RE: Appeal to EPA Appeals Convenor against Report and Recommendations of the Environmental Protection Authority, Roe Highway Extension, Main Roads Western Australia, Report 1489, September 2013

I wish to lodge the following appeal against the report and recommendations of EPA Report 1489 on the following grounds:

**Ground 1 – the EPA has not identified Aboriginal heritage as a ‘key environmental factor’ in the assessment. This contradicts the EPA’s own guidelines and legislation.**

The EPA has erred in failing to identify Aboriginal heritage as a ‘key environmental factor’ in the assessment (see omission from contents page ix), and has erred in stating in Report 1489 that Aboriginal heritage values are ‘not considered to be a key environmental factor’ and that this ‘factor does not require further EPA evaluation’.

This contradicts the EPA’s own policy guidelines and legislations. The EPA’s 2008 *Environmental Guidance for Planning and Development Guidance Statement No. 33* states that:

*The definition of environment in the Environmental Protection Act 1986 (EP Act) includes the social surroundings of man. For the purposes of the Act, the social surroundings of man are ‘...his aesthetic, cultural, economic and social surroundings to the extent that those surroundings directly affect or are affected by his physical or biological surroundings’ (s3(2) EP Act).*

*Therefore, when determining the key environmental factors associated with a scheme or a referred proposal, the Environmental Protection Authority (EPA) will have regard for impacts on the community’s physical or biological surroundings that have aesthetic, cultural, economic and social implications.*

*Relevant factors for environmental impact assessment that the EPA has identified in relation to the community’s aesthetic, cultural and social surroundings include impacts on the following:*
• Aboriginal heritage (see Chapter D1)

....

Planning authorities should be aware that physical protection of some areas may not be possible under the Aboriginal Heritage Act 1972, and that in such cases protection through planning requirements or referral under the EP Act may need to be considered.¹

A list of issues at p 16f of the same document is described as reflecting ‘the key environmental factors used by the EPA in its environmental impact assessment process’. It includes under the factor of ‘Social Surroundings’:

• Indigenous heritage sites

• Heritage sites on all lists, for example, World Heritage, National Heritage, Commonwealth Heritage, Register of the National Estate, Heritage Council of Western Australia, National Trust, local municipal inventory, other local lists

As stated in EPA report 1489, Bibra and North Lakes have been listed on the interim National Estate of the Australian Heritage Commission, due to their outstanding cultural and natural heritage values.

In the EPA’s 2004 Guidance for the Assessment of Environmental Factors Western Australia (in accordance with the Environmental Protection Act 1986) No. 41, the then Chair of the EPA also stated in the foreword of this document that this guidance considers ‘Aboriginal heritage’ as a relevant environmental factor in circumstances where the heritage values are linked directly to the physical and biological attributes of the environment, and when the protection and management of those attributes are threatened as a result of a proposed development’.² Clearly the heritage values of the Bibra and North Lakes mythological site DIA 3709 and DIA site 4107 are intrinsically ‘linked with the physical and biological attributes of the environment’: since as stated in Report 1489, ‘the Waugal inhabits North and Bibra Lakes (and many other water bodies) and maintains the water flow’, and Aboriginal heritage is a relevant environmental factor under this definition.

On the basis of the EPA’s own guidelines and legislation, it is argued that the EPA report is in error in defining the area’s major cultural significance for Noongar people as ‘not a key environmental factor’. On this important basis alone, the report should be withdrawn.

² Foreword
Ground 2: The EPA’s report has not assessed alternatives for Roe Highway Extension which would avoid severe impacts to major Aboriginal sites within North and Bibra Lake area.

The EPA’s Bulletin 1088 page 14, with reference to North and Bibra Lakes, clearly states that:

It has also been identified as being the most significant historical site within the Perth metropolitan region, south of the Swan River.....

and that:

Also, depending on the degree of disturbance, the alignment would intrude into several other archaeological sites. The potential for other unknown archaeological sites and/or sub-surface material being disturbed was also identified. It was also identified that there would also be a severe impact on Aboriginal tourism trails between the two lakes.

