28th May 2019

Assistant Director General
Heritage Services
Department of Planning, Land and Heritage
Locked Bag 2506
Perth WA 6001

Dear Sir / Madam

Submission on the 'Review of the *Aboriginal Heritage Act 1972*: Proposals for new legislation to recognise, protect and celebrate Western Australia's Aboriginal heritage'.

Let me begin by stating that it is clear that the consultation process engaged in by the DPLH is by far the most transparent and inclusive process in the reform of the AHA since its inception. I commend the Minister and the DPLH in undertaking this process with the high degree of sincerity and fairness that they have.

In this submission I have made comments and suggestions for each of the nine proposals outlined in the Consultation Paper (March 2019), and several of their various subsections. However, I begin with some over-riding comments. In canvassing the views of a wide range of stake-holders, many with quite different interests and perspectives, the draft proposals have as a consequence an inconsistent philosophy regarding heritage management. It sways between a Heritage Conservation System and an Approvals System. While any heritage legislation must accommodate development proposals within its management structure, it should be unmistakably a Heritage Act and not a duel Act for Heritage and Development. There are opening statements about the greater recognition of intangible heritage and or cultural landscapes, but these statements do not appear to be adequately covered within the respective proposals, which are a little too focussed on heritage assessments, land-use proposals and land-use agreements. Such things are necessary of course, but these have to be balanced with Heritage conservation that is independent of development proposals, and purely for the benefit of Aboriginal peoples and the wider Western Australian community.

I think it is incumbent upon a modern government to recognise Aboriginal Sovereignty over Aboriginal heritage. That is to say, that respective Aboriginal peoples are the decisive decision-

makers over their cultural heritage. Yindjibarndi heritage should be managed by Yindjibarndi people; Bunuba heritage should be managed by Bunuba people. The State should help them in providing legal protection, resources and professional advice.

Adequate resourcing of the Department to undertake all its responsibilities under the new Act is needed. Even under its current, more restrictive approvals oriented duties, it has been unable to keep up with the administration of the Sites Register, s18 and reg 10 processes and so forth. Industry in particular would benefit from improved and more time efficient administration. Given that Government values the economic contributions mining and investment in exploration give to the State economy, one would hope that the government also intends to support the minerals and development industries by improved resourcing and administration processes.

Finally, in reading the many submissions to the Phase 1 Consultation, including notes from the Community Meetings, which I think have been accurately reflected in the Phase 1 Consultation Paper, it is clear that the great majority of people and organisations that responded want a more modern, efficient and fairer management system in place for Western Australia's Aboriginal heritage.

Proposal 1: Repeal the *Aboriginal Heritage Act 1972* and deliver new Aboriginal heritage legislation

- **Repeal the *Aboriginal Heritage Act 1972* and replace it with modern legislation, regulations and policies.**

This is a good proposal, and long over-due. I support all four objectives as outlined in the Consultation Paper under Proposal 1. New legislation is needed to appropriately deal with all the elements of Aboriginal place-based heritage; but it needs a broader scope to include many elements of Aboriginal heritage which may not be place-based. An over-riding aim of the new Act after all should be to appropriately manage Aboriginal heritage and not solely Aboriginal heritage as it may relate to an approvals system. There must be capacity to store cultural information, collect cultural stories, promote and celebrate heritage to the wider public, and generally extend its mandate to embrace all elements of tangible and intangible heritage.

In order for the legislation to achieve this broad outcome it is important that it be in sync with other legislation that it currently intersects with, such as the *Native Title Act*; the *Environmental Protection Act* and other State and Federal heritage legislation. And it should take into consideration international protocols, conventions and proclamations (e.g. the *United Nations Declaration on the Rights of Indigenous Peoples*, the *United Nations Universal Declaration of Human Rights*; the *Australia ICOMOS Burra Charter*). The new legislation should acknowledge Aboriginal rights and custodianship over their heritage; that is, Sovereignty over *their* heritage. An important element of the legislation must be to ensure the active conservation and celebration of Aboriginal heritage for the benefit of all Western Australians.

