ensuring Compliance with Conditions on Mining*, Report 8. Perth: Western Australian Government.
[4] The clarification was provided in the *Iron Ore Agreements Legislation Amendment Act (No. 2) 2010* (WA).
[5] Section 17, making it an offence to damage Aboriginal sites. To 2007, there has only been six prosecutions for action contrary to s17: Hon L Ravlich, *Hansard*, Legislative Council, 15 Nov 2007, pp 7215b-7216a.

[6] eg. *Albert Little (Badimia) v Western Australia & Lake Moore Gypsum* [2012] NNTTA 56, [81]; *Maureen Young (Ngadju People) v Western Australia & South Coast Metals* [2001] NNTTA, [43]-[57].

A. YMAC'S PROPOSED REFORMS TO THE ABORIGINAL HERITAGE ACT

The immediate changes that YMAC recommends be made to the AHA and the associated administrative regime include:

Improved Standards of Protection:

- That international human rights standards relevant to the protection of Indigenous heritage be enjoyed in WA, including the right to protect Indigenous heritage, the right of Indigenous people to participate in matters affecting their heritage, and the right to equality of treatment.

- Application of relevant aspects of the *Australian Natural Heritage Charter and* Australian ICOMOS (International Council on Monuments and Sites) *for the Conservation of Places of Cultural Significance (Burra Charter)* (1999), ICOMOS *Charter (*including allowing the relevant Indigenous people to determine the significance of places in accordance with their culture; understanding the place and its cultural significance, including its meaning to people, before making decisions about its future; involving the communities associated with the place; and care for the culturally significant fabric and other significant attributes, taking into account of all aspects of significance.

- Consideration of and responses to the key issues identified as deficiencies in state heritage protection regimes by *Dr Elizabeth Evatt AC* Review of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Attachment B to this Submission) including minimum State standards of heritage protection, as informed by Traditional Owners and improvements to heritage protection made in other jurisdictions. We also note the Australian Human Rights Commission has previously raised concerns about the protection of Aboriginal heritage in Western Australia (Attachment C to this Submission).[7]

- Recognition of the existence and functions of the *Native Title Act 1993* including native title rights with respect to heritage, and consistency in the definition of sites to reflect the broader definition of sites as areas in the *Native Title Act*.

- Ensuring the independent and professional conduct of heritage survey reports, consistent report standards and methodology; and appropriate regulation to ensure that outcomes are not inappropriately influenced.

Independence:

- Progress toward a separate and independent decision-making body for Aboriginal Heritage in WA, separate from the Executive Government, and including strong representation from Traditional Owner groups that have the authority to properly determine the impact on the cultural values of a site.

- Having such a body would address legitimate concerns about the Executive's conflict of interest and political interference where the heritage regime is administered by a government department and answerable to a minister. This was recommended by the Evatt Review for the Commonwealth legislation, for reasons equally applicable to WA.

- It was also proposed in the 1992 draft WA Aboriginal Heritage Amendment Bill to set up an Aboriginal Heritage Protection Authority largely made up of Aboriginal member - that could not be directed by the Minister - to evaluate the importance and significance of places and objects. The Clive Senior review of the WA Aboriginal Heritage Act in 1995 recommended that the Minister only be involved at the stage of an appeal and in a transparent manner that would be subject to disapproval by Parliament.

- Traditional Owner access to judicial and administrative review of decisions.

Transparent Decision-Making:

- A shift in focus of the heritage administration and decision-making away from the facilitation of development at the expense of the protection of Aboriginal sites, giving appropriate weighting to protection and preservation considerations.

- Transparent, accountable and independent decision-making processes including the full disclosure of Ministerial and Aboriginal Cultural Material Committee (ACMC) decisions, evaluation criteria and any associated conditions to Traditional Owners in line with sound administrative decision-making processes.

- The separation of the function of assessment of cultural significance (ie. assessment of the factual issues) from the exercise of ministerial decision-making to ensure unbiased decisions (see Evatt).

- Transparent evaluation criteria for sites assessment to be developed in conjunction with Traditional Owners and suitably qualified professionals in an advisory capacity.

- Linkages back to cultural heritage report recommendations in ACMC and Ministerial deliberations and decision making, with transparent decision making criteria applied.

- DIA to report back to Traditional Owners on decisions made and any associated conditions, to ensure that Traditional Owners are aware of decisions that impact on their cultural heritage.

Improved Compliance:

- Improved on the ground monitoring of compliance, including by Traditional Owners, given the remote location of many of these sites.

