ROBIN CHAPPLE MLC
Member for the
Mining and Pastoral Region

**For the attention of**:
Chief Heritage Officer
Heritage & Culture Branch
Government of Western Australia
Department of Indigenous Affairs
PO Box 7770 Cloisters Square, Perth WA
6850

From:
**Robin Chapple MLC**
Member for the Mining and Pastoral Region
PO Box 94, West Perth WA 6872
41 Havelock Street, West Perth. WA 6005

Dear Sir / Madam

**Proposal 1. RE: RESPONSE TO DISCUSSION PAPER ON REVIEW OF WA ABORIGINAL HERITAGE ACT 1972 (AHA)**

In April 2009 The Industry Working group Review of Approval Processes in Western Australia Chaired by the Hon. Peter V. Jones AM was released. Part 3. Native title and Aboriginal heritage approval issues, sets out the primary concerns and directions of the Government and Industry in respect of Aboriginal heritage approval issues.

On Monday 09 May, 2011, The Hon Peter Collier Minister for Energy; Training and Workforce Development; Indigenous Affairs announced the appointment of Dr John Avery, director of Indigenous Heritage Law Reform at the Federal Government's Department of Sustainability, Environment, Water, Population and Communities as consultant to assist in the reform of Aboriginal cultural heritage processes in Western Australia.

In a media release of Tuesday 01 May, 2012 the Minister for Indigenous Affairs Hon Peter Collier stated that the WA Government proposed beneficial reforms of the *Aboriginal Heritage Act*. Feedback on Aboriginal Heritage Act reform was sought and a timeframe of 5 weeks was established to provide feedback on the discussion paper. Linked to this media release was a document entitled "Review of the *Aboriginal Heritage Act 1972* (RAHA). Discussion Paper: Seven proposals to regulate and amend the *Aboriginal Heritage Act 1972* for improved clarity, compliance, effectiveness, efficiency and certainty."

My first concern is about engagement of the community that this RAHA effects and the time frame in which that primary stakeholder group has time to respond.

My electorate covers a large percentage of the country on which the changes outlined in the RAHA will have impact. I have travelled extensively over the past months through remote Aboriginal communities and no one was aware of the RAHA discussion paper or its limited consultation deadlines.

It is abhorrent to this office that on Tuesday 01 May 2012, the same day Minister Collier announced the RAHA, the Chamber of Minerals and Energy was able to comment that they supported the RAHA, while the Aboriginal communities on which these amendments will have considerable effect had neither been consulted nor involved in the development of the discussion paper.

My second concern is that the five week consultation period on this RAHA document is an affront to the Aboriginal Nations across Western Australia. This is the single principal Act that provides the only (however limited) protection to the sacred, ritual or ceremonial places and also provides protection to objects used for, or made by Aboriginal people, past or present. Not appropriately consulting the people that this legislative amendment process will affect, and not considering the different modes of communication and learning that Aboriginal people might need to employ to have a meaningful place in this 'discussion' is disrespectful at best. Although we thank the Chief Heritage Officer for the deadline extension to the 26th June 2012, we still consider the consultation period, on matters of such importance, inadequate.

These two principal failures in due process only heighten and reinforce the statements made by Indigenous Lawyer, David Ritter in "Trashing Heritage, Dilemmas of rights and power in the operation of Western Australia's Aboriginal Heritage Legislation" where he states that:

> *What a critical legal analysis of the Aboriginal Heritage Act demonstrates is that the Aboriginal Heritage Act does not protect Indigenous interests. Rather, to a very moderate extent, it acts to prevent non-Indigenous people from disturbing Aboriginal places and materials that the non-Indigenous community regards as being worthy of such preservation. It is legislation by the non-Indigenous community for the non-Indigenous community that creates a superficial veneer of protection for Indigenous interests. The result is that the colonising power can continue to do with Aboriginal places and materials exactly as it wants. Far from being an instrument of Indigenous power, the Aboriginal Heritage Act is an instrument for the ongoing colonisation and subjugation of Indigenous peoples that denies the legitimacy and validity of Aboriginal people making political decisions about their own land.*

In referring to Question On Notice No. 369 asked in the Legislative Council on 19 December 2002, Question On Notice No. 955 asked in the Legislative Council on 27 June 2003, Question On Notice No. 1921 asked in the Legislative Council on 8 April 2004 and Question On Notice No. 4000 asked in the Legislative Council on 25 May 2011, that the AHA and the Ministers oversight role have to date failed in predominantly all cases to protect Aboriginal heritage sites.

As Ritter says —

*In the thirty years of operation of the Aboriginal Heritage Act, there have been few successful prosecutions, …*

Indeed, the question that was answered by the Minister for Transport on behalf of the Minister for Indigenous Affairs on Tuesday 10th August 2010 (number 486) noted in respect of failure to comply with Section 15 of the AHA that there are no express penalties for failing to comply with that section 15.

*15. Report of findings*

*Any person who has knowledge of the existence of any thing in the nature of Aboriginal burial grounds, symbols or objects of sacred, ritual or ceremonial significance, cave or rock paintings or engravings, stone structures or arranged stones, carved trees, or of any other place or thing to which this Act applies or to which this Act might reasonably be suspected to apply shall report its existence to the Registrar, or to a police officer, unless he has reasonable cause to believe the existence of the thing or place in question to be already known to the Registrar.*

This means that whilst the AHA requires the reporting of a known site by a person, company or mining operation under section 15 of the *Aboriginal Heritage Act* 1972, there is no punitive reason for them to do so.

Therefore, under the AHA, Aboriginal people have few enforceable heritage rights or legislative recourse under section 15 of the *Aboriginal Heritage Act* 1972.