The over-riding purpose of the new Act must be to protect, conserve, manage and celebrate Aboriginal Heritage Values; whether such values are encapsulated within places or objects or story-lines across the natural / cultural landscape or in traditional practises; whether tangible or intangible. Aboriginal heritage in all of its manifestations is intrinsically important to Aboriginal peoples themselves and is a major contributor to the cultural heritage of Western Australia as a whole.

The proposal should achieve the stated outcome if the new legislation, with its new regulations and policies, clearly articulates the four objectives as outlined in the proposal. However, it would be useful to expand on these objectives to ensure that the Act:

- acknowledges that Aboriginal heritage belongs to the respective Aboriginal peoples, living cultures in which their heritage is dynamic and ever-renewing;
- recognises that the respective Aboriginal peoples are the principal decision-makers about their heritage;
- includes intangible heritage that is both place-based and non-place-based;
- is focussed on conservation, promotion and protection of Aboriginal heritage;
- is aligned to other State and Federal legislation, such as the *Native Title Act*, the *Aboriginal and Torres Strait Islander Heritage Protection Act, Environmental Protection Act*;
- is aligned with national and international laws, conventions and protocols, such as the *United Nations Declaration on the Rights of Indigenous Peoples*, *United Nations Universal Declaration of Human Rights*, the *Australia ICOMOS Burra Charter,* etc.;
- recognises that Aboriginal heritage is an important cultural asset to the State of Western Australia, and the World, and should be celebrated and promoted to the wider public.

Importantly, the successful implementation and administration of the new Act must be adequately resourced.

Proposal 2: Update definitions and scope of new Aboriginal heritage legislation

- **Extend the scope of what is covered by new legislation to include ancestral remains, places that are cultural landscapes and place-based intangible heritage. It is not proposed to extend the definitions in the new legislation to include intellectual property rights.**

I support this proposal, and several of its listed objectives, but have some comments which are intended to strengthen the proposal.

I support the definition of 'place' as outlined under the *Australia ICOMOS Burra Charter*. However, I think a new focus needs to shift from smaller places, such as 'sites', to embrace more fully cultural landscapes. The management of cultural landscapes, I believe, requires a different approach than smaller places or 'sites'. I think it is essential to have Cultural Heritage Management Plans (CHMP) as a new standard in the management of all large areas / landscapes. It is highly likely that the current situation in which cultural landscapes are too frequently ignored in the management

process is that they are often large areas over multiple tenements with multiple interests invested. A more sophisticated approach is needed to manage the heritage values over extensive areas of country (or seascapes). Dreaming tracks and Song-lines, which are uniquely Aboriginal forms of intangible heritage, would especially benefit from CHMPs.

I think one of the comments in the Consultation Phase 1 Paper 2018 articulates very well the interface of 'place' with the wider landscape and 'place' with ecological values that are also cultural heritage values.

> 'Indirect impacts – water drawing away from a site affecting a site further away' (My Heritage, My Voice – Fitzroy Crossing).

Procedures to deal with ancestral remains is a good inclusion. At its heart should be a consultative process in which the local traditional owners or custodians are involved in a meaningful and decisive manner.

Deferring any mention of intellectual property rights to Commonwealth law is disappointing. I do not believe that Commonwealth law deals particularly well with intangible heritage as forms of intellectual property rights. I think a new Register should, in addition to objects and places, embrace intangible heritage which are both place-based (e.g. song-lines) and 'intellectual'. For example, oral traditions and mythology, rituals, knowledge and practices around bush medicines, crafts, performing arts, ecological knowledge and practises and so forth. This necessarily entails different management strategies. Drawing up policies and procedures – quite possibly in tandem with other government agencies and departments – should aim to deliver a level of protection and or promotion not currently available.

Proposal 3 (A to E)

These proposals deal with the on-going management structures to be put in place in administering the Act. They are critically important to the success (or otherwise) of the new Act, but they are perhaps a little over-emphasised on land-use proposals, as important as that area is. And despite comments to the effect of putting Aboriginal people at the centre of the process, there is an over-riding bureaucracy-heavy approach that tends towards State paternalism.

Implementing these proposals requires additional resources over and above that currently available.

