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The Hon. Peter Collier MLC
Minister for Aboriginal Affairs
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Open Letter regarding the *Aboriginal Heritage Act Amendment Bill*

We are writing to you to draw attention to concerns raised by our members about proposed amendments to the *WA Aboriginal Heritage Act (1972)* and associated changes to the interpretation and administration of the Act that are currently being implemented. We are gravely concerned about the current and future impacts of these changes on the capacity of Western Australian Aboriginal peoples to manage and protect their place-based cultural heritage into the future.

The Australian Anthropological Society (AAS) is the national representative organisation of Australian anthropologists. We have a membership of over 600, many of whom are involved in social research and cultural heritage projects with Aboriginal peoples and Torres Strait Islanders, including with groups whose traditional lands are located in Western Australia. The AAS provides national leadership on issues relevant to the professional practice of our members and the well-being of the peoples with whom they work. It is with this mandate in mind that we make the following comments.

The AAS believes that reform of the Act is long overdue and desperately needed. Existing processes for the management of Aboriginal sites in Western Australia are currently poorly and chaotically implemented and there have been few successful prosecutions of breaches of the Act. The regulation of Aboriginal Heritage in Western Australia has not kept pace with significant national and international developments in heritage management best practice, nor has it adequately responded to the legal recognition of native title rights.

While we acknowledge that the task of reforming the Act is a challenging one and recognise the need to balance the specific, local interests of Aboriginal people against the interests of the State more broadly, the AAS does not believe that the proposed changes fairly balance public interest with

the rights and interests of Western Australian Aboriginal peoples. Many AAS members are alarmed at the implications of the Bill, which will have a profound and negative effect on the ability of both themselves and the Aboriginal people with whom they collaborate to discharge their professional and cultural obligations in relation to the documentation and protection of Aboriginal heritage places in WA.

The Australian Heritage Commission's guide to managing Indigenous Heritage, *Ask First* (2002), sets out a number of principles that the AAS believes should underpin the Western Australian government's approach to the regulation of Aboriginal place-based heritage. These include that all parties concerned with identifying, conserving and managing this heritage should acknowledge, accept and act on the principles that Indigenous people must be afforded a primary role in:

- Informing Indigenous Heritage values and places
- The planning of Indigenous Heritage management processes
- The making of decisions about the management of Indigenous Heritage
- Controlling related information assets and associated intellectual property.¹

It is clear from the proposed changes to the Act along with recent developments that have seen the removal of sites from the Aboriginal Heritage Register without consultation with Aboriginal parties, that the WA government is failing in every respect to meet these most basic principles. Further comment on this failure is provided below.

A lack of Aboriginal involvement in planning and decision making

There is very little in the proposed amendments to the Act that provides Aboriginal people with any real voice in the management of Indigenous Heritage. 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. Instead, the proposed changes entrench a system which treats Aboriginal people merely as informants of heritage values and leaves decision making in the hands of distant bureaucrats who are unfamiliar with both the people and the landscape in question.

Poor processes for the evaluation of sites and their removal from the Heritage Register

Any act to remove an existing site from the Register should be conducted with the full and informed consent of the Aboriginal informants for that site, or their next of kin. The de-listing of sites without consent is, at the very least, in contravention of the United Nations *Declaration on the Rights of Indigenous Peoples* which was endorsed by the Australian parliament in 2009.²

¹ Australian Heritage Commission 2002, *Ask first: a guide to respecting Indigenous heritage places and values*, Indigenous Heritage Section, Australian Heritage Commission, Canberra.

² Article 8 of the UNRIP states that, "Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture. States shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities". Article 31 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 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 article goes on to state that, "In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights." See http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (accessed 1 June 2012).

Forced disclosure of cultural information

The proposed changes offer insufficient protection for Aboriginal parties who choose not to disclose information on the grounds that such information is subject to ritual or gender restrictions. We do not support any changes to the Act and associated process that have the effect of compromising the capacity of Aboriginal people to protect their heritage either because they cannot afford to, or because they are unwilling to divulge private cultural information without due cause.

Failure to adequately recognise the rights of native title holders

The native title rights of Aboriginal Western Australians are increasingly being recognised. At time of writing, 30 Registered Native Title Bodies Corporate (RNTBCs) were responsible for managing native title rights over more than 43% (1,090,111 sq. km) of the state.³ These figures are set to grow in coming years.

