HON. ROBIN CHAPPLE MLC

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Assistant Director General,
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Via Email: AHAreview@dplh.wa.gov.au

To the Assistant Director General;

Thank you for the opportunity to comment on the proposed changes to the *Aboriginal Heritage Act (1972)* (The Act). The new Act, at its core, shows a welcomed commitment to protecting Aboriginal and pre-colonial heritage for all Australians. As a Member of Parliament for the Mining & Pastoral Region I have dealt extensively with *The Aboriginal Heritage Act* (1972) (AHA); having worked alongside traditional knowledge-holders in registering The Sisters; Kariyarra Island 1 and Dixon Island. I am presently working to safeguard sites in our far north from industry and so I take great interest in this new act. Having seen how The Act is applied and works in real-life has given me great insight into the broader problem of preserving our pre-colonial heritage and Aboriginal cultures. My comments below on the proposed changes to The Act hope to guide legislation in realising the recognition and preservation of Aboriginal Heritage.

Limitations of *The Aboriginal Heritage Act (1972)*

It is perhaps worthwhile to review the shortcomings of The Act in its present form so as to gain a clearer picture of those issues that require further legislative support. First and foremost, amongst the issues with the current Act, the disenfranchisement of Aboriginal peoples from their respective heritage is something of a hallmark. Ownership of Aboriginal heritage was, in essence, awarded to the State's bureaucracy; an arm of government that was – and still is – unequipped to deal with the size and workload of such a portfolio. This issue has been compounded from within; by multiple, acting pieces of heritage legislation (e.g. *Native Titles*) and poor performance by the Department of Lands, Planning & Heritage; and from without by increased industrial pressure and changing understandings of heritage in academia (e.g. cultural landscapes and intangible cultural elements). Since 1 January 2011, approximately 1,636 reported heritage places and previously-registered sites have changed status to 'stored Data/Not a Site' by internal administrative decision; especially in relation to the interpretation and application of section 5(b) of the Act. The current *Aboriginal Heritage Act (1972)* has presented all stakeholders with a bureaucratic mess and has rarely been effectual in protecting heritage and Aboriginal culture.

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Conceptions of Heritage

The biggest and most far-reaching critiques of the new Act are those which concern themselves with heritage as a concept. Here, I am inclined to agree with the Australian Association of Consulting Archaeologists Incorporated (AACAI) in their arguments against the hegemony of the site; as a measure and prerequisite of cultural heritage. Whilst it is true that traditional, Western archaeology focuses on *in situ* objects, the AHA focus on *sites* is clearly inadequate in dealing with Aboriginal Australian culture. Despite mythological sites being the sort of place the AHA is supposed to protect, many of these areas – mountains, songlines *et cetera* – could not be classified as "sites" and as such, cannot utilise the protections and recognitions offered through, say, section 18 or other legislative apparatus.

With this in mind, proposal one must include a framework for identification of both *in situ* and intangible heritage. This three-way, land-site-heritage relationship must be severed to ensure the proposed changes act as they are intended. The new Act is a heritage Act and yet still focuses heavily on issues of land-use. The new AHA must also be inescapably clear regarding management actions relating to singular, isolated objects; vast cultural landscapes; and a protocol for repatriation of Aboriginal and Torres Strait Islander remains. In addition, proposal two proves problematic in its use of "value" and "significance". To whom is the thing valuable or significant? The new AHA applies to the heritage of some 500 Aboriginal nations – is an artefact, site or locus required to be significant or valuable to every group?

Concerning Native Titles (NT) & Prescribed Bodies Corporates (PBC)

The *Native Title Act (1993)* provides recognition under Australian law for Aboriginal and Torres Strait Islander peoples' rights and interests in land and waters according to traditional laws and customs and, at present, takes on some functions of heritage management which are generally beyond the scope of the original Act. Aboriginal organisations, like other groups in society, should be able to manage their affairs by representation. Whilst maintained via section 251 of the *Native Title Act (1993)*, and Regulation 8 of the *PBC Regulations,* the proposed changes to the *Aboriginal Heritage Act (1972)* diminish the sovereignty of the Aboriginal peoples over both the heritage assessment, and the process by which this assessment takes place. Regional representation should be via Native Title groups, although, with a well-devised appeal mechanism. While Native Title rights have the potential to offer a greater voice to Aboriginal people to protect places, it lacks the legal enforceability to do so. State legislation on the other hand - because it must consider the wider public interest - is subject to intense lobbying by the minerals industry to prioritise potential economic wealth above all other considerations. With this in mind, no local panel other than the groups with legal right over the land should be allowed to make agreements about land use. Under the proposed changes this becomes more difficult to assure. The proposed changes demand a high