This section(s), perhaps more than any other, entails legal rights of Aboriginal peoples to manage their own heritage; to assert, if you will, Sovereignty over their heritage. This has to be the starting point in devolving heritage management out to the respective Aboriginal groups. This recognition, therefore, takes it beyond matters simply to do with a State Act, but belies rights attained and asserted in accord with any legislation and in line with provisions of the *United Nations Declaration on the Rights of Indigenous Peoples.*

Please see my comments under the respective proposals below.

Proposal 3(A): Local Aboriginal Heritage Services

Provide for the appointment of Local Aboriginal Heritage Services to:

- **ensure the right people to speak for particular areas of country and related cultural heritage are identified;**
- **make agreements regarding Aboriginal heritage management and land-use proposals in their geographic area of responsibility.**

The recognition of Aboriginal people in the decision-making process in heritage management is a very welcome addition to the new Act. There are, however, some issues to be discussed in how this might work in practise.

Firstly: funding. Will there be sufficient resourcing for all that is intended under this proposal? Under the proposal there is some recognition that PBCs, where they exist, might be accorded the status of the Local Aboriginal Heritage Service (LAHS). However, many are currently struggling to meet the demands upon them, due to a lack of resourcing. The additional responsibilities in meeting the criteria and status of a LAHS will only add another level of burden upon them if they are not adequately supported with additional resources.

Secondly, the issue of Aboriginal autonomy in managing their affairs with State support versus State control over Aboriginal affairs, particularly in regard to heritage and land-use management.

The proposal seeks to ensure that the 'right people to speak for Country' are the ones involved in the process. While there is some recognition of native title in this proposal, authority ultimately lies with the Department as to whether it considers a Native Title group or PBC is suitably qualified in protecting *their* heritage. The proposal after all is not simply about assisting PBCs but about authorising heritage services, most of which already exist and have done a better job than the Department (in its previous forms) in protecting their heritage. There are many on all sides who want a system that is capable of making the correct decisions and selecting the true 'knowledge holders'; but is somehow immune from a wider range of issues and interests of real communities. A common issue raised under the current system – and one the DPLH appear keen to preserve – is the need to consult ALL knowledge holders. I have some comments to make: Aboriginal organisations, like other groups in society and other organisations, should be able to manage their affairs by representation. We select representatives to speak for us, rather than consult every time with a mass of informants. Surely it is up to Aboriginal groups to select who they want to speak for them. Nowhere else in society do we question the process of representation of organisations or large groups of people. We might not like their decisions but we recognise they have rights to make them and how they make them.

I think it is also important to point out that heritage is not just about protecting something from the past; it is largely about carving out a future based on community values tied to cultural traditions. That is, heritage management is not solely about who has knowledge of heritage places – which to date has been the focus of Industry and the Department as part of the approvals process. It should be obvious that Aboriginal heritage is not solely a cog in administering approvals.

It is a community concern with an agenda of issues beyond who can best assess a site in the approvals system. Advocating 'knowledge holders' over 'native title holders' only causes more division and anguish; and runs the danger of reducing heritage to an assessment process rather than a community engagement process.

Further, expressions of frustration of process – and I acknowledge that they are very real - should not be the basis to deny legal rights to Aboriginal groups. Even in instances in which people with sincere motives and deep knowledge are left out in favour of a Native Title holders, how do you ignore Rights In Law? A new Act cannot work effectively if it continues to ignore rights accorded under other legislation. As the DPLH are keen to remind us, you cannot write law out of existence.

In relation to 'ensuring the right people speak for Country'; this proposal is cloaked in paternalism. It seems extraordinarily naïve. Who, for example, choses the 'knowledge holders' and on what (cultural) authority, if not the recognised native title groups with legal rights in land, including rights in heritage management? These comments about 'the right people' only fuel divisions within Aboriginal communities without offering any way forward other than postulating unattainable ideals. As stated above, these proposals fail to appreciate that heritage is not just a government assessment process to facilitate development but essentially a community engagement process centred land management. There is an underlying tone in these proposals about Aboriginal groups and communities needing to come up to scratch and fix their poor decisions – and that such things are entirely about approvals processes - but they do not adequately address or consider the in-built structural inequalities that allow government departments behind infrastructure projects and some proponents to get away with practices that are unprofessional and unethical.