The AAS is concerned that the Amendment Bill does not adequately recognise the rights of native title holders in regards to the management and protection of places of significance, and offers no direction on how the AHA and the Native Title Act should properly interact.⁴ Nor does the Amendment Bill compel the government or proponents to consult native title holders or their RNTBCs about the management of Aboriginal Heritage in areas over which they hold native title rights, which will usually include a right related to the management and protection of cultural significance.

The AAS firmly believes that decisions about the recognition and registration of Indigenous Heritage places, sites or objects ought to give primacy to the views of the relevant Aboriginal people, who have the requisite knowledge and cultural authority to determine the nature and value of places of significance. In areas where native title rights have been recognised, the views of the native title holders should be given primacy.

The proposed amendments do not address the existing incommensurability between native title and heritage management regimes recently identified by the Productivity Commission as of concern to both Aboriginal parties and industry, albeit for very different reasons.⁵ As the amount of land and the numbers of native title holders grows, this lack of articulation between the two regimes will continue to undermine the rights of Aboriginal people as well as the efficient operation of regulation.

Poor and inadequate consultation

We are deeply concerned that the Amendment Bill was developed without adequate consultation with Aboriginal peoples or their representatives. The intention of the Act, first and foremost, is to

³ National Native Title Tribunal 2015d, Determinations of Native Title as at 31 December 2014. Commonwealth of Australia. Available from: <http://www.nntt.gov.au/Maps/Determinations_map.pdf>. [3 February 2015].

⁴ Productivity Commission 2013, *Mineral and energy resource exploration (Inquiry Report No. 65)*, Canberra. Available from: <<http://www.pc.gov.au/projects/inquiry/resource-exploration/report>>. [6 January 2015], p.164.

⁵ Productivity Commission 2013, *Mineral and energy resource exploration (Inquiry Report No. 65)*, Canberra. Available from: <<http://www.pc.gov.au/projects/inquiry/resource-exploration/report>>. [6 January 2015], p.188.

ensure that all places in Western Australia which are of traditional and cultural significance to Aboriginal people are properly recorded and their importance evaluated. Aboriginal peoples are intended to be the primary beneficiaries of this law, and it is they who stand to gain or lose the most through any amendment to the Act.

It follows that the full spectrum of Aboriginal opinion and interest should be canvassed when considering possible changes to the current legislative regime. Such consultation should be conducted in a way that enables genuine and widely representative participation of Aboriginal people across the full spectrum of age, gender and geographical differentials.

Legislating for the ongoing destruction of Aboriginal Heritage

The AAS considers it essential that the views of Aboriginal people who are responsible for sites of significance are given primacy in considerations about the issuing of permits to impact sites under s 18 of the Act.

The *State of Indigenous Cultural Heritage 2011* report found that one of the main threats to Indigenous place-based heritage is the current level of government-authorized destruction of heritage places to make way for development.⁶ In Western Australia, most newly identified Heritage sites are legally impacted shortly after documentation in order to make way for development, with little attention paid to the cumulative impact of multiple destructions. Indeed, most of the more than 1200 sites reported to the Department of Aboriginal Affairs in the period July 2013 to May 2014 were submitted along with notices lodged under s 18 of the Act.⁷

The Native Title Tribunal has acknowledged that the 'protective regime' of the Aboriginal Heritage Act is sometimes insufficient to protect Aboriginal heritage, and the Auditor General of Western Australia has also criticised your government for not actively monitoring the activities of operators in relation to Aboriginal heritage sites.⁸

The undermining of expert advice

The AAS is very concerned about proposed changes to the composition and role of the Aboriginal Cultural Materials Committee in relation to defining and impacting Aboriginal sites. The proposal to privilege the opinion of the CEO of the Department of Aboriginal Affairs in relation to the definition of an 'Aboriginal site' over that of the ACMC undermines the objectivity of Heritage decision making and further marginalises Aboriginal opinions about how best to recognise and protect significant Heritage places.

Similarly, the proposal to remove the position of Specialist Anthropologist from the ACMC undermines the robustness of advice on which decisions about Aboriginal Heritage are based. We believe that all those charged with making decisions about Aboriginal Heritage—Aboriginal parties and government officials alike—should have access to the best possible advice about the potential

⁶ S Schnierer, E, Ellsmore, S & Schnierer, S 2011, 'State of Indigenous cultural heritage 2011', *Australia — state of the environment 2011*, report prepared for the Department of Sustainability, Environment, Water, Population and Communities, Canberra, <http://www.environment.gov.au/science/soe/2011-report/contents>, p.721.

