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Review of the *Aboriginal Heritage Act 1972* (WA)
Submission by the
National Native Title Council

Background to the NNTC

The National Native Title Council (NNTC) is a company limited by guarantee under the *Corporations Act*. Since 2007 it has operated as the peak body of Native Title Representative Bodies (NTRBs) and Native Title Service Providers (NTSPs) (collectively - NTRB/SPs) recognised under the *Native Title Act* (ss203AD and 203FE) (NTA).

At present 12 of the 15 NTRB/SPs are members of the NNTC. All the WA NTRB/SPs are members of the NNTC.

In 2017 the NNTC altered its constitution to provide for direct membership of Prescribed Bodies Corporate established under s 55 of the NTA and other equivalent Traditional Owner Corporations (TOC) established under parallel legislation such as the Victorian *Traditional Owner Settlement Act*.

Currently there are 20 PBC and TOC members of the NNTC. This figure includes the *Gur A Baradharaw Kod Torres Strait Sea and Land Council* the peak body for the 21 Torres Strait PBCs. Nine WA PBCs are members of the NNTC

The NNTC is then Australia's peak Native Title Organisation and broadly representative of WA native title organisations at all levels. This current submission should be taken as supplementary to those submitted by NNTC members to the current review. The main purpose of this submission is to draw the Review's attention to standards and practices adopted from other jurisdictions and to utilise this information as a basis for proposing alternative approaches to many of the issues canvassed in the Discussion Paper.

Introduction

For Australia's Traditional Owners, culture and connection to country are inextricably linked. The NNTC recognises the primacy of Traditional Owners' rights under traditional law and custom to manage and protect cultural heritage that relates to their traditional country. This primacy is irrespective of the technical conclusion of the High Court of Australia in *Western Australia v Ward* (2002) 213 CLR 1 (at [57]-[61]) that 'the right to protect sites' lacks the necessary connection to land required by s 223 (1) NTA to be recognised as a native title right under the NTA.[1]

The primacy of Traditional Owners' rights under traditional law and custom to manage and protect cultural heritage that relates to their traditional country is recognised under the United Nations Declaration on the Rights of Indigenous Peoples[2] (UNDRIP). UNDRIP articles 11 and 12 and 32 are particularly relevant. Article 32.2 articulates the right to free, prior and informed consent and is in the following terms:

> 32.2 States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their *free and informed consent prior to the approval of any project affecting their lands or territories and other resources*, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. (Emphasis added).

This provision should be read in conjunction with Articles 11 and 12 which directly address issues associated with Indigenous cultural heritage:

> *Article 11*
> 1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
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> 2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.
>
> *Article 12*
> 1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

[1] Although the Court goes on to note that other aspects of the general law can operate to protect this right: *Ward* at [61].
[2] GA/res/61/295 Ann. 1 (Sept 13, 2007).

> 2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

UNDRIP is generally recognised as correctly stating States (nations) current obligations under international law but not creating new obligations. Increasingly, recognition of the obligations under UNDRIP are incorporated into other significant instruments such as the *UN Guiding Principles on Business and Human Rights*[3] and the International Council on Mining and Metals (ICMM) May 2013 Position Statement on *Indigenous Peoples and Mining.*[4]

As such the NNTC submits that the principles embodied in the UNDRIP should inform the current review of the AHA. This submission is based in prudence as much as principle. As noted, increasingly acceptance of the UNDRIP principles is becoming accepted as an obligation to which all governments and corporations are bound. This is particularly the case for international resource corporations that are held to international scrutiny with regard to their actions, especially with respect to their engagement with Indigenous communities. Embodiment of the UNDRIP principles can operate then to ensure that WA Aboriginal Heritage legislation reflects current best international practice and therefore less likely to require fundamental revision into the future. This ensures ongoing certainty for all stakeholders over time. In addition, as many affected corporations will already be held to account under international standards, embodiment of the UNDRIP principles ensures a 'level playing field' for all stakeholders. Finally, as the NNTC understands the situation, divergence of aspirations around cultural heritage management issues can represent a significant impediment to the timely conclusion of project negotiations. Aboriginal Heritage legislation that clearly sets out obligations in this regard in accordance with relevant international standards would provide certainty as to these issues and could therefore be expected to expedite such negotiations to the benefit of all parties and the broader Western Australian community.