- Resources to Land Councils to assist Traditional Owners to effectively monitor and report on heritage compliance, as Land Councils do not receive any funding for such activities and are well placed to assist Traditional Owners to monitor heritage compliance and ensure the objects of the Act are realised.

- Cultural Heritage Management Plans to be developed in consultation with Traditional Owners be made publicly available and monitored by DIA.

Public Education and Awareness and Heritage Preservation:

- Government resourcing to assist in the active preservation of Aboriginal Cultural Heritage, including support for Traditional Owners to engage in the monitoring, management and preservation of cultural heritage (including salvage where expert supervision is not required).

- Government support for the promotion of an understanding of the importance of Aboriginal Cultural Heritage to the broader community.

- YMAC also notes that the Register is a considerable repository of cultural information, which has been largely enabled as a response to development requirements. YMAC would like to see the WA Government invest in the improvement of this register for purposes other than approvals requirements.

YMAC SUBMISSION TO THE REVIEW OF THE ABORIGINAL HERITAGE ACT

B. COMMENTS ON PROPOSALS FOR IMPROVING THE CURRENT SCHEME

YMAC considers that proposals seeking for the Aboriginal Heritage Register[8] to be more 'authoritative' and some of the proposed amendments would weaken the protection of Aboriginal sites. There is not yet sufficient detail but key provisions of concern include:

- the specification of criteria for whether sites will be registered, and the probable inclusion of a mandatory requirement that preserving the site must be a benefit for present and future Western Australians,
- making it harder for prosecutions in regard to damage to areas that weren't registered as sites (by removing a statutory presumption that currently exists): and
- broadening who can allow sites to be impacted, by enabling the Department to pre-approve site damage (rather than just the Minister as is the current law).

YMAC's comments in relation to the seven proposals are as follows:

Proposal 1: Prescribe the manner and form of the register

YMAC would like to reiterate the lack of confidence by Traditional Owners in the Register. It is well known to DIA that Traditional Owners also have cultural imperatives to protect certain information, and YMAC would welcome a robust discussion on the manner and form of the register.

YMAC would be concerned about any processes or costs that would make it more difficult for Traditional Owners to register sites.

The identification of a process is not problematic in itself, but we would need to better understand the proposed processes for the entry and removal of information on the Register. If this deviates from current procedure, including changes to the level of protection of sites not on the register, or prejudices Aboriginal interests if sites become more difficult to register, this would be problematic.

Accordingly, we are not yet able to make any informed comment on this aspect until see the proposed process and how that compares with previous practice.

The Paper asserts that the Register is expected to be an authoritative repository. This is incorrect. The courts have repeatedly acknowledged that the Register is not such a record (and that a site's entry or absence from the register does not determine the level of protection it merits).[9] Given that the paper identifies that industry wants 'greater certainty about the Register as a source of information about Aboriginal sites', we are concerned that this will not result in adequate protection to those sites not registered.

We are unsure as to how having a record of who has been provided with what information 'will aid compliance with the Act'. It isn't clear why the Discussion Paper says this.

[8] Established under Aboriginal Heritage Act 1972 (WA), s38.
[9] eg. *Re Minister for Indigenous Affairs; ex p Woodley [No 2]* [2009] WASC 296, [8] per Martin CJ.

Proposal 2: Additional Criteria pertaining to the Aboriginal sites of State importance.

Whilst this proposal seems to be concerned only with section 5(c), it appears that this may in fact require the strict application of the definition of 'Aboriginal site' under the entirety of section 5. This would, potentially, fundamentally alter what is legally deemed to constitute a site under the Act and, therefore, what is protected by the Act.

This also appears to rely on section 39(3), where the primary consideration for the evaluation of *any place* for the purpose of the Act is its associated sacred beliefs and ritual or ceremonial usage. We further note and are concerned about the change of the term from *any place* to *sacred site*.

The definition of sites under each clause of section 5 also contains the words '*importance and significance*'. Whilst s39(2) already outlines criteria for the evaluation of importance, it seems that these are being rejected in favour of different criteria.

It is also unclear whether any criteria will operate *instead of*, or *in addition to*, existing discretions in registration (eg. of the ACMC and the Registrar). The Discussion Paper appears to make one additional criterion compulsory: that sites only merit registration where 'the preservation of the place would benefit current and future generations of Western Australians'.

We would have serious concerns if this were to operate as a pre-condition for any registration, as it could restrict what types of sites are registered. For example, some sites may be significant to the relevant Aboriginal persons, but this new criteria may present a possible barrier to registration if it must also be shown that 'the preservation of the place would benefit current and future generations of Western Australians'.