I think regional representation, via LAHS, should be the respective native tile groups, PBCs and or their nominated heritage providers, or in their absence custodial groups making the primary decisions. However, I am in favour of a dispute mechanism.

One subsection under this proposal states that the LAHSs would 'Make agreements regarding heritage management and land-use proposals'. This is what native title groups currently do. They negotiate agreements that not only comply with State Heritage legislation (namely, the AHA at present) but with regard to rights in land that have been or might be recognised under Native Title law and processes. They negotiate land-use agreements – and not solely heritage agreements - on the basis that they hold, or potentially will have recognised, native title rights in that portion of land. I do think it is advisable or legally unencumbered to have such agreements negotiated other than by a PBC or its nominated land management or heritage management service provider. I do not think it is in the interests of PBCs or any Aboriginal group to effectively hand over control in negotiated agreements in land. This is not giving Aboriginal people more voice, but less than they have now. In some instances it is envisaged that the Department itself may take over this role (where a PBC is determined by the Department not to meet the standards of a LAHS). This is fraught with legal and ethical issues.

A better way forward is to recognise existing PBCs and or their nominated heritage and land management service providers as the decisive organisations that can undertake such matters. The Department, however, could and should offer advice and administrative support. This would be especially so for severely under-resourced PBCs.

Putting resources and administrative attention to improving the Register is very important. I believe it is still focussed on objects and places; though I note that cultural landscapes may count as 'places'. I think a twin Register of non-place-paced heritage would be useful. Management processes would necessarily be different and this whole area is definitely worth workshopping with heritage professionals and nominated Aboriginal peoples. It would go a long way in establishing a useful data-base resource of cultural and intellectual property information, which will need to be managed with appropriate privacy protocols in place.

This section appears to be about the DPLH or its Aboriginal Heritage Committee having the mandate to choose whether to deny rights to native title groups, organising works that are not necessarily by people from the specific group and so on, on the grounds of more sound heritage management. It is naïve and legally problematic. Perhaps that is not the intent this section but rather it aims to create some minimum standards. I think the content of this whole section can be rewritten to provide recognition and resource support to PBCs and other local Aboriginal groups without taking away any of the rights of those groups (i.e. native title rights).

Appointment of Local Heritage Services

This subsection deals with legitimising which body is the decision-making body (LAHS) at the local level. While there is recognition that PBCs might fulfil this role, it is up to the State to sanction them. What happens when a different body is selected over a group who have legal rights in land? This is too cloudy to be useful in its current form. Some PBCs are unlikely to meet all the criteria set out under this section, which allows the State to select another group and make agreements in land-use over the top of native title holders. This section is burying its head in the sand regarding native title, as if native title is some kind of internal policy that people can chose to recognise or not. It would be more helpful and legally less compromised to assist small PBCs in administration and auditing, etc. Providing resource support to PBCs would be a great step forward. The critical thing is that wording of legislation should be clear and unambiguous about what assistance the Department can give to Aboriginal groups in managing their heritage.

Proposal 3(B): **Aboriginal Heritage Council**

a) Establish an Aboriginal Heritage Council (AHC) as the central body providing advice and strategic oversight of the Aboriginal heritage system.

b) Abolish the Aboriginal Cultural Material Committee.

I agree that the Aboriginal Cultural Material Committee (ACMC) should be replaced by the Aboriginal Heritage Council (AHC), with its new mandate of operations and functions. This would include providing professional advice to the Minister and to other parties as required; maintaining

the Register, and after seeking independent expert advice on heritage management and standards, should set and monitor new heritage standards across Western Australia.

With regard to agreements that are said to 'contract out of law', I think it is important to reiterate that no agreement past or future can contract out of any law, State of Federal. However, a larger problem with agreements is not that they are outside the law but rather that standards either do not exist of are so varied that they cannot be called 'standards' in the true meaning of the term. There are plenty of agreements that are in accord with the law but because standards do not exist or are not adhered to they are inadequate for the appropriate management of heritage.