The relevant international standards as described above inform the following core principles which the NNTC submits should be included in any revised Aboriginal Heritage legislation:

- Aboriginal Cultural Heritage must be given a broad definition that gives effect to the holistic perception of 'culture' understood by Traditional Owners.

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[3] A/HRC/8/5.

[4] International Council on Mining and Metals, May 2013. Available at https://www.icmm.com/website/publications/pdfs/commitments/2013_icmm-ps_indigenous-people.pdf.

- Traditional Owners are the only appropriate people to manage and protect cultural heritage.
- WA needs overarching and harmonious policy between cultural heritage, native title and any native title related settlements. To achieve this, wherever possible native title organisations should be the 'authority' with respect to Aboriginal cultural heritage management decisions within their area of operations.
- Organisations representative of the relevant local Traditional Owner community can be invested with Aboriginal Cultural Heritage authority in advance of any final determination of native title. Adoption of this approach can not only facilitate expeditious resolution of native title matters but also support the effective transition of such organisations to discharge native title responsibilities into the future.
- In the event there is no organisation representative of the relevant local Traditional Owner community structures should be put in place that allow consultation with such communities around decisions that affect representative of the relevant local Traditional Owner community.
- All organisations discharging statutory Aboriginal Cultural Heritage responsibilities should be appropriately resourced and accountable for their decision making.

Informed by these principles this submission will move to make comment of the specific proposals contained in the Discussion Paper.

Proposal 1 - Objects

The repeal of the existing Aboriginal Heritage Act and its replacement with new Aboriginal heritage legislation is supported. In addition to the objects identified in the Discussion Paper, the NNTC submits that consideration should be given to inclusion of objects similar to the current "purposes" contained in s 1 of the *Aboriginal Heritage Act 2006* (Vic) (amended in 2016) ("the Vic AHA"). This Act states its main purposes as being:

> Section 1 (a) to provide for the protection of Aboriginal cultural heritage and Aboriginal intangible heritage in Victoria; and
>
> (b) to empower traditional owners as protectors of their cultural heritage on behalf of Aboriginal people and all other peoples; and
>
> (c) to strengthen the ongoing right to maintain the distinctive spiritual, cultural, material and economic relationship of traditional owners with the land and waters and other resources with which they have a connection under traditional laws and customs; and

> (d) to promote respect for Aboriginal cultural heritage, contributing to its protection as part of the common heritage of all peoples and to the sustainable development and management of land and of the environment.

It is submitted that these purposes are in accordance with the international standards discussed above and are an example of these standards being included in contemporary legislation in a significant Australian jurisdiction.

Proposal 2 – Definitions

The intent behind the alignment of the definition of place contained in the International Council on Monuments and Sites (Australia) "Burra Charter" is laudable. Incorporation of notions such as "cultural landscape" and "a site with spiritual or religious connections" as well as the incorporation of both tangible and intangible aspects of cultural heritage value within the Burra definition of place is also supported. However, the Burra Charter definition can be contrasted with definitions contained in existing Australian legislation.

The *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) ("NTASSA") incorporates relevant definitions contained in s 4 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth.) (ALRA). These include the definition of sacred site which is as follows:

> *sacred site* means a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition…

In turn Aboriginal tradition is earlier defined to mean:

> … the body of traditions, observances, customs and beliefs of Aboriginals or of a community or group of Aboriginals, and includes those traditions, observances, customs and beliefs as applied in relation to particular persons, sites, areas of land, things or relationships.

The definition in the Vic AHA is contained in several provisions. Aboriginal cultural heritage is defined to include Aboriginal places, Aboriginal intangible heritage and Aboriginal ancestral remains. Focussing on the definition of "Aboriginal place", this is in turn defined (in s 5) as follows:

> (1) ….an Aboriginal place is an area in Victoria or the coastal waters of Victoria that is of cultural heritage significance to Aboriginal people generally or of a particular community or group of Aboriginal people in Victoria.
>
> (2) For the purposes of subsection (1), ***area*** includes any one or more of the following—
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> (a) an area of land;

(b) an expanse of water;

(c) a natural feature, formation or landscape;

(d) an archaeological site, feature or deposit;

(e) the area immediately surrounding anything referred to in paragraphs (c) and (d), to the extent that it cannot be separated from the thing without diminishing or destroying the cultural heritage significance attached to the thing by Aboriginal people;

(f) land set aside for the purpose of enabling Aboriginal ancestral remains to be re-interred or otherwise deposited on a permanent basis;

(g) a building or structure.

