



Yamatji Marlpa
ABORIGINAL CORPORATION

6 August 2014

Chief Heritage Officer
Department of Aboriginal Affairs
PO Box 3153
EAST PERTH WA 689

By email: aha.reform@daa.wa.gov.au

Dear Mr. Rayner,

YMAC SUBMISSION ON THE ABORIGINAL HERITAGE ACT AMENDMENT BILL 2014

Yamatji Marlpa Aboriginal Corporation (YMAC) is the Native Title Representative Body for the Geraldton and Pilbara regions of Western Australia. YMAC is also the nominated Heritage Service Provider for many of the Native Title Claim Groups in these regions, and provides cultural heritage protection advice and support to Native Title Claimants as a significant aspect of Native Title.

The purpose of the *Aboriginal Heritage Act 1972* ('the Act') is to provide a statutory framework to protect and preserve places and objects customarily used by, or traditional to, the original inhabitants of Australia on behalf of the community. YMAC welcomes this review of the Act, and would welcome changes that lead to greater efficiency in the approvals process and certainty for both Traditional Owners and Industry, provided that those changes strengthened protection of Aboriginal heritage. YMAC routinely works with Industry and Traditional Owners to secure Agreements to protect heritage sites and put in place processes for consultation and cooperation. It is YMAC's wish that these agreements be supported by effective legislation.

The proposal is a missed opportunity for creating a sound foundation for an equitable balance of interests. The Amendment Bill does not address the fundamental inequities in the Act, nor does it address the specific concerns raised by Aboriginal organisations, communities and expert consultants in the 2012 review process. It is with disappointment that we note the failure of this Amendment Bill to take into account State and Federal Government reviews of heritage legislation, most notably The 1995 Review of the Act by Dr.



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Clive Senior ('the Senior Review') and the 1995 Review of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* by Hon. Elizabeth Evatt AO ('the Evatt Review').

The Amendment Bill also fails to live up to standards set by legislation in other Australian States and Territories, and fails to adequately reflect changed standards and expectations since 1972.

The inadequacies of the Amendment Bill are clearly seen when contrasted with legislation protecting WA's non-Indigenous heritage. The Heritage Council, established by the *Heritage of WA Act 1990* has a number of functions relating to conservation, encouraging public awareness, provision of expertise and financial assistance, and preventing the destruction or deterioration of heritage places. Neither the Act nor the Amendment Bill establish equivalent functions for Aboriginal heritage in most of these areas.

YMAC's submission to the 2012 review dealt with our concern over the lack of consultation with stakeholders whose interests lie in protecting Aboriginal heritage. It appeared industry was afforded greater input into the process. These concerns are not assuaged by this Amendment Bill, which introduces far-reaching powers for a CEO not envisaged by the 2012 Discussion Paper, and does not address most concerns raised by the majority of non-Industry submissions.

It is not acceptable that fundamental aspects of the functioning of WA's Aboriginal heritage protection regime will be left to as yet undrafted Regulations, and not included in the legislation itself. We cannot be confident that the CEO's and Minister's decision-making processes or requirements for consultation with relevant experts and Aboriginal people will be adequate. This raises concerns about the manner in which the CEO or appointed power is to exercise his/her power and the validity of such decisions.

These concerns are addressed further below.

Key Concern #1: Formal role for Aboriginal People in decision-making process and powers of the CEO

The Amendment Bill does not provide Aboriginal people with a formal role in key decision-making processes, such as issuing of permits and declarations, and the management of the Register of Aboriginal Sites and Objects.

The Amendments do not recognise the special interest that Aboriginal people have in protecting and preserving their own heritage, as recommended by the Senior Review. Recommendation 1 of the Senior Review reads:

The long title to the Act should be re-drafted along the following lines:

'An Act to provide for the protection and preservation of the Aboriginal heritage by and on behalf of Aboriginal people and the community generally and to recognise and give effect to the rights and responsibilities which Aboriginal people have in relation to their heritage and for related purposes.'



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The procedural arrangements for evaluating sites and issuing declarations and permits undermine this special interest by not affording Aboriginal people any formal role in the decision-making process. The assessment of areas of significance needs to be made by the relevant Aboriginal people, not arbitrated by the CEO, or other party.

The Evatt Review recommended that the **question of significance** should be regarded as a subjective issue to be determined on the basis of beliefs and feelings of Aboriginal people, and that any assessment must be based on information provided by them, or on reports provided with their consent. South Australia's *Aboriginal Heritage Act 1988* provides that before making a determination or giving an authorisation to damage sites, the Minister must take reasonable steps to consult the Traditional Owners, and must accept the views of the Traditional Owners of the land or object on the question of whether the land or object is of significance according to Aboriginal tradition (s13).

