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Our Ref: RIV1388

Mr Clayton Lewis
Aboriginal Heritage Action Alliance
42 Sydney Street
NORTH PERTH WA 6006

Dear Clayton,

ABORIGINAL HERITAGE ACT AMENDMENT BILL 2014

1. Here are some notes on the Bill. They are not exhaustive of legal issues and policy concerns. At the least the Bill should, indeed, must, be referred to a Select Committee of the Legislative Council. Really, in the interests of good governance and the Aboriginal people of Western Australia and their cultural heritage, and the Government not being regarded as cultural pariahs, the Bill should be withdrawn.

2. Only by referral to a Select Committee can the full implications of the amendments be analysed, assessed, judged and proper policy for heritage protection be debated publically. The clear intention of the legislation is to seriously restrict the opportunity for aboriginal participation in the administration of the Act, and to weaken and limit the protection of heritage places and objects so as to allow more and easier access to land.

3. The amendments are truly offensive; bad legislation and bad administrative practice; and fundamentally destructive of aboriginal cultural heritage protection.

4. It is a 360 degree reversal of the original intention of the 1972 Berndt legislation.

5. If passed I would expect protection of heritage in Western Australia to be driven to Commonwealth environmental and heritage legislation and more objections channelled through the *Native Title Act* ("**NTA**"). The irony is that that would be more costly and time consuming for prospectors, miners, developers and the State Government. Anyone who has been involved in negotiating major (and lesser) mining native title agreements knows the interaction between the *State Heritage Act* and the NTA. Commonwealth legislation can and will be brought

into play. If WA wants to protect its sovereignty it should abandon the Amendment Bill.

6. The fundamental objection is to the substitution of the CEO for the present Advisory Committee and the untrammelled bureaucratic power then given to the CEO over the lifeblood of sustained recognition of aboriginal cultural heritage and, therefore, the long term sustainability of aboriginal traditional law and custom. Destruction of the places and objects of law and culture is the first step to the ultimate destruction of that law and custom.

7. By the amendments protection of sites would be centred on the "*opinion*" of a bureaucrat, the CEO, with no aboriginal appeal; s.18A (3) and in particular there is no appeal from the CEO's decision that there is no site. WA has no laws for judicial review of administrative decisions and no appeals except where allowed to the State Administrative Tribunal ("**SAT**"). Administrative law review by the Supreme Court is limited and difficult to sustain; although cases will certainly be mounted if this Amendment Bill goes through. The High Court has shown in *Bropho* (Old Swan Brewery case) that they can be successfully brought but only after a long battle through the courts.

8. Of course, a right of appeal is necessary as the very basis of natural justice and equal treatment under the law but without other changes, even that becomes a weak reed to stand up to the impact of the proposed changes. I doubt that other citizens would stand for their basic rights being treated in this way.

9. In contrast to the lack of aboriginal appeal, a decision by the CEO not to allow disturbance of a site is appealable; s.19A.

10. There is, apparently, a suggestion that an amendment might be made to require consultation with aboriginal persons. That is entirely insufficient.

11. Consultation is a weak mechanism. Consultation does not restrain or restrict the exercise of power by the CEO in the absolute form the amendment gives to the CEO to form his or her own opinion. Consultation can take any form the CEO wants it to take.

12. The role of the Committee is reversed. From being the "*filter*" composed of experienced and professional people and aboriginal advisers to the Minister, the Committee would now only participate when requested by the CEO. A request to the Committee is entirely discretionary. The Committee, by the amendments, becomes powerless and can, therefore, expect to be quickly made redundant by the CEO not making requests to the Committee.

13. In any case, when the Committee reports to the Minister the Minister's powers are unlimited in the "*general interest of the community*", whatever that means. As Humpty Dumpty said to Alice in ***Through the Looking Glass***, "*When I use a word," Humpty Dumpty said in rather a scornful tone, "It means just what I*

choose it to mean – neither more nor less." The Minister, like Humpty Dumpty "*is to be master – that's all*." And if the Minister gives a permit to disturb or destroy a heritage site, affected aboriginal persons have no right of appeal. More discriminatory legislation is hard to believe a Minister could propose to Parliament.

14. The critical provisions of s.7A evaluation are a totally inadequate basis for evaluation; they do not include any evaluation on behalf of aboriginal people, let alone aboriginal people by whose traditional laws and customs a place or object is identifiable as a site or which should be protected.

15. The language reflects a lack of knowledge or understanding of traditional law and custom and related cultural heritage. It appears to reflect a deliberate diminution of the status of traditional law and custom; e.g. "*relevant aboriginal custom*" instead of the High Court Mabo decision and NTA (s.223) recognition that it is traditional laws and customs recognised by and as part of Australian Common Law which underpins connection to country and the existence of native title rights and, hence, the identification of sites, places and objects, whether called sacred, important or significant by those traditional laws and customs.