Ritter goes on —

*What a critical legal analysis of the Aboriginal Heritage Act demonstrates is that the Aboriginal Heritage Act does not protect Indigenous interests.*

The RAHA provided a unique opportunity to review and enhance the AHA to reflect and address the concerns raised by David Ritter, the concerns raised in the 1995 comprehensive review of the Act by Clive Senior the 'Senior Review', the concerns expressed in Annex VIII WA of the 1996 Evatt Report and those of "The Aboriginal Heritage Act 1972: a clash of two cultures; a conflict between two Laws" by Tracy Chaloner

It is important to remember that both the Tonkin Labour government and the Griffith led Opposition supported the purpose and intent of the Bill for an Aboriginal Heritage Act, and to reflect on the words of the Hon. W. F. Willesee, the member for North East Metropolitan and Leader of the House in the Legislative Council when he introduced the Aboriginal Heritage Bill on Tuesday, 11 April, 1972:

*The preservation of sites and objects of Aboriginal origin is now recognised throughout Australia as an important aspect of providing Aboriginal citizens with the social*

*environment that they need when they still retain partly or wholly their traditional religious beliefs.*

*It is recognised that high among the reasons for protecting Aboriginal sites is that they are often important records of the history early settlement of Australia by Aborigines, Asians and Europeans. In fact, the connection with the Aboriginal people who had no written language, the archaeological content of Aboriginal sites is the only historic record available to scholars, and it is of considerable importance that their excavation is strictly controlled so that valuable records are not destroyed. It is known that archaeological deposits date back a far as 30,000 years ago.*

And further the comments of members of the Liberal Opposition in support of the legislation:

The Hon. W. R. Withers Liberal MLC (North)

*In rising to support the Bill … it is very necessary that we protect the objects of heritage of the Australian Aborigines. Many of these objects are interesting not only to the Aborigines but to white laymen as well as anthropologists and archaeologists.*

Mr. Alan Ridge Liberal MLC (Kimberley)

*We in the Liberal Party recognise the desirability of this legislation because we can see that it clearly establishes the principle that the historical culture and traditions of the Aboriginal people are worthy of recording because they form the basis for engendering self-respect in Aboriginal people by encouraging them to be proud of their own lifestyle and traditions.*

These quotes clearly illustrate the purpose of the Bill and point to the archaeological record as being of substantial importance in maintaining a living, on-ground record of Aboriginal culture and prior occupation for all humankind into the future.

The Discussion Paper sets out Seven Proposals to improve outcomes under the Act

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|---|---|
| Proposal 2. | Prescribe the manner and form of the Register |
| Proposal 3. | Additional criteria pertaining to the Aboriginal sites of State importance |
| Proposal 4. | Stronger compliance measures including civil penalties and remediation orders and adjustment to the onus of proof provisions |
| Proposal 5. | Site impact avoidance certificates |
| Proposal 6. | Enable the Department to levy fees and recover costs for surveys and other services |
| Proposal 7. | Remove risk that section 18 consents may be technically invalid because of the definition of ‘the owner of any land’ |
| Proposal 8. | Investigate options to amend the Aboriginal Heritage Act 1974 and the Environmental Protection Act 1986 to streamline decisions about Aboriginal heritage |

It is difficult to comment on any of these proposals as they are so loosely defined as to their specific intent that they may be misconstrued / misinterpreted. It would have been far better to have articulated what was proposed to occur than have such a set of incomplete proposals. These proposals seem to reflect and fit with the aspirations of the Industry Working Group Report (IWG) prepared for the Minister for Mines and Petroleum in April 2009 rather than any need to provide real protection and due process to the application of the AHA.

In the IWG Section 3 dealt with industries and government concerns about having to deal with the AHA and the impact this was having on timelines and cost, this in many senses was a highly misleading statement. Industry knows that it can readily use the Section 18 process to destroy sites with impunity but it has to go through a legitimised process to do this. Parliamentary questions show that the Section 18 process provides no protection to any site in Western Australia.

It must also be noted that Industry in many cases uses manufactured delays in heritage clearances and Native Title negotiations to gain exemptions for their Form 5 lease expenditure requirements of the Department of Minerals and Petroleum.

The RAHA amendments seem to fit clearly with industry's view that, as they can already get approval to destroy any aboriginal site they wish through the section 18 process, they would appreciate a less time consuming and expensive route to achieving the same outcome.

It is noted that in IWG emails and documents the membership: Peter Jones, Chairman, former Minister for Mines, Fuel and Energy for Western Australia; John Bowler, MLA, Deputy Chairman, Member for Kalgoorlie; Derek Carew-Hopkins, Adviser, Office of the Minister for Regional Development; Mark Gregory; Partner at Minter Ellison Lawyers; David Parker, Government and Public Affairs Manager, Apache Energy; Richard Ellis, Western Australian Director of the Australian Petroleum Production and Exploration Association; Ian Wight-Pickin, Chief of Staff, Office of the Deputy Premier and Minister for Indigenous Affairs; Ian Fletcher, BHP Billiton's Vice-President of Government Affairs; Tim Shanahan, Director, Energy and Minerals Initiative, University of Western Australia; Chris Clegg, Principal Consultant, Statewide Tenement and Advisory Services; Doug Koontz, Principal Environmental Consultant, Aquaterra; Noel Ashcroft, Chief Executive of Government Relations and Market Development for the Griffin Group; and Tony van Merwyk, Partner at Freehills, had identified the need to overhaul the AHA to suit industry's purposes:

*Subject: Working Draft IWG Report - Executive Summary & Key Recommendations (for comment)*

> *To IWG members,*
>
> *The attached working draft IWG report provides an executive summary and key recommendations for your review and comment.*
>
> *The body of the report is in development with new information being provided in the form of case studies. At the moment Mark Donovan's paper on Native Title and*

*Aboriginal heritage forms the bulk of the section on Aboriginal Heritage and NT issues. The proposed actions in this paper are distilled into key recommendation 6.*

The IWG subsequent Recommendation 5 – Reform Native title and Aboriginal heritage processes is provided below:

*Uncertainty, complexity and the resultant delays associated with Native Title and Aboriginal heritage have a disproportionate adverse impact on mineral and petroleum tenure and activity approval timelines. In particular, the original objectives of the Aboriginal Heritage Act 1972 (AHA) are not being fully achieved to the detriment of economic development in the Western Australian resource sector.*