In the absence of any requirement that the views of the Traditional Owners be accepted, disagreements about significance should be determined by an independent body consisting of relevant Aboriginal people. The current framework requires that the Aboriginal Cultural Materials Committee (ACMC) is in a position to provide relatively independent recommendations and advice to the Minister. The Bill reduces the role of the ACMC by shifting its function to the CEO, removes any statutory obligations for the CEO to make a decision in consideration of ACMC's recommendations, and further proposes to remove the requirement of the ACMC to include an anthropologist.

It is YMAC's view that The Minister or CEO inevitably has a conflict of interest in determining matters where the government is a proponent or the grantee of any land or tenements, and will not necessarily have any expertise in determining matters of assessment. The Evatt Review also recommended that Aboriginal heritage bodies controlled by Aboriginal members should make the ultimate determinations on the significance of sites and make recommendation concerning protection of such sites.

Similarly, due to potential conflicts of interest, decisions as to whether permits or declarations should be given or made should also be referred to independent bodies.

The Department states that the Amendment Bill provides a stronger voice for Aboriginal people, however, this is not evident in the proposed Draft. The Amendment Bill should include procedural rights to bring Aboriginal custodians into the decision making process, within limited time periods, using the Native Title system to help provide certainty as to the right people for country. We encourage reconsidering the Amendment Bill and entering into a more suitable process of engagement.

The Amendment Bill should also include legislative mechanisms to ensure sufficient capacity and competency of the Department to make decisions regarding the registration and management of sites. Requirements to consult with communities, elders, and/or qualified experts as part of the Minister's or CEO's decision-making needs to be included in the Act, and not left to a vague commitment to be included in as-yet-undrafted Regulations. This has procedural certainty implications for all parties.



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Key Concern #2: Appeal rights and procedural fairness

The need for equity in appeal rights between developers and Aboriginal custodians of heritage has still not been addressed. I refer you to YMAC's letter to Hon Peter Collier MLC, Minister for Aboriginal Affairs dated 14 August 2013, which outlines the basis for YMAC's concerns.¹

In summary, the lack of rights to be adequately notified of decisions that affect their cultural heritage and traditional country, and the lack of any right to appeal or review decisions that affect their cultural heritage and traditional country, amount to an absence of natural justice for Traditional Owners, as outlined in the WA Ombudsman's *Guidelines on Procedural Fairness*. The inability of Aboriginal people to challenge the decision of the CEO in the State Administrative Appeals Tribunal does not 'deliver an environment of certainty, fairness and consistency' that the Minister for Aboriginal Affairs claims these amendments will provide.

The powers of the CEO in sections such as s18C (a) and (b) and s50B should be made explicitly subject to processes which provide for notification of Native Title Bodies Corporate or registered native title claimants, the relevant Native Title Representative Body and any other Aboriginal people with traditional interests recognised in the area, and the ability of such bodies to lodge objections in a particular time frame. This should extend clearly to provide for rights for Aboriginal parties to be served and to participate in State Administrative Tribunal appeals by applicants for permits or declarations under s18-18C.

Key Concern #3: Problematic drafting of section 5 criteria

The recent interpretation guidelines for section 5 emphasise 'sacred belief and/or religious use'. This is inconsistent with how many Aboriginal people actually value certain places. For instance, some places may be so sacred that they are *not* used, but this would make them inapplicable to the AHA under this interpretation. To say otherwise (as in the section 5 guidelines) is misleading and the reliance on such misinformation may lead to legal action in which compensation may be sought to be claimed from the government.

This concern could be addressed by a proper and more expansive interpretation of s5 and removal of the emphasis on 'sacred belief /religious use' in s.7A. Section 7A should clarify that sacredness, importance and significance must be determined by the Aboriginal people with connections to the site or area. At the very least there needs to be a recognition that the existing s5 applies to any sacred site of importance and special significance, and is not limited to sites of ritual or ceremonial use.

¹ For more information see <http://ymac.org.au/media-and-publications/policy-submissions/>



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Key Concern #4: Transferability of permits and authorisations

While it has not always been complied with in the past, the scheme of the Act expects s18 consents should apply only to very specific uses required by the applicant, with conditions designed to minimise damage to those sites. These consents and conditions should refer to the precise proposed activity and locations for that activity.

Section 19A(4) should therefore be restricted to circumstances where the transferee can demonstrate there will be no changes to the impact of activities to be undertaken, compared with those proposed activities under which the original permit was sought. Permits should not be transferred to other parties when the activities of the other party will have a different impact on Aboriginal heritage sites and objects. The State Administrative Tribunal system could be used for the process of decisions on permits and declarations, rather than vesting such power with the CEO or Minister.