We are also concerned that the intention of the additional criterion which would require Aboriginal people to demonstrate current use of a ritual site in order to ensure its ongoing protection. This appears to be a deliberate step to remove certain sites.

Again, it is unclear how any new criteria are to be applied in decision making. YMAC would like to see more guidance given to the ACMC on the registration of sites, and this process should be transparent.

One of the fundamental problems of the AHA is that the protection is only afforded to specific geographically delineated sites and does not extend to prohibitions of activities that are inconsistent with or diminishing to the heritage values of the sites. Overall, YMAC sees the need for a comprehensive review and improved clarity of process and intention about assessment criteria given its centrality to the Act. The Register and registration processes create much confusion to all parties, and this proposal does not provide any clarity.

Proposal 3: Stronger compliance measures including civil penalties and remediation orders and adjustment to the onus of proof provisions

The proposed change seems to be a reduction of the current support which the Act provides to prosecutions for damaging an Aboriginal site under s17, but it is unclear because of the language used in describing the proposal.

The current Act allows the Government to assert, as part of any prosecution, that the area impacted was a site and the Court can proceed without requiring proof of the fact, unless and until disproved by the accused (AHA s60(3)). This system applies regardless of whether the area impacted is a registered site or not. We understand that the proposal is for this procedure

to only apply if the site is registered, and presumably, remove the statutory presumption in relation to areas which are not on the Register.

This would mean that any prosecution for impacting such a site will need to first prove that the area is a site within the AHA's definition. This would make it more difficult to prosecute parties for damaging these areas.

YMAC does not support such a proposal if this is what is intended.

Proposal 4: Site impact avoidance certificates

We understand that this proposes to broaden who can give permission to damage an Aboriginal site. We are concerned that DIA does not have the professional capacity to make such decisions, and given the lack of transparency around DIA processes, exceeds what we would consider to be appropriate for a public servant. We see this purely as an exercise in expedience given DIA's significant administrative backlogs, due to administrative inefficiencies and chronic under-funding, rather than as an improvement or measure to improve protection and to make informed decisions.

We are also concerned about the lack of rationale for this process, and indeed what constitutes "more routine matters". We would also seek further clarification and explanation of how the Department would determine whether an activity would be adverse to the importance and significance of Aboriginal sites and how this arrangement would be administered transparently.

Site impact avoidance certificates are an element drawn from the Northern Territory heritage protection model, without the other key components of this system including a statutory body and Traditional Owner representation under the operation of the *Aboriginal Land Rights Act 1972*, which is key to the protection of Aboriginal heritage interests.

YMAC does not support the broadening of the basis of who can approve activities which would damage a site. Dependent upon the drafting of such a proposition, we would be concerned if this could potentially impede the independence of the court and the prosecutor. We consider that a determination of whether s17 is breached is a matter for the court, and the question whether to prosecute should be an independent decision of the prosecution. These proposals could be interfering with that inappropriately, and contrary to what Parliament intends in establishing an offence and process under s17.

Any such proposal also requires clarification around how Traditional Owners will be consulted, and how matters will be resolved should Traditional Owners not consent to use.

We note the Northern Territory's Aboriginal Areas Protection Authority's (AAPA) Submission to the Review and, in particular, that the Authority Board structure ensures a clear separation between the AAPA and Government; and that this structure is very different to the proposed system of the State Government issuing certificates through DIA. It further states that "In the Northern Territory the statutory separation of the AAPA from Government, the independence and Aboriginality of the Authority Board and the transparency of any Ministerial review process are fundamental to our record of effectively protecting sacred sites."

YMAC would support such a model in Western Australia, but does not support the model as proposed in the Discussion Paper.

Proposal 5: Enable the Department to levy fees and recover costs for surveys and other services

We consider that administrative costs associated with assessing section 18 applications may more appropriately rest with the responsible party rather than the taxpayer. We also support cost recovery if that funding is to be applied in part to the production of information that better informs the public about the importance of Aboriginal cultural heritage and provides increased clarity around processes.

However, the proposal is not clear in explaining which surveys would be conducted by the Department and for what purpose; and what consultations are being referred to and how this would operate. This needs to be further elaborated before we can provide any meaningful comment.

We are also concerned that fees may provide a disincentive for landowners to engage in the process, and would seek for Traditional Owners to be exempt from charges to access their own cultural information.