*It is strongly recommended that the efficiency of the administration of the AHA be improved through administrative reform. It is not recommended that the AHA be reviewed and legislatively changed at this time. A series of administrative and regulatory reforms are required to establish clear guidelines and fee structures for the conduct and registration of Aboriginal heritage surveys, together with section 18 procedural transparency through strategic reform and establishment of appropriate conditions. A review of the register of sites and record keeping practises is required. It is recommended that appropriate training is provided to DIA staff.*

*It is recommended that new Aboriginal heritage guidelines being developed by the Department of Indigenous Affairs (DIA) are reviewed by the mining and petroleum industry prior to final endorsement by the Minister for Indigenous Affairs. The impact of these guidelines on existing work practices, approval timelines and heritage survey costs should be measured over a 12 month period. It is recommended that DIA and the resource industry jointly develop appropriate impact measures. A report on the impact of the new guidelines using these measures should be provided to the Minister for Indigenous Affairs and published on the DIA website by 1 July 2010.*

In response to questions asked by the media on 10th of January 2010 of John Duffy and the Minister of Mines said in respect of consultation with stakeholders as part of the work of the IWG the Minister stated:.

*"You ask in there why we haven't got environment people and aboriginal people and that this particular enquiry has been done for me as Minister for Mines so I can understand the mining industry position. I predict the Minister for Environment will go to environment groups and say what do you think? So she can make a contribution."*

These proposals by the IWG clearly demonstrate the arrogance of both Industry and Government as there was to be no consultation with the aboriginal stakeholders the AHA purports to represent. Clearly it also seems that the RAHA is mirroring this same level of arrogance and lack of consultation with the Aboriginal stakeholders.

It is my view that this process is not one of a genuine review of the AHA as has been called for by many Aboriginal people, Heritage consultants, Lawyers and Academics in the past but a further proposal to weaken the AHA continuing on from what was commenced in 1980 by the insertion of the provision of the Section 18 process as a result of the Nookanbah conflict.

You will find attached to this letter a full submission on the Discussion Paper from the Office of Robin Chapple MLC.

Yours sincerely

**The Hon Robin Chapple MLC**
Member for the Mining and Pastoral Region

5 June 2012

**Hon Robin Chapple MLC - Submission**

The Office of the Hon Robin Chapple MLC (the Office) thanks the Chief Heritage Officer for the opportunity to comment on the proposed changes to the Aboriginal Heritage Act 1972 (WA) (AHA) as set out in the Review of the Aboriginal Heritage Act 1972 Discussion Paper: Seven proposals to regulate and amend the Aboriginal Heritage Act 1972 for improved clarity, compliance, effectiveness, efficiency and certainty.

The Office has significant concerns about the purpose and the process around this Discussion Paper and questions the rationale for the proposed amendments. It is our view that the proposed changes do not improve the Act or strengthen protection of Aboriginal heritage.

In point of fact the Office asserts that the AHA is currently failing to achieve the outcome of protecting Aboriginal heritage in Western Australia and will be further disempowered to achieve these aims should these proposed amendments be applied.

Additionally, the attached letter expresses the disappointment of the Office in the deficient consultation process, which has effectively served to disempower the Aboriginal people with respect to their only legal avenue for protection of cultural heritage. This is an unacceptable situation and one that this Office expects to see rectified with a full and lengthy consultation process undertaken on a broad scale with Aboriginal stakeholders around the state, which reflects the tyranny of distance, communication barriers, learning styles and access to appropriate means of information gathering (technological or otherwise).

The WA AHA is hugely inadequate when measured against cultural heritage legislation in other Australian jurisdictions. With the exception of Tasmania's Aboriginal Relics Act 1975, the WA AHA provides the lowest level of protection for Aboriginal heritage in Australia[1], and these amendments will worsen that situation markedly. Further explanation and consultation is patently and urgently required.

**The Discussion Paper: Proposals to regulate and amend the Aboriginal Heritage Act 1972**

The Discussion Paper sets out Seven Proposals to improve outcomes under the Act

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| Proposal 1. | Prescribe the manner and form of the Register |
| Proposal 2. | Additional criteria pertaining to the Aboriginal sites of State importance |
| Proposal 3. | Stronger compliance measures including civil penalties and remediation orders and adjustment to the onus of proof provisions |
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| Proposal 7. | Investigate options to amend the Aboriginal Heritage Act 1974 and the Environmental Protection Act 1986 to streamline decisions about Aboriginal heritage, |

[1] National Native Title Tribunal, Commonwealth, State and Territory Heritage Regimes: summary of provisions for Aboriginal consultation, a report prepared for the New South Wales Aboriginal Land Council, August 2010, available online at: http://www.nntt.gov.au/Mediation-and-agreement-making-services/Researchservices/Pages/Specific-Issue-Reports.aspx

**Preliminary Comments:**

Without more clarification or appropriate levels of investigation these proposals are difficult to comment on. Taken on reading of the material provided, the proposals leave far too much room for interpretation by those who would wish to use them to facilitate and expedite their ability to destroy sites of significance to Aboriginal heritage. The specific intent of the proposals is not made clear, however given the current pro-development government one might reasonably assume this to be the case, in which case these proposals stand as a basic human rights and equity issue.

It would have been far better to have further articulated what was proposed to occur than to publish a set of incomplete proposals which only serve to inflame negative public response to the Department of Indigenous Affairs (DIA), the current government and, with all due respect, to the author of the proposed amendments.

It would appear that, although an investigation / report is alluded to as part of the Discussion Paper, it is not publicly available, unless the report referred to is the Due Diligence Guidelines themselves. If there is more evidence to qualify the need for these proposals and their intent, then it would serve the DIA to publish that information in order to give the Aboriginal people, and those working on their behalf, surety that these proposals are not designed to deliberately 'water down' their ability to protect their own heritage.

In fact, taken on reading of the material provided, these proposals seem to reflect the aspirations of the Industry Working Group Report (IWG) prepared for the Minister for Mines and Petroleum in April 2009, rather than providing real protection and due process to the application of the Aboriginal Heritage Act (AHA).

The Office concurs with the premise of the Discussion Paper that stronger guidelines for identifying and recording Aboriginal sites are required, providing the Indigenous community and proponents with the certainty of process they require.