A meaningful step forward would be to form a panel of professional experts (anthropologists and archaeologists and Departmental personnel) that draw up templates and guidelines that suit different types of work proposal / land-use, and can easily be slotted into agreements.

I am not opposed to the AHC assessing the suitability of land-use proposals in relation to the new Act. Setting uniform standards should, however, assist this process for better outcomes overall.

I welcome the provision that the AHC will be tasked to promote heritage to the wider community, provide training and generally be pro-active in developing a positive platform for WA's Aboriginal heritage. The AHC will need adequate funding and requisite skills to undertake its many functions efficiently.

3(C): The Minister's Role

> **The Minister retains overall accountability and decision-making powers for the Aboriginal heritage system in Western Australia, but may delegate certain decisions and functions to the Aboriginal Heritage Council.**

I agree that the Minister should have over-sight in the administration of the Act. Decision-making needs to be devolved into small regional groups (LAHS – PBCs) in addition to 'top-level' Ministerial decisions. This is in fact what is proposed throughout the Discussion (Proposals) Paper. With regards to altering the status of Protected Areas I believe an Act of Parliament is necessary. For matters in dispute I believe an Appeals Tribunal should have carriage of matters.

I agree that the Minister should have the capacity to delegate decision making to the AHC for 'minor' impacts. Transparency of the decision-making process is essential. All parties affected by a decision must have a right of appeal.

No Ministerial or delegated decision can take away the rights of Aboriginal people.

3(D): Role of the Department of Planning, Lands and Heritage

> **The Department of Planning, Lands and Heritage remains responsible for the day to day operation of the Act.**

I agree with the proposal that the Department of Lands, Planning and Heritage (DPLH) should be the administrator of the new Act. It is imperative that DPLH receive increased funding and resourcing, and have the necessary levels of expertise and skills to fulfil its role.

DPLH should be working in a cooperative manner with proponents and Aboriginal groups and various interested parties to achieve a level of professional consistency across the Aboriginal heritage system in Western Australia.

3(E): Heritage Professionals – aiding selection of those with appropriate qualifications and experience and improving standards

> **Aid people needing to engage a Heritage Professional with appropriate qualifications and experience, and promote higher standards by publishing on the Department's website a public Directory of Heritage Professionals and the standards required for heritage investigations, community consultation and reporting of heritage information.**

Like others, I think creating a system of standards, protocols and ethics is important. I think the emphasis should be on creating templates in standards rather than a Directory. I think standards need to be tailored for the works intended. And I think it should be done by a panel of experts from the respective disciplines (applied archaeologists and anthropologists) with staff from the Department. The *Burra Charter* should be drawn upon in setting heritage standards and protocols. Standards have to reach beyond the AHA (or its new incarnation). After all, most agreements in place recognise heritage in much wider terms than the current AHA. Finally, standards have to gel with Traditional Owner aspirations.

I support the proposition that the Department can and should refuse to accept reports which fail below these new standards. However, I think that the Department itself needs to undergo a skills upgrade to undertake any such assessments. DPLH staff need appropriate qualifications and heritage management experience, and they need to be supported with appropriate resourcing.

4: Retain the current form and function of the register of Aboriginal places and objects but rename it the Aboriginal Heritage Register

> **a) Rename the Register of Aboriginal Places and Objects to the Aboriginal Heritage Register to reflect the proposed shift of emphasis from 'sites' to the revised scope of the legislation.**
>
> **b) The Aboriginal Heritage Council will set and regulate reporting standards and improve the accuracy and utility of the register as a mechanism for Aboriginal people to record their heritage and as a land-use planning tool.**

I agree with the proposal to rename the Register of Aboriginal Places and Objects to the Aboriginal Heritage Register. The Register can be a helpful tool in heritage management with improved and more consistent information, using improved standards and reporting templates. However, it requires greater allocation of resources. The DPLH is currently way behind in registration of places and objects. I think this is one area that is relatively uncontroversial. Stake-holders across the board would like to see an immediate injection of resources and more efficient processes in up-dating the Register.