Considering that the EPA has documented how significant the Aboriginal sites of North and Bibra Lakes are, and the impact that Roe Highway Extension will have on their cultural integrity, as well as severe impact on Aboriginal tourism trail, the EPA has failed in its mandate by not assessing the No Roe Highway option or other alternatives that do not require Roe Highway Extension. This EPA principle is documented in its 2008 ‘Environmental impact assessment’ guidelines (EPA, 2008, Chapter A2, p 1) under the heading ‘Terms’, which states:

Environmental impact assessment is described by the EPA as an orderly and systematic process for evaluating a scheme or a proposal, including its alternatives where relevant, and its effects on the environment, including the mitigation and management of those effects.

Section 4A of the Environmental Protection Act 1986 part 1 states in relation to the precautionary principle:

In the application of the precautionary principle, decisions should be guided by —
(a) careful evaluation to avoid, where practicable, serious or irreversible damage to the environment;

The EPA has already stated in Bulletin 1088 and the current proposal, Report 1489, that the Roe Highway Extension will impact on archaeological sites and Aboriginal cultural values such as tourism trails, but have failed their obligation under section 4A to protect Aboriginal
heritage from irreversible damage caused by the construction of this highway by not assessing other alternatives.

**Ground 3:** given the inability of the AHA to adequately protect Aboriginal cultural heritage in the North and Bibra Lakes area, it was incumbent upon the EPA to take steps to ensure that Aboriginal heritage sites were properly protected.

In a devastating critique of WA’s Aboriginal Heritage Act, leading Australian native title lawyer David Ritter has argued that:

> it is a myth, expressed by the objects of the Aboriginal Heritage Act, that the main purpose of the legislation is to protect Aboriginal heritage. It may be more accurate to describe the AHA as an act to regularize the obliteration of Aboriginal heritage.

The current Roe Highway project is a case in point: rather than protecting important sites, s 18 of the AHA is being used as the legal mechanism for destroying them:

> The proponent has submitted an application under section 18 of the Aboriginal Heritage Act 1972 (AH Act) to impact sites DIA 3709 and DIA 4107. The Department of Aboriginal Affairs has considered this application and has advised that the potential impacts to heritage values can be managed under the AH Act.

This statement in Report 1489 is factually incorrect, unless ‘management of potential impacts to heritage values’ is perversely construed to mean ‘the destruction of such heritage values’ under s18 of the AHA: there is an obvious circular argument in the EPA’s statement.

In previous EPA policy documents, the EPA has highlighted the obvious deficiencies of the AHA and noted that the EPA act has the scope to protect Aboriginal heritage sites which cannot be protected by the AHA:

**2.2 Aboriginal heritage**

*Both the EP Act and the AH Act have the legal capacity to consider aspects of Aboriginal heritage. ..The EP Act allows for the consideration of actual physical impacts as well as social impacts. The EP Act can, in some instances, complement the AH Act, for example, in cases where actual physical protection of the environment is required to protect sites of heritage significance. The EP Act can also give attention to matters of a social nature, such as traditional hunting activities, by providing for the retention of habitat for native fauna to enable those activities to continue.*

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Previously, the EPA has considered that, in relation to Aboriginal heritage issues, the AH Act has legislative processes which have to be met and that compliance with that Act would be the appropriate way to ensure that those issues were addressed. However, given the definitions in the EP Act and the EPA’s obligations when assessing a proposal, the EPA has revised its approach to addressing Aboriginal heritage. If Aboriginal heritage is a relevant environmental factor in the context of a proposal being assessed under the EP Act, the EPA must consider the issue and must satisfy itself that it can, and will, be addressed, consistent with the scope and requirements of the EP Act. One way to assist the EPA to be satisfied is for the EPA to be provided with confirmation that environmental aspects of the issue will be fully addressed through other processes, such as under the AH Act [this is clearly not the case in this instance]

The EPA will give consideration to Aboriginal heritage matters to the extent that they may be affected by the impacts of the proposal on the physical or biological surroundings. (EPA, 2004, pp2f)

It is argued that given the inability of the AHA to protect important Aboriginal cultural heritage values in this, as in so many other cases, it was incumbent upon the EPA under its legislation to protect these values, rather than washing its hands of the matter and outsourcing responsibility for Aboriginal cultural heritage matters to the DIA and the Minister for Indigenous heritage.