However, the proposals outlined above do not give this certainty and in fact would appear to diminish the enforceability of the Act, rather than strengthening it.

**<u>Responses to Individual Proposals and Key Recommendations for Improvement</u>**

**Proposal 1: Prescribe the manner and form of the Register**

**Recommendation 1**

- That the manner and form of the Register be prescribed, but with a view to strengthening its ability to protect sites (ensuring blanket protection) rather than diminishing it.

Proposal 1, particularly when considered in relationship with proposal 3, has the effect of reducing the protection offered under the AHA. This is highly undesirable.

The WA Act currently applies to sites, whether registered or not (see section 5 of the Act). The Paper proposes that "the current onus on persons accused of breaching the Act to prove that places and

objects...are not Aboriginal sites or objects to which the Act applies would be more effective and fair if confined to places and objects that have been included on the Register" (page 5).

This would effectively strip protection provided in the Act for non-registered sites. It is stated in the 'Questions and Answers' document available from the Department of Indigenous Affairs website that this would not be the case. However there is little assurance on how the DIA intends to ensure that blanket protection is given to non-registered sites, nor to enabling the appeal of Aboriginal people on destruction / damage of sites.

Paul Seaman QC, wrote in the 1983 *Aboriginal Land Inquiry:*

"The system of sites registration upon which the Act relies is, in my view, quite inappropriate to protect places of significance... [There is a] danger of reliance upon a register, when there is no machinery to ensure that proper steps have been taken to consult Aboriginal people with traditional links to the area about their sites" [2]

The founders of this Act point to the significance of the archaeological record as history. Best practice significance assessment requires a far more complete body of informed records than is currently held by the DIA. Notional 'significance' also uses regional as well as state-wide perspectives and concerns the representative as well as the rare or unusual.

Sites should be registered as having significance from both a cultural and a historical perspective.

**Recommendation 2**

- That the concerns of Aboriginal people on revealing sensitive information about heritage sites (i.e. on a public register) be respected and the register amended to ensure that no sensitive material is required to be publicly available / accessible.

The Paper states that 'It is proposed that regulations, supported by any minor amendments that may be necessary to the Act, prescribe…security, confidentiality and conditions of public access to the Register that could give Aboriginal informants sufficient confidence.'

It is noted that many Aboriginal people in Western Australia have concerns about revealing sensitive information about sacred places. Currently the Act provides no protection for confidential Aboriginal information and does not recognise the rights of Aboriginal people to hold sacred their own sensitive cultural material.

It does however recognise the rights of industry proponents to protect their own commercially sensitive information such as material relating to trade secrets, or mining or prospecting operations (see section 56), which seems a vast inequity, in keeping with the current human rights record of this government, but starkly contrasted with similar Acts in other jurisdictions.

For example, the South Australian *Aboriginal Heritage Act 1988* ('SA Act'), states that it is an offence for anyone to divulge, in contravention of Aboriginal tradition, information relating to Aboriginal sites (see section 35 of the SA Act).

[2] P Seaman, *The Aboriginal Land Inquiry*, Government Printer, Western Australia, September 1984, para 8.30.

Section 7(1) (b) of the WA Act currently provides that the Act will not be construed so as to require an Aboriginal person or group to disclose information or act contrary to Aboriginal law.

However, the amendments to the Act as proposed will have the effect of forcing Aboriginal people to choose between revealing sensitive information about sites so that they can be placed on the Register and thus receive some level of protection, or risking having the site effectively excluded from even the meagre protection the Act offers which currently intimates that only registered sites will / can be protected to any degree.

The current practice of 'hiding' sites via the placement of polygons around the known area of sites to obscure exact details of significant sites or objects is one of the only redeeming functions of the current register. This is an imperfect system, however offers some protection to sites which may be susceptible to vandalism, theft or culturally inappropriate use if precise geographical location is provided to 'land users', particularly if land users have vested interests in ensuring that the land is not considered valuable from an Aboriginal perspective.

**Recommendation 3**

- That the register be required to house accurate records of sites which, if they cannot at the present time be fully verified, must be reassessed and re-recorded in a respectful manner.

Currently the Register lacks accuracy, and many sites are misplaced / recorded incorrectly in a large part due to the transferring of paper imperial data into a metric digital system. To ensure that these issues are corrected the sites currently registered should be reviewed and re-recorded accurately by an independent body / assessment process.

For example Wanaliri site 14377, was found to be some 6 km outside the sites defined polygon area and there are several sites on the Burrup that have been recorded twice in different areas with some sites listed as being 60 metres out into the ocean. These are obvious examples of the government not knowing what it needs to protect, let alone how to appropriately do so.

The current Register can only be used as an indication of past and often incomplete knowledge of Aboriginal heritage, and this is in some cases the only knowledge that DIA possesses of historic cultural information (e.g. if informants are deceased). A large percentage of information is held outside of the DIA by private consultants, industry corporations and Representative bodies and this should also be considered as information relevant to proposals.

There are no proposals to enhance or retrieve data to make the Register a practical repository and no regulations have been suggested to address this issue. It occurs to this Office, though repudiated by John Avery in various meetings, that a significant number of sites may be removed from the Register if Proposal 2 is followed. If a site is considered to hold insufficient information it could, under these criteria, be removed from the Register. This could lead to large scale removal of sites and it has been indicated by a number of Aboriginal informants that this is already occurring.

Enhanced regulations to improve the quality and confidentiality of information about sites on the register are required but not appropriately articulated by these proposals.

**Recommendation 4**

That improvements can be made to the register that will facilitate the process in a more timely manner and can be achieved without legislative change including but not limited to:

- improving the quality of information put onto the Register;
- improving the detail of information included in the Register – this will allow for more timely and accurate assessments of significance;
- ensuring that the format of the Register meets all three basic purposes of a heritage sites register: for research, for conservation management and for safekeeping information on sites and Aboriginal culture for transmission to future Aboriginal custodians (Sullivan 1989 in Brown 2008:23);
- providing access to information on cumulative impacts on heritage across the state (observing and respecting the right to privacy on sensitive cultural material); and
- consulting further with all stakeholders to determine the manner and form of the Register.