The term "cultural heritage significance" is in turn defined in s 4 of the Vic AHA as including:

(a) archaeological, anthropological, contemporary, historical, scientific, social or spiritual significance; and

(b) significance in accordance with Aboriginal tradition;

Finally, in terms resonate of the NTASSA and ALRA, "Aboriginal tradition" is also defined in s 4 as follows:

(a) the body of traditions, knowledge, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people; and

(b) any such traditions, knowledge, observances, customs or beliefs relating to particular persons, areas, objects or relationships;

It is the NNTC's submission that the definitions containing the elements in both the NTASSA and the Vic AHA allow a greater focus on the significance of a "place" under Aboriginal tradition to Aboriginal communities and groups rather than the cultural heritage "professional" notions incorporated in the Burra Charter. Notably ICOMOS describes itself as a non-governmental professional organisation…primarily concerned with the philosophy, terminology, methodology and techniques of cultural heritage conservation. The distinction between the two approaches is perhaps crystallised by the two limbs of cultural heritage significance contained in the Vic AHA. Relatedly, the NNTC also submits that the definitions contained in the NTASSA and the Vic AHA more comfortably accommodates the traditional significance of a "natural feature, formation or landscape".

Although it is accepted the notes accompanying Article 1 of the Burra Charter do make mention of the term "cultural landscape".

Finally, it is noted that it appears not to be contemplated that the new legislation would address the management of intangible Aboriginal cultural heritage. In the submission of the NNTC this is a significant omission from the proposed legislation. An example of an operative regime of the management of intangible Aboriginal cultural heritage that recognises the ownership of this form of property by Traditional Owners can be found in Part 5A of the Vic AHA. The NNTC submits consideration should be given to adoption of a similar regime.

Proposal 3(A) – Local Aboriginal Heritage Services

The concept of a Local Aboriginal Heritage Service (LAHS) performing the functions described in the Discussion Paper is generally supported. In particular the proposal that, where one is established, a Prescribed Body Corporate (PBC) (or other post native title settlement Traditional Owner Corporation – TOC – for example a Noongar settlement type corporation) should (be given the option to) undertake this function is entirely consistent with the fundamental principles outlined earlier in this submission. However, several matters are raised in the discussion around this proposal that require clarification. First, it would be inconceivable that a PBC or TOC that has expressed a desire to undertake LAHS functions would **not** be appointed as such. The proposal that the appointment of a PBC (or TOC) as an LAHS would be subject to the whim of the State through an EOI process is, in the NNTC's submission, unacceptable.

Second, the Discussion Paper makes little reference to the resources necessary to undertake these statutory functions. While accepting a "proponent-pays" principle, it must also be accepted that in many parts of the State the revenue derived from undertaking LAHS functions will not be sufficient to the support the ongoing administrative capacity of an LAHS discharging statutory functions. Many LAHS will require resources from the State to undertake these functions efficiently and effectively. Experience suggests however, that this support will also have the benefit of facilitating the administrative foundation of these organisations that will allow them to pursue independent economic development activities for the benefit of their members.

The third matter is the question surrounding exactly what authority an LAHS will have. The Discussion Paper suggests that this may be limited to the provision of evidence and advice to the ministerially appointed Aboriginal Heritage Council who (apparently) will have the ultimate control (subject to Ministerial intervention) over decisions regarding the cultural

heritage of affected Traditional Owners. This notion is antithetical to the international standards outlined above and quite unacceptable. The matter is discussed further below in relation to proposal 3B.

Proposal 3(B) – The Aboriginal Heritage Council

Before considering the proposals outlined in the Discussion paper it is useful to briefly outline the role of the bodies equivalent to the proposed Aboriginal Heritage Council (AHC) contained in the two other pieces of legislation already referred to in this submission.