Proposal 6: Remove risk that section 18 consents may be technically invalid because of the definition of "the owner of any land"

YMAC seeks further clarification on this proposal, including whether the proposed amendment increases the potential for government agencies to apply for permission for sites to be destroyed.

Proposal 7: Investigate options to amend the Aboriginal Heritage Act 1972 and the Environmental Protection Act 1986 to streamline decisions about Aboriginal heritage

Until there is greater specificity of what is being proposed, it is difficult to make any informed input on this proposal.

However, Aboriginal cultural heritage and environmental considerations are inextricably linked. An example of this is water, where environmental impacts on water may affect the cultural heritage integrity and value of a site. We therefore do not support this proposal, and do not support the argument that the existing process is a duplication.

Ideas of sustainable development emphasise the importance of integrated planning and assessment, and it seems a retrograde step to be endeavouring to compartmentalise issues to specific areas for assessment and approval.

If the proposal is that the EPA simply address physical issues and that social impacts are separated to be addressed by other Government processes that seems something quite broader than the remit of this Discussion Paper.

Attachment A - Evatt Review

***Overview of State and Territory Aboriginal Heritage Legislation* by Elizabeth Evatt**

Commonwealth Act is a last resort

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ('the Act') is an Act of last resort. The Commonwealth Minister can act to protect Aboriginal heritage where he or she considers that State or Territory laws do not provide adequate protection for the area or object under threat. If State or Territory laws provided effective protection, then there would be less need to have recourse to the Commonwealth Act.

The 1996 Review of the Commonwealth Act recommended that minimum standards be established for State and Territory laws.[1] The State and Territory regimes are briefly considered in the light of those standards.

Key issues under State and Territory laws

Ideally, State and Territory laws should provide an effective process for the protection of areas and objects significant to Aboriginal people when they are threatened by development. This process should include early consideration of heritage issues, effective consultation with Aboriginal people and genuine mediation or other processes aimed at avoiding injury to or desecration of sites.

There are, however, wide differences in the laws and procedures and in the level of protection provided to Aboriginal heritage under the various State and Territory legislative regimes. The objectives of the legislation vary across regimes, from those which focus on the protection of cultural heritage values of indigenous people themselves to those which emphasize a balance between these and the heritage values of the wider community. The most effective model in practice is that of the Northern Territory. Where State laws are ineffective, as in Queensland, Aboriginal people make far greater use of the Commonwealth Act.

In Victoria, Aboriginal heritage is protected mainly under Part IIA of the Commonwealth Act, passed by the Commonwealth in 1987 at the request of the Victorian Government. Part IIA gives local Aboriginal communities an extensive role in the protection of heritage; the ministerial powers under Part IIA are delegated to the Victorian Minister.

The heritage concept: what is protected

The definitions of Aboriginal heritage vary from those which draw on indigenous heritage values to those which rely on anthropological, archaeological or scientific values. The Northern Territory, South Australia, Victoria (Part IIA), the Australian Capital Territory and the Commonwealth all protect areas and sites which are significant according to Aboriginal custom and tradition. Western Australia also gives limited recognition to custom and tradition. New South Wales, Queensland and Tasmanian laws have narrower definitions of heritage which focus on relics or do not give weight to Aboriginal cultural values. South Australia and the Australian Capital Territory are unique in recognising contemporary traditions which have evolved or developed since colonisation.

The minimum standard proposed by the Review was that State and Territory laws should be extended to protect objects of significance to Aboriginal people in accordance with their traditions, including traditions which have evolved from past traditions. It was also proposed that historic and archaeological sites should be included.

***Type of protection: registration, offences and penalties [3,4]*[2]**

The level of protection available under particular legislation and the protection actually afforded in practice vary considerably. One type of protection regime is based on site registration combined with a development application process. In another model, automatic or blanket protection is provided for any areas or objects which fall within legislative definitions. Blanket protection means that all areas and sites which fall within the legal definition of heritage are automatically protected by sanctions which make it an offence to cause damage or desecration to the site or area, whether or not the site has been assessed or recorded. Under this kind of regime, there are usually also procedures for developers to make applications for permission to proceed with development in cases where there is a danger of damage to an area or site. Registration may be conclusive evidence that the site is an Aboriginal site (Victoria, Northern Territory, South Australia).

The Northern Territory, South Australia, Western Australia, the Australian Capital Territory and Victoria provide blanket protection for Aboriginal heritage, though it is important to bear in mind how broadly heritage is defined in each legislative regime. New South Wales, Queensland and Tasmania provide more limited protection because their definitions of sites are even narrower. Victoria, South Australia, New South Wales and Queensland include specific provision for emergency protection to respond to immediate threats.