I believe, however, that the Register could be opened up to include many elements of non-place based heritage. I believe this is best managed by two parts of the Register, in which different

protocols of management exist. Having a database of non-placed heritage will be an important asset to Western Australia, and a great reservoir of cultural information for generations to come. Because it is not place-based, its management should be something akin to a Register of intellectual property and cultural information, with appropriate privacy protocols in place. It is something called for in many of the previous submissions, in which many asked for the conservation and public promotion of many aspects of Aboriginal cultural heritage currently under-valued by the wider public (e.g. songs, videos of traditional performance, knowledge of bush medicines and so on).

I agree that the Aboriginal Heritage Council (AHC) should regulate reporting standards and improve the accuracy and utility of the Register, but such standards should be set by the AHC in consultation with professional heritage practitioners and experienced Aboriginal heritage managers.

5: Introduce a referral mechanism to facilitate tiered assessments of proposed land-uses

> **a) Introduce a referral mechanism to facilitate tiered assessments of proposed land-uses, with early advice (non-binding) provided by the department or Aboriginal Heritage Council on standards of consultation and / or research necessary to support the approvals process for a development.**
>
> **b) Non-compliance with standards of consultation or documentation will result in the application not being accepted and the clock will stop on any agreed timeline until correct documents are submitted.**
>
> **c) A 'call in power' will ensure that proposals that should have been referred, but have not been, can be assessed.**

I accept that this proposal is about streamlining approvals that are unlikely to be contested or problematic, cutting out a level of burdensome bureaucracy. The idea of tiered assessments is to speed up the process where the Department determines that there are no impacts or there are limited impacts on heritage; or where agreements in place permit it, after having undertaken Traditional Owner surveys and consultations. Although I acknowledge a need for a more stream-lined process, there are risks in this proposal.

It is therefore imperative that an early referral system is based on Departmental advice on professional heritage standards in Aboriginal consultation (and possibly other land users) and heritage surveys / investigations / assessments in relation to the nature of the proposed land-use and expected impacts. As stated above (3(E)), heritage standards will need to be established by a panel or committee specifically set up for the task, and made up of heritage professionals and Departmental staff specialising in Aboriginal heritage management and administration. And that: non-compliance with these standards or inadequate documentation will result in the land-use application being put on hold or cancelled.

A further point on Standards: Standards are not solely the prerogative of a government Department, but frequently an agreed process between parties to a particular land-use. The agreed process must not be below any minimum standard established by the DPLH (in consultation with a panel of heritage experts) but it may be higher. That is, the Standard must be compliant with the law; compliant with minimum standards set by the Department and also compliant with any agreement in place between a traditional owner or Aboriginal custodial group and a proponent.

Determining that a proposed land-use will not result in a negative impact upon heritage values (whether contained within places, landscapes, objects or other) must follow suitable heritage surveys / investigations or assessments and clear evidence of Aboriginal consultation and consent by the authorised PBC or Aboriginal group in question. It is important to point out something that is frequently misunderstood by many. When Aboriginal people give consent or 'heritage clearance' under many agreements, that consent is specific to a particular land-use proposal at a particular time. It is based on a working relationship between a particular Aboriginal group and a particular proponent and or project. It is not a 'forever' clearance. As stated previously in this submission, heritage is very much focussed on a respectful relationship over land-use and agreed processes, and not solely a one-off assessment, now owned and managed by the State.

Which brings us to another matter. There are problems with accepting 'previous' heritage results, depending of course on what those reports are precisely. Heritage is more than bureaucratic process. It is about involving people today in their land management processes – bringing them into a relationship over land management. Heritage is also about teaching the young. What is important is that a modern regime recognises: 1) heritage is dynamic; 2) it is the heritage of contemporary groups; 3) it is based on agreements structured around mutual relationships of respect and involvement, and so on.

6: Encourage and recognise agreement making

a) Encourage and recognise agreement making between Local Aboriginal Heritage Services or other relevant Aboriginal body and land-use proponents.

b) The Aboriginal Heritage Council will consider and, if appropriate, ratify agreements where land-users wish to rely on an agreement to expedite approvals under the new Act.