**Proposal 2: Additional criteria pertaining to the Aboriginal sites of state importance**

**Recommendation 1**

- That any further report / legislative amendment proposal be very specific with respect to the interpretation of the above points, in particular around how determinations on whether a site meets these criteria are made and by whom. It should be clearly articulated whether a site will be recognised on the basis of its historical or cultural significance, or whether it must be proven to be a site by virtue of its current use for ritual and ceremonial purposes.

Definitions of a site under section 5c of the AHA should be further clarified, particularly in light of the fact that this discussion paper is largely silent on sites already registered / classified under section 5a and that registrations under section 5c may lead to a devaluing of those sites already registered under 5a. This must be further clarified and consulted.

'Interpretable' wording such as 'benefit current and future generations', and 'significance' which could lead to subjective, context specific assessments of 'benefit' and 'significance' being made by proponents with vested interests should be removed or further defined to provide protection for site currently registered under section 5a and / or under section 5c in future.

Wording that is 'interpretable' or 'negotiable' will result in lack of protection for culturally significant sites in light of the current heavy influence of vested interests, and should be either removed from, or better defined in any further iteration of the Act amendments, Discussion Papers and consultation processes.

It is considered that this proposal to prescribe matters that the Aboriginal Cultural Material Committee (ACMC) can have regard to in relation to recommending places to be preserved (under section 39(2) of the WA Act) further narrows a discretion which was already limited in its ability to protect sites of significance.

**Recommendation 2**

- That the language and purpose of the Act be carefully considered to move beyond its current consideration of Aboriginal heritage as merely a 'recording and cataloguing' function of the Department of Indigenous Affairs and towards a notion of the protection of a living culture.

Wordings such as 'anthropological', archaeological' and 'ethnographical' imply a devaluing of the significance of historical and cultural artefacts in modern Aboriginal spirituality.

This language signifies that the Act and the proponents of these amendments share a common view of the culture as something to be protected purely from an 'observatory' or historical perspective, which is disrespectful to the people to whom sites, the objects on them and the history surrounding them forms part of their current deep, spiritual connection to country.

This language also signifies a reluctance of this government to keep pace with current legislative change in other States and Territories. The current South Australian Aboriginal Heritage legislative reform process considers heritage to be much broader in scope than the proposal outlined above; specifically it considers hunting grounds, campsites, intellectual property, stories, songlines and dreaming trails, waterholes, landscapes and skyscapes, to be worthy of consideration and protection. The SA Act also refers to sites 'of significance to Aboriginal tradition', and this include traditions that have developed since colonisation (see the definitions of 'Aboriginal site' and 'Aboriginal tradition' in section 3 of the SA Act).

Under the Australian Capital Territory *Heritage Act 2004* ('ACT Act') the term 'Aboriginal place' is defined to mean a place of particular significance to Aboriginal people considering both Aboriginal tradition, and the history, including contemporary history, of Aboriginal people in that place (see section 9 of the ACT Act). In addition, 'Aboriginal tradition' is further defined to include traditions that have evolved or developed since the European colonisation of Australia (see section 4 of the ACT Act).

The QLD Act sets out a set of fundamental principles that underpin the purpose of the Act, which consider that the recognition, protection and conservation of Aboriginal cultural heritage should be based on respect for Aboriginal knowledge, culture and traditional practices – see section 5(a), and that Aboriginal people should be recognised as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage – see section 5(b).

**Recommendation 3**

- That specific, mandatory criteria be set for the equitable inclusion of Aboriginal people on all committees, boards and representative tribunals with any responsibility for decision-making over the preservation or protection of Aboriginal heritage.

The current WA Act lacks provisions requiring the involvement of Aboriginal people in decision-making processes, and these new proposed amendments do not significantly address this issue. While the ACMC - which plays a central role in assessing section 18 applications - has Aboriginal membership, there is no statutory requirement that any Aboriginal people be on the committee. This Committee effectively presides over decisions as to which sites can be actively destroyed to make way for industry. Despite this fact the current WA Act specifically provides that members need not be Indigenous - see section 28(4).

Current legislation in other State and Territories requires that comparable committees have Indigenous membership, with some jurisdictions further requiring equal representation of Indigenous men and women, and / or that membership is drawn from different geographic regions. See, for example, section 7 of the SA Act and section 131 of the VIC Act.

**Recommendation 4**

- Flexibility and fixed term review of the Act and its regulations should be incorporated into the Act itself to ensure that the purposes of the Act are not being subverted by vested interests, or diminished by a lack of appropriate administration as has currently been shown to be the case.

The regulations, processes and enforcement of the Act should be regularly reviewed. Currently it is evident that few actual cases have been brought before the courts by the DIA with respect to protection of Aboriginal heritage, and few section 18 proposals have been refused. If this is to continue then a full scale inquiry should be conducted into the running of the DIA and the Act under which it operates.

**Recommendation 5**

- That 'state importance' be defined with a view to a respectful interaction with Aboriginal people.

The importance of Aboriginal heritage sites, artefacts, objects and areas is not a decision that can be made by a 'state'. The significance of these places to Aboriginal people is not a determination that can be 'catalogued' as a matter of public record or 'archived history'.

Should the state wish to make determinations on what cultural heritage is of value to it, then it should also allow the Aboriginal people to have the same autonomy over determinations they make of the value of sites, recognise their decisions on the importance and sacredness of sites as a matter of respect, and privilege these determinations over the vested interests of industry.

Additionally, the regional significance of sites should not be discounted. While not all sites will contain objects or artefacts of state significance, many may be regionally significant or significant to a specific Indigenous group or area.

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

**Recommendation 1**

- That all Aboriginal sites be given blanket protection in Western Australia and that burden of proof for any kind of industry proposal on country should be placed on the proponent. All sites / proposals should be independently investigated for cultural heritage significance, with the cost of these assessments being borne by the proponent (not the taxpayer).

This proposal could be interpreted to be a removal of this blanket protection. It could be read to mean that any site not on the DIA register will not be required to be assessed from an Aboriginal heritage perspective.