Most States and Territories make it an offence to damage, destroy or interfere with Aboriginal sites or objects. Some legislative regimes protect relics, while others protect areas and objects which are significant to Aboriginal people. Penalties range from $500 for an individual to a maximum of $50,000 for a body corporate, but so far there have been few prosecutions. These laws are considered inadequate because they are difficult to enforce, because they do not provide Aboriginal people with adequate authority to enforce them, and because it is difficult to prove the necessary intention contained in the offences.

Aboriginal heritage bodies [5]

It is Aboriginal people themselves who should have the major responsibility for determining the significance of an area or object. A number of regimes establish bodies with minority or majority indigenous memberships that serve various functions from consultation to actual assessments of significant areas and objects. The Northern Territory and Victoria have committees with Aboriginal membership established by law. South Australia and Western Australia require committees to be set up, but Aboriginal membership is not legally prescribed. In the Northern Territory and Victoria, the members are chosen by indigenous people; elsewhere they are appointed by the Minister. Apart from the Northern Territory Aboriginal Areas Protection Authority, few committees have the legislative independence or the resources to carry out their responsibilities comprehensively.

Queensland, New South Wales, Tasmania and the Australian Capital Territory have no legal provision for Aboriginal heritage bodies to be established, though in practice committees may be set up or there may be consultation with local Aboriginal groups. In most regimes, there is little statutory provision for indigenous management of areas and even less indigenous involvement in cultural heritage policy. Victoria has a detailed law on management, but the Northern Territory model appears to be more effective in practice. In other jurisdictions, Aboriginal wardens or heritage officers may play a role in the management of Aboriginal sites.

Provision for access to sites [6]

The Northern Territory has a comprehensive law which guarantees Aboriginal people access to sacred sites. In South Australia, the Minister may authorise access. The right to use sites for traditional purposes is maintained or recognised in some States such as Western Australia, South Australia, Queensland, and Tasmania, although these States have no procedures for legally enforcing access rights. Some pastoral leases, or legislation governing pastoral leases,

provide for access to sites, as for example the *Pastoral Land Management and Conservation Act 1989* (SA), s43. Victorian legislation permits access to sites which are protected by a declaration for the purpose of placing signs marking it as a site. Other States and Territories make no specific provision for Aboriginal access to sites.

Planning procedures; assessing significance [7,8]

Ideally, each heritage protection regime would require that steps be taken early in the development process to identify Aboriginal heritage interests, and to organise direct consultation and negotiation with Aboriginal people when sites are or may be threatened by a planning or development application. In particular, the process should ensure that proper weight is given to Aboriginal cultural heritage, and that any decision to withdraw protection from heritage or to proceed with development is made only on the basis of compelling reasons. In the Northern Territory, South Australia, Western Australia and Victoria, a referral to the Aboriginal heritage body is a recognised step in the development approval process. These bodies then determine or recommend whether the site is of significance to Aboriginal people. In other States, consultation with Aboriginal people may be necessary as part of the environmental assessment process, or it may occur *de facto*; but in all cases Aboriginal people do not have any power to determine conclusively the issue of significance.

Authorising development [9]

The power to determine land use, and to permit development which may damage a heritage site, is exercised by the executive, in practice by the Minister or, in New South Wales, the Director-General of the National Parks and Wildlife Service. Few regimes provide for merits review of protection or development approval decisions and, given the scope of ministerial discretion, there have been few judicial review cases. In some cases, appeal mechanisms are available only to land owners and developers.

Protecting confidential information [10]

There are variations in the extent to which confidential information is protected. The Northern Territory and South Australian legislation have provisions giving general legal protection for information held by the registering authority which is considered confidential in accordance with Aboriginal custom. For example, in South Australia it is an offence under s35(1) to divulge, in contravention of Aboriginal tradition and without authority, information about an Aboriginal site, object or remains or about Aboriginal tradition. Other States and Territories place restrictions on access to the register of sites in some situations. This is the case in the Australian Capital Territory, Tasmania (in practice), Victoria and Western Australia (in practice). Queensland protects only secret or sacred information given during authorised survey or research work.

In most cases, restrictions are ultimately balanced against the need to promulgate information about site location, etc. Similarly, any restrictions in an application-based system must be balanced against the requirements of procedural fairness. There are very few cases where traditional owners may be able to prevent disclosure by claiming public interest immunity or seek equitable remedies for breach of confidence.