Key Concern #5: Disclosure of Cultural Information and Prosecution

There is insufficient protection for non-disclosure of information that should not be reported or placed in the public arena. It is well-known that information about sites is often restricted or at least not to be the subject of general knowledge, but held by the Traditional Owners, and possibly even restricted to only some key people within the group of Traditional Owners.

The Evatt Review recommended that heritage protection legislation should respect customary law restrictions on the disclosure and use of information about Aboriginal heritage and minimise the information that needs to be provided to ensure protection. Where such information may have to be disclosed to third parties on a confidential basis in order to assist them to avoid sites, there should not be a requirement for those third parties to disclose or report such information.

The Amendment Bill fails to spell out appropriate protections and leaves much up to the discretion of the CEO (see s50B). In addition, the inclusion of significant penalties in s15 is a further threat to require disclosure where it may be inappropriate.

In order to allow Traditional Owners to maintain control of their cultural knowledge without facing potential prosecution or fines, s15 should add *“unless they have reasonable cause to believe that such a disclosure is contrary to Aboriginal customary law or tradition”*.

Key Concern #6: Bringing the AHA in line with other legislation and with recommendations of reviews of the heritage legislation

It is inappropriate to pass legislation but leave all the significant controls and limitations to regulations, which may or may not be in place to condition the operation of the Act. Modern heritage legislation in Australia has included safeguards and requirements for notification and



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consultation with Aboriginal people into the legislation itself. This mode of proceeding by the Department seems contrary to the stated goal of transparency.

The Amendment Bill fails to provide any statutory mechanism to enable long-term conservation and management of sites, for example as compared to the *Heritage of WA Act 1990*, or other States' Aboriginal Heritage legislation.

The Amendment Bill proposes a heightened responsibility and administrative burden on an already overloaded Department. This is exacerbated by not including any scope for private prosecutions (see s57A) in situations where the Department may not have the resources to pursue these. Some provision for private prosecutions should be made so that Traditional Owners are afforded effective and actionable protective measures for their cultural heritage.

In modern Aboriginal heritage legislation such as the Victorian and Queensland Acts, notification and objection processes are expressly set out, as are processes for the assessment of heritage management plans, and agreements or independent reviews in the event that there are continuing disagreements. The Victorian and Queensland legislation provide for registered Aboriginal parties or cultural heritage bodies to give clarity as to who should be notified. There is also an emphasis on agreement-making rather than litigation and ongoing disputation which is inevitable if damage to sites is allowed without according a proper role to Aboriginal custodians.

The Evatt Review also made recommendations for minimum standards for State and Territory Indigenous heritage protection legislation which included an effective consultation and negotiation process for reaching agreement facilitated by independent Aboriginal heritage bodies controlled by Aboriginal members.

The Senior Review recommended introducing provisions to 'make emergency declarations for up to one month to preserve or protect an area if it believes that an Aboriginal site is under serious and immediate threat of injury or desecration.' (Rec.14). The review also focused extensively on the need to improve access for Aboriginal people to significant sites and areas, through permits for Traditional Custodians to access Crown Land, and provisions for agreement-making with private landholders.

Conclusion

The principles of the UN Declaration on the Rights of Indigenous Peoples should serve to guide the processes defined for the protection of Aboriginal Cultural heritage in Western Australia.²

Article 31(1) states that "*Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral*

² <https://www.humanrights.gov.au/publications/un-declaration-rights-indigenous-peoples-1>



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traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions. ”

The WA legislation falls far short of these accepted and functioning practices which afford Aboriginal people a legislated right to make decisions about their cultural heritage. As such, we are of the view that if the proposed Amendments are adopted they only serve to diminish the existing rights and interests of Aboriginal people in regards to heritage management and conservation.

It is our view that Aboriginal people should be afforded the opportunity to be viewed as more than merely a stakeholder in decisions affecting their cultural livelihood. Article 32(2) of The UN Declaration also provides for the right of Indigenous People to their “*free, prior and informed consent*” before adopting and implementing legislative or administrative measures that may affect them. Ultimately, the Bill should reflect the rights of Indigenous peoples to participate fully in any proposal that may have an impact on their cultural heritage.

These amendments do not remedy the current absence of opportunity for Aboriginal people affected by decisions under the Act to shape the processes or decisions affecting outcomes directly related to their cultural heritage, and we do not suggest that they proceed in their current form.

Yours faithfully

Simon Hawkins

Chief Executive Officer