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level of experience and ability in regards to assessment however, they inadvertently question the knowledge of aboriginal people of their own cultures. Related also; the proposals seem to pit "real" knowledge holders against NT Holders which is ill-advised given the aforementioned multiple pieces of legislation currently concerned with Aboriginal Heritage. I have personally helped knowledge holders who were not Native Title Holder(s) register sites and it is imperative that these sites must have the same status as those lodged by Native Title Holder(s).

There are concerns, also, over the outcomes when a different body is selected over the groups that possess legal rights over the land. Continuing in this vein, some perfectly apt PBCs are unlikely to meet the criteria set out in section 3(a) of the proposals. This then allows the State to select another group and make legal agreements independently of the Native Title Holder(s). As well as disenfranchising Aboriginal peoples and their right to govern themselves by representation, the potential for misuse and manipulation is alarming and must be addressed before these cases proceed to litigation.

Concerning *Local Aboriginal Heritage Services*

With regards to Local Aboriginal Heritage Services (LAHS), there is concern over the proposed changes and their effect. It must be noted that most PBCs that *can* do their own heritage management already do. Making PBCs subordinate to the Department of Lands, Planning & Heritage (DLPH) is problematic and will not aid PBCs in fulfilling their role as LAHS. If these LAHS are an arm of the DLPH, then one can only expect issues with neutrality and vested interest. Also, it cannot be ignored that some PBCs are better-resourced than others and thereby more capable of performing to the new act. Concerns arise however when considering those smaller, yet still legally-valid PBCs and their future as representatives for Aboriginal peoples. Already the crux of the issue is apparent: for these local bodies to operate as intended, they must be further provisioned to deal with the increase in workload and standard of work, in an increasingly-industrial and -legal space, whilst maintaining a genuine autonomy from the department. It is perhaps then more valid and less legally-compromised for the new Act to assist these bodies in administration, auditing and other functions rather than pushing the Department of Lands, Planning & Heritage to assume a management role.

Also, if the LAHS is responsible for maintaining a registered site, it seems logical to defer to LAHS on the existence and classification of a site. That is to say, if a LAHS considers a place to be a site, and manages it accordingly, that decision must be upheld by the Department. Furthermore, for obvious reasons, there is the absolute need to separate the assessment process from permission to use the land. Alongside the issues of provisioning and neutrality, the proposals raise the logistical issue of operating a local assessment scheme alongside a national, centralised register. This, in light of the existing demand for better resourcing, bears problems for the LAHS in completing work in due time.

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Lastly, on a more abstract note, the proposals place a lot of emphasis on "the Aboriginal voice" without fully defining the term. What is intended by the phrase "Aboriginal voice"? A platitude without a definition invites manipulation. Furthering this point, it is unclear how the proposals will confer authority to this voice, and all without huge increases in funding.

Concerning *The Aboriginal Heritage Council* (AHC), it's Administration and its Duties

Of the several concerns over the proposed *Aboriginal Heritage Council* (AHC), the issue of credibility – and sustaining this credibility – is at the heart of each. Starting at the beginning, it would appear that the responsibilities of the Council during its establishment are in excess of what could reasonably be achieved by nine part-time councillors. Even if funding for this were to be increased, it is still advisable to employ members on a fulltime basis whilst holding them to the same standards as independent contractors – a noted weakness in the last AHA. This standardisation of role and workload would go a long way in ensuring the credibility of the new AHC.

Similarly, the council ought to have, as per its nature, qualified archaeologists and anthropologists amongst its members. In doing so, the council would likely safeguard itself from future risk of mismanagement. With credible members, the council is also better-suited to accept reports from non-qualified persons. Whilst the intention behind this particular proposal was genuine – in the sense that it allows individual knowledge-holders to contribute – it is a double-edged sword and easily manipulated. In addition, current Aboriginal Cultural Material Committee (ACMC) assessments do not require the assessor to provide a detailed rationale to Aboriginal stakeholders; something the new Act ought to provision and necessitate. Also, at present, it is possible to see agreements that comply with *The Aboriginal Heritage Act (1972)* and its due diligence guidelines, and yet, still fall below the limits set out in professional standards. If the government mean to take Aboriginal Heritage in earnest, they must continually be above-board in their dealings with any and all stakeholders.