Procedures in some States and Territories encourage work area clearance rather than site identification. This helps to protect confidential information.

Heritage Agreements

Provision is made in Northern Territory, Victorian and South Australian legislation for agreements concerning the protection of heritage. The Victorian provisions (ss37A, 37B) have never been used, but there has been at least one agreement in South Australia. Heritage agreements may be made between the Minister and the owner of the land on which an

Aboriginal site or object exists. Under s37A, any traditional owners or their representatives must be given an opportunity to become parties to the agreement. Such an agreement attaches to the land and is binding on the current owner and occupier. Heritage agreements may form part of a Regional Land Rights Agreement.

Conclusion

There are great differences in the level of legal protection provided by State and Territory laws to significant areas and objects and to culturally sensitive information. Few regimes give indigenous people control over assessments or any real involvement in protection or policy development processes, and decision makers have a wide discretion to permit damage or destruction of significant sites. The result is that protection decisions depend to a great extent on political considerations.

In some regimes, flaws in the legislation have been ameliorated by the practices and procedures adopted by heritage protection agencies. While there may be no statutory consultation provisions, in practice there is generally a degree of informal consultation with indigenous communities over assessments and protection decisions. There are likewise informal mechanisms for agreements and work area clearance programs and informal connections between the heritage, planning and environmental processes. While these factors are positive in themselves, they will rarely provide a satisfactory substitute for adequate legislation.

Gaps in the various heritage protection regimes and the failure to provide adequate protection has resulted in a disproportionate reliance on the Commonwealth Act as the primary source of Aboriginal heritage protection. While the Commonwealth has a national responsibility to protect indigenous cultural heritage, it is the States and Territories which must provide effective primary protection. To ensure uniform best practice within all heritage protection regimes, it is essential that minimum standards for State and Territory laws be established.

The principal standards which need to be established are:

- appropriate definitions of what constitutes indigenous heritage;
- the development of formal links between protection legislation and other land planning and environmental laws and processes;
- formal provision for negotiated agreements;
- the separation of the assessment process from actual decision-making in specific heritage protection cases and
- greater indigenous control over assessments and involvement in the protection and policy development processes.

Dr Elizabeth Evatt AC is a member of the UN Human Rights Committee, and is the author of the Review of the Aboriginal and Torres Strait Islander Heritage Protection Act, 1984.

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[1] See Evatt, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, 1996, chapter 6 and Appendix VIII: 'Overview and Summary of State and Territory Laws'.

[2] Numbers refer to sections in the Comparative Table of Aboriginal Heritage Protection Legislation.

Yamatji Marlpa
ABORIGINAL CORPORATION

Attachment B - Concerns from Human Rights Commission

(Extract from letter and submissions from Aboriginal and Torres Strait Islander Social Justice Commissioner to Independent Review Committee (Review of Project Development Approvals System), 4 March 2002)

4 March 2002

Dr Michael Keating
Chair, Independent Review Committee
Review of Project Development Approvals System
PO Box 7606, Cloisters Square
Perth WA 6850

Dear Sir

Submissions on Interim Report for Comment

I refer to the above interim report arising from the Review of Project Development Approvals System by the Independent Review Committee and provide the enclosed submissions in relation to the report. The recommendations arising from these submissions are summarised in section 5.

I urge the Committee to address, in its analysis of the development approval system in WA, the human rights of Indigenous peoples and their relationship to that system. The content and value of the Committee's final report will be diminished if it contains material or recommendations that are inconsistent with Indigenous human rights.
In the interests of transparency and openness, I consider it useful for matters to be widely discussed, which assists differing approaches in understanding. Accordingly, I intend to provide copies of these submissions to various relevant parties, and would be grateful for your views on this.

I also enclose, for your information and reference, recent issues of the Native Title Report. These reports, which comment on the Native Title Act and its effect on Indigenous human rights, are provided to the Commonwealth Attorney-General as required under the Native Title Act. The reports provide far greater analysis of many of the matters I have only briefly mentioned in these submissions.

If you have any questions regarding this matter, please contact John Southalan.

Yours faithfully

Dr William Jonas AM
Aboriginal and Torres Strait Islander Social Justice Commissioner

Submissions of Aboriginal and Torres Strait Islander Social Justice Commissioner on Interim Report for comment by Independent Review Committee

1. OVERVIEW

1.1 Introduction

In September 2001, the Western Australian ('WA') Government established a review of the Project Development Approvals System ('Review') to be undertaken by the Independent Review Committee ('Committee'). The Committee is chaired by a former Commonwealth public servant and comprises five other members: three from resource/development companies, a member of a WA environmental group and an officer from a Native Title Representative Body ('NTRB'). The Committee published an Interim Report for comment in January 2002 [1] ('Report').