This proposal provides no enforceable legal recourse for destruction or disturbance of sites and thus offers even less protection than currently exists within the Act. Should the onus of proof provisions be amended, they should be tightened to ensure that all proposed projects include a requirement of independent assessment of the project area.

This is particularly at issue with respect to the destruction and disturbance of sites. Civil penalties and remediation orders are of no use to Aboriginal people who have lost areas of cultural significance. Remediation is a 'band-aid' measure, which does not respect the purpose of the Act as it was drafted initially, nor does it respect the nature of the Aboriginal people's connection to their cultural places. Once a heritage site is destroyed or disturbed, it cannot be repaired.

It is also considered that it will be very difficult to prosecute for disturbance or destruction of unregistered sites post approval and that this proposal could therefore encourage proponents to disturb unsurveyed areas potentially destroying sites prior to providing an assessment of the area.

**Recommendation 2**

- That any amendment to the Act ensures that full access to land on which development is proposed is granted to Traditional Owners and archaeologists / human geographers / anthropologists and other researchers and that any sites found are immediately registered.

It is considered that this proposal may give rise to land owners considering future developments on their land refusing to grant access to country to Traditional Owners and academic researchers as it might be deemed high risk to project proponents (i.e. if unregistered sites were found, they might consider that future activities on that land would be restricted).

**Recommendation 3**

- That any amendments to the AHA require protection for all Aboriginal Heritage, not only places recorded in the Register, and that it meet national and international obligations regarding the protection and management of Aboriginal / Indigenous heritage.

Currently this proposal cannot be achieved without a significant rewriting of section 17 of the Act resulting in a dramatic reduction in the scope of the protection it currently provides. The rewriting of section 17 would diminish the Act in its current form and weaken Western Australia's commitment to the protection of Aboriginal heritage significantly, particularly against the commitments of other State and Territories and against international standards.

**Recommendation 4**

- That serious offences against Aboriginal heritage be not only punishable with tougher civil penalties, but also warrant criminal charges, as serious environmental offences do.

The current penalties for damage / destruction of sites / heritage do not provide enough of a deterrent to industry, particularly mining / resources industries to prevent them from simply choosing to pay the penalties.

The penalties applied must be commensurate with the value of the site to the proponent, which would mean undertaking an assessment of the projected value / likely financial gain of their interest in the land. The civil penalty therefore should be enforceable and reflective of the cultural value of that site / area to the people to whom it has cultural significance, as well as to the people for whom it has financial significance.

Additionally, legal penalties such as removal of licence or even incarceration periods, should apply to those who can be found to have been derelict in their duties to adequately assess the heritage value of the land they propose to use, and to those who have participated in any breach of legal requirements to respect heritage.

Currently few prosecutions have been brought in the history of the Act. If the true purpose of these proposals is to strengthen the enforceability of the Act in its role as protection for Aboriginal heritage, it should encourage relevant authorities to prioritise the investigation of any possible offences against the Act and to prosecute them. This would require significant resources to the Department (or, more desirably, an independent body) to enable appropriate investigations and assessments to be carried out in a timely manner.

**Proposal 4: Site Impact Avoidance Certificates**

**Recommendation 1**

- That any proponent requesting an 'Impact Avoidance Certificate' be required by law to carry out a full site survey / assessment and to document any findings, cultural or environmental, on that site.

This proposal could be interpreted to mean that certificates may be issued after consultations or negotiations without the requirement to conduct an Aboriginal heritage survey for an area that has no recorded (registered) sites on the land in question. This is an unacceptable risk.

If no survey / assessment has been carried out on a site / proposal, then no certificate should be issued, regardless of whether or not there are heritage sites registered on that land. It should not be assumed that, because there are no current registered sites, there are no sites of significance existing.

The definition of 'low impact activities' needs to be clearly articulated and should **not** follow the current guidance on low impact activities as prescribed by the DIA's *Due Diligence Guidelines*.

**Recommendation 2**

- That full consultation and negotiation with Aboriginal representative bodies and / or Aboriginal land councils be carried out prior to any Impact Avoidance Certificates being issued.

This proposal fails to mention negotiations with Aboriginal representative bodies and land councils. The proposed amendment refers to Traditional Custodians rather than Native Title Claimants, determinants or informants and their relatives.

This represents a return to an era prior to the Aboriginal Heritage Act passing through both Houses of Parliament. Should Certificate applications follow the new Due Diligence Guidelines, disturbances of

sites will occur and protection of sites will be further denuded. If this is the purpose of the proposal it should be clearly stated. Currently this proposal is highly undesirable.

**Recommendation 3**

- That a process by which any 'agreements' between proponents and traditional custodians of land is clearly articulated and a transparent framework for mediation of consultation and negotiation be required by law to be adhered to.

This amendment promotes 'agreement' between applicants and traditional custodians. Currently there is significant pressure applied to Indigenous parties to relinquish their rights to heritage places or make agreements which are not in the best interest of preserving and protecting sites on behalf of future generations.

This proposal does not outline how the 'agreement' process will be monitored or mediated to ensure that vested interests are not allowed to exert undue influence over Traditional Owners or Native Title Claimants to give up their heritage in favour of large payouts. This has happened on many occasions in the past, for example, in such cases as FMG - Yindjibarni, James Price Point and Lake Disappointment.

Without an articulated process for ensuring protection it is unclear as to what purpose the Certificates will serve other than to facilitate the mining and resources industries in their bid to secure entitlements over Aboriginal lands.

**Proposal 5: Enable the department to levy fees and recover costs for survey and other services**

**Recommendation 1**

- That the Department of Indigenous Affairs be adequately resourced to ensure it can carry out both the administrative functions ensuring compliance under the Act, and the required on-ground processes such as site surveys and assessments which would facilitate best practice Aboriginal heritage protection, as is the role of the Department.

Currently funding to the DIA is inadequate and is presently constraining their role as enforcement officers. This in turn makes it difficult for the Department to ensure that the best interests of those they should be representing, the Aboriginal people, are protected.

The Department should be able to levy fees / charges to recover costs. However this proposal does not articulate how those charges might be levied, by whom, and upon whom. It also does not make fully clear what services the Department would offer on which it would require levies to be charged.