16. The omission of the words "*traditional laws and customs*" and use only of "*Aboriginal custom*" and "*Aboriginal lore*" signifies to me a deliberate effort by the Minister or person drafting the amendments to exclude statutory recognition of the existence of aboriginal traditional laws and customs as the foundation of aboriginal heritage.

17. In s.12A we have this mistaken concept of "*lore*" instead of traditional law and custom. It is clearly a conception of the beliefs underpinning places and objects deserving of protection having a status less than traditional laws and customs recognised as part of Australian Common Law by Mabo and NTA. One might say it is pandering to the deniers of aboriginal traditional law and custom declared by the High Court to exist within Australian Common Law, reaffirmed by the High Court in its rejection of the Western Australian challenge to the constitutionality of the NTA.

18. S12A(a) is also objectionable in the implication it carries from the phrase to evaluate places and objects "*alleged*" to be associated with Aboriginal persons. That has overtones of disbelief and ridicule which used to be commonplace amongst miners and the like and racist minded public always ready to heap ridicule upon "*sacred sites*." One would have thought that kind of thinking was beyond the parliamentary draftsperson unless directed ministerially. Moreover, it is a misconception to relate places and object to persons; the relationship is to beliefs of the Dreaming, the traditional laws and customs of the aboriginal persons to whom the laws and customs relate and the places and objects are connected.

19. Words such as, and hence, ideas of "*reputed use*" and "*sentiment*" used in s. 7A seriously downplays the existence, character and status by traditional laws and customs of places or objects to be evaluated.

20. The reference to "*community*" is of uncertain application. What community? The whole population of Western Australia? Or some part of it? The Perth community or South West community for Noongar places or objects. The Kimberley community for Wandjina rock art? The Karratha or Pilbara community/ies for Burrup/Depuch Island et al rock art, and so on. In anthropological terms (and law) society and community and group have many different meanings according to time, location, people and circumstance.

21. S.12A is in interesting and critical contrast to s.7A. 12A has the CEO evaluating "*on behalf of the community*". It does not include "*persons of Aboriginal descent*" as in 7A. A critical omission. Under 12A the CEO is not required to evaluate specifically, "*on behalf of*" the very persons whose cultural heritage is at risk. Whilst "*community*" will include aboriginal persons they have lost their identity as aboriginal persons when regarded only as members of the "*community*". Surely a most telling and serious omission. As a matter of interpretation, the different expressions in 7A and 12A , the deliberate exclusion of reference to "*persons of Aboriginal descent*" in 12A and that 12A expressly sets out the CEO's functions would mean, in my view that the word "*person*" in the opening words of 7A does not include the CEO.

22. There is simply no benchmark criteria by which the CEO is to form an opinion that a place or object is "*important", "significant*" to the "*community*" or has "*outstanding importance*" – s.19 amended. These three concepts seem to be used in ascending order of perceived relevance to a place or an object. The legislation leaves one to guess what the difference is between the concepts. How is the CEO to make that judgment except on a personal view of what has heritage worth? The CEO has an untrammelled power to form his or her own opinion. The most dangerous of all statutory powers under any legislation. And, I might say, was the kind of legislative drafting which began the whole legal and political battle started over 80 years ago to cut down this kind of bureaucratic and ministerial power which has led to Courts being prepared to interfere and enlightened governments to introduce the kind of legislation the Commonwealth has to open up these kind of administrative decisions to appellate oversight and judicial review.

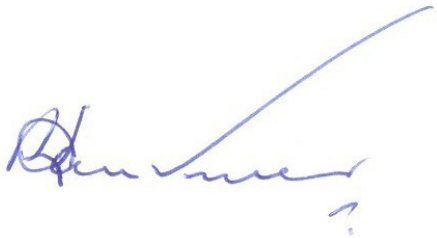
23. In other legal circumstances concepts of "*significant*" or "*significance*" have set a high bar to be achieved; "*outstanding importance*" must be even higher, approaching, for example, certainty; or a World Heritage standard. In other words, the CEO is left to set his/her own standard, and any court or tribunal is also left without any but its own standard by which to evaluate.

24. Whilst some of the concepts of importance and significance, and s.5 (except for the substitution of CEO for the Committee) are retained from the Act, they can

take on a whole new meaning in the hands of untrammelled bureaucratic decision making by one person, the CEO, in the context of the new sections 7A, 12A, 18B(4) and the new administrative structure built around those provisions.

25. I repeat that I believe the Aboriginal Heritage Act Amendment Bill 2014 is truly bad legislation. The Bill is not only offensive to aboriginal heritage but to modern international approach to the protection and preservation of indigenous heritage and the cultural traditions of indigenous peoples for the benefit of the whole of a national society.

Yours sincerely,



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