I am not convinced this is a good proposal in its current form. It seems a little top-heavy. In the past the Department (the DAA and DIA) was somewhat contemptuous of the agreements process between proponents and Aboriginal groups (usually native title claimant groups) which provided for certain rights of Aboriginal peoples and offered a higher level of protection to Aboriginal heritage than the AHA (and in particular the narrow focus the Department had in what constituted a 'site'), while assisting exploration and development proposals. If the intention of this proposal is to ensure that proponents are compliant with the new Aboriginal Heritage Act I think there is one thing that is obvious: no agreement past or future can write any law (including NTA and AHA or other State or Federal Heritage law) out of existence. These laws cannot be waived. I think only

that the DPLH needs to ask PBCs and other groups if they can check those elements of the new Aboriginal Heritage Act clauses (or its equivalent) to ensure that is the case.

Agreements could be a whole lot better but in general they have been more successful in bringing in Aboriginal people to the centre of the process and in protecting heritage values beyond just 'sites' than any process solely within the processes of the AHA. Before native title nowhere in the country were thousands of heritage surveys taking place every year. And thousands of places – many not likely to meet the criteria of a 'site' under the AHA (especially the somewhat narrow way in which the Department (DAA) chose to interpret what a site is according to some imagined 'fresh-hold' that had nothing to do with the application of the AHA), and therefore offered no legal protection – have been protected under these agreements. Before these agreements, heritage protection under the AHA rarely involved Aboriginal people beyond the role of 'informants' in a site assessment process, often at the tail-end of a development proposal in which a proponent sought to destroy the sites in question or impact them in some manner. The critical thing to understand is that heritage is not just an assessment process for commercial interests. There is a whole other Big Picture going on.

Further, since Native Title legislation was enacted and an agreements (mostly Future Acts) process engaged with across the State, the WA minerals-extraction and exploration economy has seen an unprecedented expansion. There have been fluctuations caused by other economic factors, generally the state of play in international trade and markets, but Aboriginal heritage and native title are not key factors in the international trade in minerals. Native Title and heritage processes are often blamed for a down-turn in the minerals industry – when in fact the opposite has occurred. In the past, uninformed Industry operators and several equally uninformed government bureaucrats have been keen to engage in deceptive misinformation about Aboriginal heritage and against Aboriginal interests as a means to place pressure on governments to give a 'quick-fix' to bureaucracy. Not by fixing an under-resourced and cumbersome bureaucracy – the real culprit - but by demanding that the Department should take the view that many places are not worthy of legal protection or that Aboriginal groups are somehow economic opportunists rather than sincere in wanting recognition and protection of their heritage. This street-talk moaning and implied racial chauvinism belongs in the 1970s, and is unhelpful in developing a more modern and efficient Aboriginal Heritage Act.

This proposal as a whole seems to unnecessarily bureaucratise an existing process between proponents and native title groups, that for the most part works quite well. Perhaps it can be refashioned into a support mechanism for PBCs (or their equivalent) to ensure compliance with the law; and recommendations of new standards, to be set hopefully with the advice of heritage professionals (see above).

Finally but importantly, there are, sadly, some unscrupulous operators that pressure local PBCs into signing inadequate agreements. Perhaps an even bigger issue is that some proponents and some government departments and government utilities and agencies organise heritage 'clearances' and land-use without any agreement in place with Aboriginal groups. This is an archaic

and unacceptable practise in modern land-use management. It is a disgrace that rogue elements in government and in Industry believe that such practises are acceptable in modern management, and it an embarrassment to the majority of proponents who have engaged with heritage management and with Aboriginal groups with sincerity and in good faith. This is an area that the DPLH needs to scrutinise with much greater force.

7: Transparency and Appeals

a) Reasons for decisions are to be published.

b) Land-users and Aboriginal people whose legal rights and interests are adversely affected by a decision will have the same rights of review and appeal.

c) Retain the State Administrative Tribunal as the primary review body.

I support this proposal. It is a fine proposal, and long overdue. Equity and transparency of process (parts a and b) is essential for the efficient workings of the heritage system. Such a system of appeals, built on the principles of equity and fairness, needs to be precisely that. Under-resourced Aboriginal organisations need adequate notice and timeframes for Community engagement built into the system of appeals.