For detailed critiques of DIA, the AHA and WA’s current deficient heritage protection regime, see submissions to last year’s review of the AHA on DIA’s own website at http://www.daa.wa.gov.au/en/Heritage-and-Culture/Aboriginal-heritage/Heritage-Act-Reform/Submissions/:

Professor Mick Dodson
Sally Morgan
UWA indigenous legal academic Ambelina Kwaymullina
SWALSC
GLSC
YMAC
Friends of Australian Rock Art
AACA
AAS
WDLAC
Swan Valley Nyungah Community
KLC
CDNTS
Macintyre Dobson & Associates
Ground 5: EPA has failed to ‘demonstrate that any concerns raised by Aboriginal people have been adequately considered by the proponent in its management of environmental impacts’, as required by its own guidelines.

Guidance Statement 41 (EPA, 2004) lists as an action ‘pertinent to the factor of Aboriginal heritage’: ‘demonstrate that any concerns raised by Aboriginal people have been adequately considered by the proponent in its management of environmental impacts’.

As is obvious from the representative sample of publicly available statements reproduced below by Noongar people and their organisations expressing concern over the Roe Highway’s impact on North and Bibra Lake, the EPA has again failed to adhere to its own guidelines in this regard, by failing to consider the almost unanimous opposition to this proposal in the Noongar community and explore alternatives to the proposed project.

Report 1489 further states that ‘Thorough consultation with the correct Aboriginal people has not been conducted’. It further states that ‘All communications with representative families show they oppose the proposal but are unable to speak up due to customary laws’.

The latter claim is not credible, and is belied by the many public statements of opposition by Noongar people already available in the public domain.

**REPRESENTATIVE SAMPLE OF STATEMENTS EXPRESSING CONCERNS BY NOONGAR PEOPLE TO ROE HIGHWAY EXTENSION.**

See also his recent statement to NITV in September 2013:  
(and scroll to the time 12:57)

In a 2010 letter to Roe Highway heritage consultant Brad Goode, the CEO of South West Aboriginal Land and Sea Council (the body representing Noongar people’s native title interests, stated as follows):

> I am writing to advise that, subsequent to extensive consultation with members of the Noongar community, the South West Aboriginal Land and Sea Council (SWALSC) is fully satisfied that there is deeply held and widespread opposition by the Noongar community to the plans relating to the extension of the Roe Highway.

> The Noongar community members with whom we have consulted are opposed to the Roe Highway extension because they firmly believe it will destroy a number of sites that are regarded as being of cultural and spiritual significance.

> I further advise that, should the State Minister grant consent for the extension of the Roe Highway under Section 18 of the Western Australian Aboriginal Heritage Act, community members have indicated that they will seek that SWALSC refer the matter to the Federal Minister under the Aboriginal and Torres Strait Islander Protection Act (1994).

In a letter to DIA in November 2002, the Noongar Council of Elders stated as follows:

> Mr Bernard Bowen

> RE: Road construction in the Bibra Lake and North Lake areas.

> Recent meetings of the Metropolitan Noongar Council of Elders, has highlighted some concern over road works in the Bibra Lake and North Lake areas. Information was delivered to the Elder’s group identifying that although current plans have opposed the construction of the Roe Highway, there may be some plans to upgrade Farrington Road as a result.

> The Elders appreciate the need to establish substantial infrastructure to enable community growth, however they also believe that some alternative should be considered in relation to the extension or further development of either the Roe Hwy or Farrington Road.

> In an effort to express their trepidation, the Elders wish to ensure that you are aware of their concerns for the locations environment, which also has traditional importance to them. Of further concern is the need to protect the cultural significance of the area, and to highlight that any disturbance would result in irreparable damage.

> After considering the Council’s concerns it is hoped that your awareness may inhibit any extension of the Roe Highway, and might ensure that Farrington Road remain without alteration, reducing the likelihood of future development of the area.

> Yours sincerely

A 2002 heritage report commissioned by the Department of Planning and Infrastructure (O’Connor, 2002) recorded the following statements by senior Noongar elders Ken Colbung,
Richard Wilkes, the Reverend Cedric Jacobs and Patrick Hume expressing their opposition to the Roe Highway route through Bibra and North Lakes:

disturbance occurs. Mr Colbung also stated that the Nyungar people of Perth had, some years ago, campaigned vigorously against the extension of the Roe Highway between North Lake and Bibra Lake, on the grounds that this would constitute a violation of the mythological site associated with the wetlands. This opinion has not changed over the intervening years.