There is a risk that this proposal, if not clearly stated, will further affiliate developer and Department / government, and will create expectation in the proponent that, as they (presumably) have paid for the survey to be undertaken, they can influence the outcome. It also opens the Department itself to corruption, particularly as the financial influence of the proponents is commonly significant.

**Recommendation 2**

- That surveys and assessments on any sites to be evaluated either for an Impact Avoidance Certificate, or a Section 18 proposal, be conducted by an independent body without specific ties to government.

DIA officers conducting Aboriginal heritage surveys presents a clear conflict of interest. If officers of the DIA are to undertake and charge for their own heritage surveys / assessments on behalf of either other Government agencies or external proponents but also act as the regulatory authority which can assess and evaluate those same surveys and issue section 18 consents or Impact Avoidance Certificates, it would further degrade any trust held by Indigenous people in the function or legal protection offered by the Aboriginal Heritage Act or the DIA.

**Recommendation 3**

- That in order to remove any issues of conflict arising from the regulatory body of an Act also being the administrative body responsible for carrying out assessments under the Act and provisions therein (as per recommendation above), an independent body be established to ensure due diligence is done and the intent of the Act is incorruptible.

In June 1995 Dr CM Senior prepared a report for the Minister of Aboriginal Affairs[3] recommending that a new body be established with responsibility for the administration of the Aboriginal Heritage Act (similar to the situation in the Northern Territory). It was recommended that this body, notionally called the AHPA (Aboriginal Heritage Protection Authority) would comprise of a membership of at least 10 part time Aboriginal male and female representatives of regional Western Australia with particular expertise in Aboriginal Heritage.

Appointments would be made by the Minister from panels of persons nominated from the regions[4]. This would have created greater independence and separation from the Minister and Cabinet and protected the integrity of the Act and of the government from the external influence and pressure exerted on government by vested interests.

As the Act is now being administered by the DIA it lacks the necessary to ensure informed and reasoned decision making. Significant expertise in archaeology, human geography and Aboriginal history are required to make adequate assessments of whether or not a site is significant, along with deep consultation with Aboriginal people. Currently this expertise and seniority does not exist within the Department. Without significant additional funding / resourcing of the Department itself, the Act, even in its amended form, will not be enabled appropriately and thus could lead to issues of liability and legal challenge.

One can assume that, should administration and regulation of the Act continue to be held by the Department with Ministerial oversight and a vetoing role, the ability of the Act to protect sites of significance will be significantly diminished within the framework of a pro-development government.

[3] Final Report, Review of the Aboriginal Heritage Act 1972, Prepared for the Minister for Aboriginal Affairs. Western Australia.

[4] Final Report, Review of the Aboriginal Heritage Act 1972, Prepared for the Minister for Aboriginal Affairs. Western Australia (p193, rec 58).

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

**Recommendation 1**

- That any lack of clarity or ambiguity in proposal 6 be removed and for the proposal to clearly state that Indigenous interests in any land over which section 18 applications or Impact Avoidance Certificates are sought take precedence over the claims of industry proponents.

The alteration to the legal requirement for 'the owner of any land' to be the proponent of a notice under section 18 of the Act should be clarified. However the insertion of the term 'any lawful land user' should not be applied in this Act under any circumstances.

It is clear that the intent of this amendment is to expedite the Section 18 process and to enable claims from **any** claimant / proponent to seek approval to undertake acts regardless of their negative impacts on heritage sites. Given the current standing of Aboriginal people in the Act, this is likely to further privilege mining claims over lands at the expense of heritage values and Aboriginal interests.

Under the provisions of this proposal a holder of a mining lease over land is termed a 'landholder', while the rights of native titleholders of the land in question are not recognised in either the AHA or the proposed amendments. This is unacceptable.

**Recommendation 2**

- That Aboriginal people have equal rights to appeal any decision made under the Act, including section 18 proposals and Impact Avoidance Certificates should evidence of sites be found.

The inequitable nature of the appeals process under the current Act is highly unacceptable, as the applicant can appeal any decision by the Minister, whereas Aboriginal custodians cannot.

It is considered that as such, section 18 thus breaches the Commonwealth Racial Discrimination Act 1975 (RDA)**.**

It would be advisable for the DIA to amend Section 18 to be consistent with the RDA, as this would provide greater certainty for developers and eliminate the possibility of litigation which could invalidate all s18 declarations since 1975, thus leading to compensation claims against the State Government and developers by aggrieved Aboriginal parties. It would also tighten protection for the Aboriginal people for their sites and ensure that industry was not being unfairly privileged.

**Proposal 7: Investigate options to amend the *Aboriginal Heritage Act 1974* and the *Environmental Protection Act 1986* to streamline decisions about Aboriginal heritage.**

**Recommendation 1**

- That a definition and rationale for 'streamlining' be clearly and transparently articulated and that any process undertaken to 'streamline' decisions about Aboriginal heritage enhance protection for Aboriginal sites of significance.

The Paper states 'it is proposed to investigate options to amend both the EP Act and the AHA to streamline and align approval processes by removing the requirement for the EPA to consider Aboriginal heritage in environmental impact assessment when these matters are properly addressed in another process of Government.'

Currently, taking into account a very pro-development government, notions of streamlining approval decisions on industry proposals conceptually equate to a decrease in protection for Aboriginal heritage. Again, this proposal is designed to facilitate the mining industry while sidelining Aboriginal heritage issues.

This proposal assumes that Aboriginal heritage will be adequately addressed by processes under the AHA, and that the Act alone will be sufficient to protect Aboriginal heritage.

As previously expressed, the current AHA is inadequate and provides a very low standard of protection when compared with other Australian jurisdictions and against international standards. The proposed amendments do nothing to address this issue and in fact would appear to be deliberately decreasing the capacity of the Act to provide such limited protection as it currently affords.

Additionally, site protection, by definition, necessitates a protection of the environmental co-benefits to a site. Damage to the environment around a site will inevitably impact on the site itself and vice-versa, and neither impact / outcome is acceptable.

This proposal also disrespects the 'connection to country' of Aboriginal people and makes an unnecessary distinction between the environment and heritage, which may not be a valid distinction from the perspective of Aboriginal people.