⁷ L Vaughn 2015, 'Aboriginal Heritage Act Amendments', <https://aboriginalheritagewa.wordpress.com/>

⁸ Productivity Commission 2013, *Mineral and energy resource exploration (Inquiry Report No. 65)*, Canberra. Available from: <<http://www.pc.gov.au/projects/inquiry/resource-exploration/report>>. [6 January 2015], p.164.

values of Indigenous place-based heritage. This should include the advice of anthropologists, archaeologists, historians and heritage practitioners as to the potential cultural and scientific values of places of significance.

The way forward

In other states, such as Victoria where they have implemented a system of Registered Aboriginal Parties (RAPs), Indigenous Heritage regimes have been amended so as to provide Aboriginal people and native title holders specifically with a primary role in decision making about their Heritage. It is not inconceivable that the Western Australian government could do the same.

We encourage your government to consider reforming the Act so that it empowers Aboriginal people to have greater input into the protection and management of their heritage at all stages of the process. Enabling free, prior and informed consent is standard ethical practice across all social science disciplines including anthropology, and should be a cornerstone of future Indigenous Heritage management legislation and policy in Western Australia.

It is a well known fact that Aboriginal people remain among the most economically and socially disadvantaged citizens of Western Australia. Aboriginal people have lower life expectancies and educational outcomes and higher rates of unemployment, disease and incarceration than the rest of the population. These inequities are even more apparent in the context of the current mining 'super-boom'.

There is a considerable and growing body of scholarship which demonstrates, however, that a strong attachment to traditional culture is found to enhance outcomes across a range of socioeconomic indicators.⁹ This suggests the maintenance of cultural heritage should be viewed as a potential part of the solution to Aboriginal disadvantage in Western Australia rather than an obstacle to achieving it. It follows that providing strong mechanisms by which Aboriginal people are empowered to speak about, manage and control places of significance on their own terms in the face of competing interests in land will benefit not only Aboriginal families, but the population of the state more broadly. We encourage those within the Western Australian government who are responsible for overseeing the amendments to the Act not to lose sight of this fact as they proceed with what could, with adequate consideration and consultation, be an extraordinary opportunity to reform the management of Aboriginal heritage to the benefit of future generations.

Minister, the AAS urges your government to listen to the many voices of Aboriginal Western Australians and their representatives who have expressed their opposition to the proposed amendments to the Act and withdraw it from Parliament.¹⁰ We suggest that before further changes

⁹ See Dockery, A.M (2009), 'Culture and wellbeing: The case of Indigenous Australians', Centre for Labour Market Research Discussion Paper 09/01, Curtin Business School, Curtin University of Technology. Dockery's findings were based on an analysis of data collected from the Recent research using data from the *National Aboriginal and Torres Strait Islander Social Survey*. Other examples of relevant research include: Halloran, M. (2004), 'Cultural Maintenance and Trauma in Indigenous Australia', *Murdoch University Electronic Journal of Law*, 11(4).

¹⁰ 'Speaking with one voice – WA's changes to Aboriginal Heritage law rejected at bush meetings', *The Northern Myth* (30 Sep 2014), <http://blogs.crikey.com.au/northern/2014/09/30/speaking-with-one-voice-was-changes-to-aboriginal-heritage-law-rejected-at-bush-meetings/>; see also KLC 2014, 'Speaking with one voice' (20 Nov 2014), <http://www.klc.org.au/docs/default-source/Media-Releases/aboriginal-coalition-rejects-wa-heritage-changes-at-parliament.pdf?sfvrsn=4>

are attempted the matter be referred to a Parliamentary inquiry and full and informed consultation with Aboriginal people and their representatives be undertaken.

Far from being an impediment to development, reforming the existing regime to ensure the full and informed participation of Aboriginal peoples in the management of the state's Indigenous Heritage would be an act of reconciliation that has the potential to contribute to the physical and emotional health and well-being of Aboriginal families and bring about real change in the relationship between Indigenous and non-Indigenous Western Australians.

Yours sincerely,

Prof. Chris Houston (President)

Prof. Ghassan Hage (President Emeritus)

Dr. Pamela McGrath (President Elect)

Dr. Hannah Bulloch (Secretary)

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