Rev. Cedric Jacobs also advised that the spiritual aspect of the North Lake/Bibra Lake mythic site would be violated by roadworks or bridgeworks between the two waterways or by any work on other options that impacts them. He advised that the wetlands are current areas of spiritual significance. Aboriginal people consider regional wetlands to be spiritual repositories, not only in the sense of the ubiquitous Waugal myth, which has been previously recorded in relation to North Lake and Bibra Lake, but in a more general sense which draws on the fundamentals of Aboriginal philosophico-religious belief. In this belief system all living creatures, including humans, share a common spiritual essence and therefore, by extension, every living being represents a part of the wider spiritual universe. The region's wetlands, as breeding grounds for numerous living creatures, are therefore repositories of this spiritual essence realised generationally by individuals. His clan would oppose any destruction of or encroachment into the wetlands, on the grounds of detriment to their spiritual aspect.
Mr Patrick Hume and Ms. R. Hume of the Independent Aboriginal Environmental Group are also members of the Swan Valley Nyungah Circle of Elders and claimants in the Combined Metropolitan Working Group native title determination application. They stated that any roadworks that pass between North Lake and Bibra Lake will intrude into the mythological site and desecrate its spiritual aspect. They are also opposed to any tunnelling underneath the wetlands or the area between them on similar grounds.

Mr Richard Wilkes is an applicant on the Combined Metropolitan Working Group application for determination of native title, whose claim covers North Lake and Bibra Lake. He stated that he and the group consider that the North Lake and Bibra Lake spiritual site (that is, the registered mythological site) is a continuum stretching from the southern boundary of Farrington Street to South Lake. Existing roads within this site have impacted it already, but the Nyungars have accepted them, because they were built in an era when the Nyungar people could do little to protect their heritage. Acceptance, however, does not equate with approval, and the Nyungar people would not wish for further destruction of their heritage to occur. Tunnelling beneath the Aboriginal site would also, he believes, constitute a desecration of that site. He pointed out the opposition of Aboriginal people in the past to tunnelling under Bennett Brook and Swan River as examples of this.

**Ground 4:** By failing to provide Noongar people’s legal representative SWALSC with full documentation of the final s18 report relating to the proposed destruction of Aboriginal heritage in the North and Beeliar Lakes area before the close of EPA submissions on Friday 27 September 2013, the State government and DIA have denied Noongar native title holders and their legal representative, SWALSC, natural justice and due process in relation to the impending destruction of Noongar cultural heritage under s18 of the AHA.

The Minister for Indigenous Affairs is often very zealous in being seen to ‘afford natural justice and due process’ to developers when they wish to deny protection under the AHA to Aboriginal heritage sites (see for example his reply of 17 September 2013 in State Parliament
to recent parliamentary QON on Lake Yindarlgooda in the Goldfields, which suggests that DIA recently acceded to pressure from a group of Goldfields mining companies for this site not to be protected under the AHA).

In the interests of due process and natural justice, SWALSC and its Noongar clients should have been given the opportunity to consider and comment on the final DIA s18 report on proposed disturbance to sites DIA 3709 and DIA 4107 before close of submissions to the EPA on 27 September, but were not given this opportunity. Given this denial of due process and natural justice, the recommendations of EPA report 1489 should be rejected.

BIBLIOGRAPHY


Metropolitan Nyoongar Council of Elders (2002) Letter to DIA signed by Chair Norman Harris, 18 November. Reproduced in Goode & Harris, 2010


SWALSC (2010) Letter to Brad Goode signed by SWALSC CEO Glen Kelly, 8 February. Reproduced in Goode & Harris, 2010

This appeal requests that the Appeals convenor recommend 1) that report 1489 be withdrawn because of the deficiencies outlined above, 2) that the EPA and State Government accede to longstanding requests by the Noongar community to protect the Bibra and North Lakes area from development and 3) that the EPA assess other options which do not impact on this area. I also request the opportunity for a meeting with the Appeals Convenor to present further evidence confirming the points made in this submission.

Yours sincerely,

Dr Stephen Bennetts
Consultant anthropologist
14 Stainer St
Willagee
WA 6156
bennes06@tartarus.uwa.edu.au
0404674261