The Aboriginal and Torres Strait Islander Social Justice Commissioner ('Commissioner') has statutory functions to promote discussion and awareness of human rights in relation to Aboriginal and Torres Strait Islander people, to report to the Commonwealth Government on the enjoyment and exercise of human rights by Indigenous Australians, and to recommend where necessary on action that should be taken to ensure these rights are observed. [2] These submissions are made pursuant to the Commissioner's functions. A summary of the recommendations arising from these submissions is contained in section 5.

1.2 Contents

These submissions first outline the human rights principles relevant to the Review, and then focus on the particular areas in the Report of concern from a human rights perspective. The document is divided into the following sections:

...

4.3 Interaction between native title and other development approvals

The Committee encourages a 'whole of government' approach,[100] with the benefits this brings in ensuring government decision-making across all agencies is integrated and consistent. The Committee repeatedly emphasised the importance of resolving native title issues by agreement,[101] an approach which, when based on the free and informed consent of both parties, is consistent with human rights principles. The problem is that when the Report is read as a whole, there is a contradiction: the resolution of native title issues by agreement (and the Committee's endorsement of the Wand Report[102]) does not correspond with the Committee's recommendations decreasing protection of native title rights.[103] A whole of government approach should be seeking to incorporate native title and effective Indigenous participation into government decision making. This is in contrast to the Committee's approach, which will encourage a development approval process operating with little reference to, and in conflict with, separate government processes dealing with 'native title issues'.

(a) WA's Aboriginal heritage system

One of the issues considered by the Committee is the role of the Aboriginal Heritage Act 1972 (WA) ('AH Act') in development approvals. The Committee is aware of anomalies in the AH Act's protection of Indigenous heritage - the Report specifically acknowledges the racially discriminatory denial of Indigenous rights under the AH Act.[104] In addition, the Committee may wish to note the AH Act is based on a limited conception of heritage and provides little enforcement of heritage protection.[105] It is of concern, therefore, to find the Report:

(i) makes no specific recommendation on improving Indigenous rights under the AH Act (by, at least, granting them equal status to non-Indigenous rights); and

(ii) recommends restricting Indigenous rights in other arenas[106] leaving their 'protection' under the discriminatory AH Act.

If this outcome (namely removal of Indigenous rights under various laws leaving reliance only on heritage laws that discriminate against Indigenous people) arose as a result of an oversight,[107] the Committee may wish to alter its approach in any final report. However, if the Committee intends such an outcome, this should be fully explained because it is contrary to human rights principles.

The Committee's recommendations in relation to Aboriginal heritage also addressed the issue of heritage surveys. The Committee proposes that once a survey is completed, this should be sufficient reference for all future activity on that land.[108] There are practical and human rights difficulties with such a suggestion. Often a mining tenement covers a large area of land and so the company and relevant Indigenous group agree to survey only the proposed work, resulting in that particular proposal being cleared or modified depending on the location and importance of sites. This enables the proposed work to commence with minimum time, cost, and intrusion into Indigenous culture. To expect an entire tenement or area of land to be 'audited' for Indigenous sites, regardless of the proposed work at that time:

- may be impossible because traditional owners are likely to have different concerns depending on what activity is being proposed on the land (aerial exploration or surveying may need no, or only few, areas to be avoided - whereas an intensive drilling program or construction of a mine will raise different heritage concerns); and
- is inconsistent with developing human rights standards on Indigenous culture (which emphasise the right of Indigenous peoples to maintain and develop their own cultures and knowledge systems, and Indigenous peoples' ownership and custody of their heritage as collective, permanent and inalienable).[109]

...

Notes

100. Report, pp43-45. The Committee's terms of reference also specify the Review's outcome to be for 'a system of government decision making which is co-ordinated and integrated [and] balanced between community and developer needs', Report, p123.
101. 'A move away from the adversarial approach when dealing with native title towards an approach based on conciliation and negotiation can be expected to contribute significantly to a more timely processing of project approvals where these have native title implications', Report, p87.
'The State should encourage and promote the use of agreements - protocols, regional heritage agreements, memoranda of understanding and Indigenous Land Use Agreements - as part of moving towards greater use of agreement to resolve native title issues', Report, p89.
102. '[T]he Committee welcomes the Wand Report and anticipates that its outcomes and implementation of the government's response will do much to overcome that uncertainty in relation to who holds native title over land', p44.
103. '[I]t is not sensible to allow obstacles to be placed before the owner of a resource, as that owner may have alternatives elsewhere, where land is not an issue', Report, p59.
'The Mining Act should be amended to ensure that environmental objections [arising through the provisions for 'public interest' objections, which also permit Indigenous objections in the court] are not heard by the Warden's Court', Report, p85.
'The EP Act should not be used to duplicate, and should be amended if necessary to remove the duplication