The proposal's use of "equitable agreements" is somewhat redundant as agreements are, by their very nature, adversarial instruments. With this in mind, it is paramount that the proposals, at all levels, include – or at least plan for – extensive mitigation and appeal mechanisms. This is even more important when one considers that agreements are often over land-use in heritage areas, and are not *strictly* to do with heritage management in the historic or cultural sense.

Concerning the Department of Planning, Lands & Heritage; the Register; and the Role of the Minister

Of the several concerns regarding the new AHA, most are the result of prior liaisons with the Department under the old Act. It cannot be omitted that the Department, in its current state, is under-resourced. One wonders how (without huge increases in funding) the department would

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feasibly complete outstanding registrations alongside the work under the new Act. The department at present is not equipped to sustain the provision of advice regarding what studies/standards are required and nor can it satisfy the Minister that risk has been suitably avoided. This, it appears, would further the necessity of a convened panel of applied experts to work alongside the Department of Lands, Planning & Heritage. To further this point, such a panel would prove to be of immense benefit in determining minimum standards under the new act. It is imperative, whatever the case, that the Minister actively seeks advice from the proposed *Aboriginal Heritage Council*. Furthermore, the duties and responsibilities of the Minister must be clearly delegated within the new legislation. There can be no legal ambiguity in either approval or mediation processes if the government seeks to avoid litigation. The Minister must be seen to be the protector of aboriginal heritage not an arbiter.

There are also concerns regarding the authority of the department -- that is to say, the department's ultimate authority in deciding whether a given NT group or PBC is qualified to protect heritage. Such a stance is vaguely condescending as well as presenting a fairly obvious mechanism for abuse and personal interest. Also, Acts in themselves are blunt instruments and, in lieu of regulations or case-law, there are concerns about the department's application of the new Act. It has been noted as fairly odd that a heritage-body, in its musings about heritage protection, also provides advice on commercial projects of importance to the State. Ignoring the obvious problems of bias and vested interest, which have been touched on extensively, further clarification of "state importance" is absolutely required. Is it the department who will judge a matter as being "of state importance"? How will this be achieved; and in what sense is something important to the state in such a way that it outranks the importance of the State's culture and heritage? It is the hope that these questions highlight the legal naïvety, and possible ramifications, of the new Act. Continuing in this vein, the phrases "due regard for socio-cultural effects"; "relevant Aboriginal peoples"; and "public interest" invite interpretation. This cannot be allowed to be the case in the new act. The Act must define how much regard is due; which Aboriginal peoples are relevant (and how this is decided), and so on.

Regarding the proposed consultant register, efforts must be made to safeguard all stakeholders. How does the Department propose to identify individual professionals in a manner that avoids risk? It is also worthy of note that the new Act fails to suggest any form of penalty for consultants who breach professional standards. Similarly to elsewhere, the new Act fails to provide a pragmatic course for appeals or mitigation; a feature that would definitely be prudent from its implementation. Regarding consultants and their work, it is imperative that all reports and assessments are submitted to the Department of Lands, Planning & Heritage and are publicly-available, following the manner of environmental assessments. Likewise, companies cannot be allowed to retain the information provided by a heritage consultant. Finally, a note on the Aboriginal Heritage Register – this cannot be simply a list in its current form. Instead, it must take on a data-base aspect; complete with information on place, in a manner that facilitates and allows for extensive and longitudinal study of Aboriginal Heritage.

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Again, I would like to thank The Department for their genuine attempt to safeguard and preserve the millennia of pre-colonial heritage and to promote and propagate the cultures of our Aboriginal peoples. I hope that the contents of this letter aid you in your endeavours and I look forward to seeing the final incarnation of the long-awaited Aboriginal Heritage legislation.

Yours Sincerely,

The Hon Robin Chapple MLC
Member for the Mining and Pastoral Region
24th May 2019