In relation to part c of the proposal: I believe a new Appeals Tribunal needs to be established that specifically deals with matters of dispute in the heritage field in relation to impact proposals (approvals). The Appeals Tribunal must consist of persons of accredited heritage professionals, legal experts, mediation specialists and experienced Aboriginal representatives, independent of any party to the conflict or the DPLH.

8: A Modernised Enforcement Regime

a) Create a modern enforcement regime by ensuring offences and penalties are brought into line with the *Heritage Act 2018* and other modern statutes.

b) The statutory limitation period is extended to 5 years.

c) Conducting compliance inspections and proceedings will be the responsibility of the Department of Planning, Lands and Heritage.

I support a stronger enforcement regime. This is an improvement on what we have now. Notably:

- Maintaining current range of offences
- Limit the ignorance offence to circumstances where the land-user has done everything reasonably practicable to make themselves informed. This is essential. It appears to be the prime reason that prosecution has been so rare under the current Act.
- Reinforce that a place need not be on the register for the offences to apply.
- Increase penalties up to $1 million, or that with imprisonment for 1 year if contravening stop work order. I support this clause of the proposal, but believe that it is an insufficient fine for a major commercial corporation that may be in breach of the Act.

- Restoration orders and compensation orders for damage or loss of heritage. I think this is an important and useful proposal that provide a higher level of compliance once it is enacted.
- If someone is convicted the Governor may order that the land not be developed for up to 10 years or used only for specific purposes. Or he / she may not. I would like to see this same proposal worded a little more firmly. This is potentially the strongest part of this multi-pronged proposal but it is a little too open to options. I would prefer that a ten year 'no development' clause is automatic, but allow for an appeals process.

However, I am unclear about the legalities of a 'person' being found guilty as opposed to a 'corporation'. There is nothing in this proposal about corporations or government departments that are in breach of the Act. I think this needs to be addressed more fully.

I believe there should be a mechanism to compensate traditional owners or Aboriginal custodians who have suffered a loss to their heritage. And further, that remedial action on heritage place is undertaken (by the offender), in consultation with and with the relevant traditional owners or Aboriginal custodians.

I am also unsure as to why Honorary Wardens is proposed to be removed. I believe Aboriginal appointed Rangers could fulfil this role, and that DPLH should provide them with the assistance to do so.

In relation to part b: I support the perspective advocated by Greg McIntyre (as cited in the Consultation Phase 1 Document):

> 'There should be no limitations on the prosecution of offences because there is a high likelihood that offences will be committed in locations where it may be difficult to detect them within a short time frame' Greg McIntyre Sc (Submission cited in DPLH's Consultation Phase 1 Document, March 2019).

In relation to part c: I believe the DPLH should work in cooperation with Aboriginal Rangers conducting compliance inspections and proceedings.

9: Protected Areas

a) It is proposed that the existing Protected Areas and the ability to declare new ones will carry forward into new legislation.

b) A new regulation will be created to authorise specific management activities by the relevant Aboriginal people.

This section carries forward something that does not currently work but tries to make it work. Protected Areas (PAs) are presumably 'places' under the new Act, but with the added status of 'Protected Area'. One has to assume the point of a Protected Area is that it is exempt from any major disturbance. I believe that protecting areas of outstanding heritage significance need a particularly high level or protection, which excludes any 'impact' proposals; but allows for the

active management of the area. Having Aboriginal endorsement for such areas is important. In some instances this may be across country of more than one traditional owner or Aboriginal custodial group. A management system needs to be developed that is inclusive of Aboriginal consent and on-going management.

I am of the view that once a place is determined to be a Protected Area it cannot have its status changed or its boundaries reduced or areas within it excised other than by an Act of Parliament or some Tribunal in addition to any consent by the Minister.

Developing new regulations around the management of Protected Areas should set protocols on its on-going management (using Rangers preferably) and access. Developing specific Cultural Heritage Management Plans for each Protected Area is essential. And as stated above, it needs the consent and involvement of local Aboriginal traditional owners or custodial groups.