of any functions of the Aboriginal Heritage Act and protection of sites should be entirely through that Act', Report, p86.
'The Mining Warden should only deal with matters and objections that relate to the provisions of the Mining Act, and the Mining Act should be amended to make this explicit', Report, p96.
'The State should open negotiations with the Commonwealth to mesh the State Aboriginal Heritage Act with the Commonwealth Aboriginal and Torres Strait Islander Heritage Protection Act such that a Section 18 clearance under the State Act entirely satisfies the protection requirements of the Federal legislation in relation to the land which is the subject of the clearance', Report, p89.

104. Section 18 of the AH Act allows a person to destroy an Indigenous site if the Minister has approved that occurring. The Committee notes that 'Under the AH Act, an owner of land can appeal [to the Supreme Court] the Minister's decision regarding a Section 18 application, however, the legislation provides Aboriginal people with no such recourse', Report, p36. This represents a clear discrimination on racial grounds because 'owner of land' is defined to exclude an owner of Indigenous interests in the land: AH Act, ss18(1) and (1a).
105. In contrast to the model of Indigenous heritage enacted in the AH Act, the UN Sub-Commission on the Promotion and Protection of Human Rights is elaborating human rights-based principles and guidelines for the protection of the heritage of indigenous people: *Draft principles and guidelines for the protection of the heritage of indigenous people*, (Annex I to UN document E/CN.4/Sub.2/2000/26, dated 19 June 2000). The principles include the following matters.
    - The effective protection of the heritage of the indigenous people of the world benefits all humanity. Its diversity is essential to the adaptability, sustainability and creativity of the human species as a whole (paragraph 1).
    - The discovery, use and teaching of indigenous peoples' heritage are inextricably connected with the traditional lands and territories of each people. Control over traditional territories and resources is essential to the continued transmission of indigenous peoples' heritage to future generations, and its full protection (paragraph 5).
    - To be effective, the protection of indigenous peoples' heritage should be based broadly on the principle of self-determination, which includes the right of indigenous peoples to maintain and develop their own cultures and knowledge systems, and forms of social organisation (paragraph 2).
    - Indigenous peoples should be the source, the guardians and the interpreters of their heritage, whether created in the past, or developed by them in the future (paragraph 3).
    - Indigenous peoples' ownership and custody of their heritage should be collective, permanent and inalienable, or as prescribed by the customs, rules and practices of each people (paragraph 4).
106. 'The Mining Act should be amended to ensure that environmental objections [arising through the provisions for 'public interest' objections, which also permit Indigenous objections in the court] are not heard by the Warden's Court', Report, p85.
'The EP Act should not be used to duplicate, and should be amended if necessary to remove the duplication of any functions of the Aboriginal Heritage Act and protection of sites should be entirely through that Act', Report, p86.
'The Mining Warden should only deal with matters and objections that relate to the provisions of the Mining Act, and the Mining Act should be amended to make this explicit', p96.
'The State should open negotiations with the Commonwealth to mesh the State Aboriginal Heritage Act with the Commonwealth Aboriginal and Torres Strait Islander Heritage Protection Act such that a Section 18 clearance under the State Act entirely satisfies the protection requirements of the Federal legislation [note 'Federal legislation' rather than 'Act', perhaps indicating the Committee advocates a s18 should override the NTA] in relation to the land which is the subject of the clearance', Report, p89.
107. Which would be consistent with the Report's statements that 'No submission sought to demonstrate that existing regulatory efforts serve no useful purpose and should be removed' (p83), and 'The proposals put forward seek to ensure that environmental, native title, planning and other checks and balances that serve the public interest are note reduced' (p118).
108. 'The State should encourage industry and Aboriginal representatives to join with it in developing heritage guidance and protocols ... accepting that a full [heritage] survey would identify all sites on a particular piece of land and would be the point of reference for all further activity on the land', Report p89.
109. See, eg. paragraph 2 and 5 of draft principles and guidelines for the protection of the heritage of indigenous people, (UN document E/CN.4/Sub.2/2000/26, 19 June 2000).