**Recommendation 2**

- That the right of appeal using the provisions of EPA legislation be maintained and strengthened.

This proposal could effectively remove the limited protection afforded to Aboriginal sites of significance by removing the right to appeal using the provisions of the EPA legislation. This is the only redress Aboriginal people currently have if the AHA fails to adequately protect Aboriginal heritage sites. It also removes another check on developers to recognise heritage and / or environmental concerns.

The EPA's Public Environmental Review (PER) has been the only opportunity for the public and concerned stakeholders to comment on and appeal against industrial proposals that affect the environment, including Aboriginal heritage. To remove this right of appeal is undemocratic.

As discussed previously, Aboriginal people are already disadvantaged under s18 in objecting to developments affecting their heritage. This proposal would weaken still further the possibility of public review of projects affecting Aboriginal heritage.

**Conclusion**

The AHA and its administration should be modelled on best practice cultural heritage management and international standards. Any reforms should take best practice cultural heritage management into consideration. Currently they do not.

Protection under the AHA should include all aspects of contemporary Aboriginal traditions, inclusive of archaeological and traditional sites, to provide an appropriately inclusive approach (Evatt 1996, Annex VI). Currently it does not.

This Office strongly urges the government to apply the minimum standards for cultural heritage legislation, as outlined in the Evatt Report (1996), in particular:

- the definition of heritage should be as broad as the Commonwealth legislation and should extend expressly to include historic and archaeological sites;
- legislation should provide automatic/blanket protection to areas and sites;
- assessments relating to the significance of sites and areas to be separated from decisions concerning land use. The former should be the responsibility of Aboriginal heritage bodies, the latter the responsibility of the executive;
- an independent Aboriginal heritage body should determine whether a site is significant and should make recommendations concerning its protection;
- decisions overriding protection should have regard to the wishes of Aboriginal people, should be supported by compelling reasons of public interest and be subject to accountability;
- the opinion or conclusions of the independent Aboriginal heritage body as to the significance of a site should be binding on the Minister; and
- site protection legislation should take into account the basic principle that Aboriginal people should be given control over the day to day functioning of those aspects of the legislation which affect their interest in Aboriginal sites.

These proposed amendments, in combination with the already released Due Diligence Guidelines, principally concern a strict application of the definition of section 5 of the Act.

On consultation with concerned groups this Office has learned that the application of these proposals could effectively result in greater that 90% of all Aboriginal heritage sites in this State being disqualified from legal protection under the Act. We request that the government provide assurances that no sites will be disqualified under the new provisions and that further protection be provided to non-registered sites.

These proposals, in combination with the already released Due Diligence Guidelines, would appear to remove the requirement in the vast majority of cases for developers to commission or undertake Aboriginal heritage surveys. We request that the government provide assurances that all proponents for section 18 declarations or Impact Avoidance Certificates will be mandatorily obliged to undertake full heritage surveys.

In short, this Office views the proposed amendments to the AHA as a further blight on Western Australia's increasingly poor human rights record and requests that the government withdraw the proposals and consider a full review of the existing Act, in full consultation with the Aboriginal people. This would be, as far as this Office can see, the only way in which to restore the faith of the First Australians in this government.

Finally, it is appropriate for this government, prior to considering proposals to amend the AHA, to consider whether the AHA, in and of itself, is actually a lawful Act. Tim Robertson QC considers the section 18 clause of the Aboriginal Heritage Act WA to be unlawful and to contravene the Commonwealth Racial Discrimination Act, which was enacted in 1975, after the AHA.

Robertson, in his legal advice on the Burrup Peninsula Matters – Memorandum of Advice, provided legal counsel considering the possibility that the regime for the protection of Aboriginal sites of significance (in particular under section 18) is contrary to s.10(1) of the Racial Discrimination Act, which relevantly provides:

"If, by reason of, or of a provision of, a law of … a State …, persons of a particular race … do not enjoy a right that is enjoyed by persons of another race … or enjoy a right to a more limited extent than persons of another race …, then, notwithstanding anything in that law, persons of the first-mentioned race … shall, by force of this section, enjoy that right to the same extent as persons as that other race … ."

It is the opinion of Robertson that:

"Section 10(2) defines "right" by reference to Article 5 of the Convention for the Elimination of All Forms of Racial Discrimination ("CERD"), which incorporates well-known human rights such as freedom of religion as well as the right to participate in cultural activities. Section 10 may operate directly on a State law by requiring rights conferred by that law to be shared by others not entitled to them, or indirectly, where the State law takes rights away, in which case the State law is inconsistent with s.10, and to the extent of the inconsistency will be invalid by reason of s.109 of the Constitution. There is an exception in the case of a special measure (s.8), in essence affirmative action."

and also that:

The following observations may be made:

a. Section 10 is directed to the enjoyment of rights by some but not by others or to a more limited extent by others; it is the unequal enjoyment of rights that is the subject matter of the provision.
b. The notion of enjoyment directs attention to the effect rather than the purpose of the law, and hence the law need not have a discriminatory purpose.
c. The section may operate on State laws in two different ways. First of all it may feed the rights conferred by State law so that persons of the first-mentioned race enjoy the same rights as others. This operation occurs where the relevant State law merely omits to make the enjoyment of a right universal.
d. In the second case, if the State law imposes a discriminatory burden or prohibition directed to persons of a particular race who are prevented from enjoying the particular human right or fundamental freedom enjoyed by persons of other races, then this necessarily results in an inconsistency between s.10 and the prohibition contained in the State law. The same is true where the State law deprives persons of a particular race of a right or freedom previously enjoyed by all regardless of race.

There are two possible arguments that s.18 of the Aboriginal Heritage Act is invalid. The first is that its practical effect is to remove the right to participate in cultural activities in general, or in particular the possibility of Aboriginal persons enjoying a spiritual traditional relationship with land which has particular significance to them, and the enjoyment of those rights (assuming they are human rights or fundamental freedoms…) is to a lesser extent than rights enjoyed by persons of other races.

For further information on these findings you may contact the Office of Robin Chapple MLC.

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