The members of the Aboriginal Areas Protection Authority (AAPA) under the NTASSA are appointed by the (Territory) Minister but nominated by the Aboriginal Land Councils established under ALRA. AAPA has the function (*inter alia*) of maintaining the register of Aboriginal sacred Sites and consulting with relevant affected Traditional Owners in relation to the issuance of a Certificate to a proponent. The Certificate is conclusive (subject to a Ministerial over-ride and judicial review) and operates as a defence to the offence of interfering with an Aboriginal Scared Site.

Under the Vic AHA the Victorian Aboriginal Heritage Council is composed on Traditional Owners appointed by the Minister and has the function *inter alia* of appointing Registered Aboriginal Parties (RAP - broadly the equivalent of the proposed LAHS) and the management of Aboriginal ancestral remains. A RAP has the function of considering Cultural Heritage Management Plans (CHMPS) which are prepared by qualified experts) in consultation with the relevant RAP) who are engaged by proponents. A RAP's decision to refuse or impose conditions on a CHMP is reviewable by the Victorian Civil and Administrative Tribunal. In areas where no RAP is appointed, the function of considering a CHMP is undertaken by the Department in consultation with Traditional Owners identified by the Department.

It is against this background that the structure outlined in proposals 3A and 3B should be considered. In summary the proposal would appear to be that: the AHC is comprised of individuals who have relevant "knowledge, experience, skills and qualifications" in areas such as "heritage management, conservation and interpretation, anthropology, archaeology, land use planning and development, board governance, administrative decision making and history" – the appointment of Aboriginal people would be a "priority"; an LAHS may prepare and submit evidence and advice to the AHC; the AHC considers and

approves land use proposals; AHC decision are subject to a ministerial override and administrative review.

A not unreasonable summary of this proposal is that the role of Traditional Owners in the management of their cultural heritage is reduced to provide advice to a Ministerially appointed AHC that *may* include some Aboriginal people. This model does not conform with the international standards outlined above or the principles which are derived from them.

A potential alternative would be to integrate the two models described earlier. Under such an integration an LAHS would have the function of negotiating and approving (subject to conditions or not at all) an Aboriginal Cultural Heritage Management Agreement associated with a land use proposal with a proponent. As such the AHC would have no involvement in the approval of an Aboriginal Cultural Heritage Management Agreement associated with a land use proposal in circumstances where a LAHS has been appointed. This model is similar to that adopted under the Vic AHA in circumstances where a RAP is appointed. Similarly, also to the model under the Vic AHA the decision of the LAHS could be subject to administrative review (see Proposal 7 below). Where no LAHS is appointed in respect of an area the AHC would undertake the function of negotiating and approving (subject to conditions or not at all) an Aboriginal Cultural Heritage Management Agreement associated with a land use proposal with a proponent.

Informed by the NTASSA model the AHC could comprise a mixture of ministerially appointed nominees of LAHSs (and potentially also Native Title Representative Bodies and Service Providers) and direct ministerial nominees.

Proposal 3(C) - Minister's Role

Subject to the matters addressed in relation to proposal 3(A) and 3(B) above the NNTC would accept that it is inevitable there would be a Ministerial over-ride (or call in) in certain circumstances.

Proposal 3(D) – Role of the Department

Consistent with the model utilised in the NTASSA and the articulated aspiration of the Victorian Aboriginal Heritage Council, the NNTC would submit that the AHC should be constituted as an independent statutory authority and the functions attributed to the Department in the Discussion Paper should be undertaken by this Authority. It is submitted

that the establishment of the AHC as an independent statutory authority with the resources to undertake the functions proposed to be informed by the Department would both instil confidence in the integrity of the AHCs decision making and give appropriate recognition to Traditional Owners' status as owners of their cultural heritage.

Proposal 3(E) – Heritage Professionals

Again, inter-state experience suggests two models. Under the NTASSA, research leading to preparation of an AAPA certificate is undertaken by professional, generally anthropological, staff employed by AAPA. By contrast under the regulations to the VIC AHA a CHMP is prepared for a consultant engaged by a proponent. The consultant must be a person listed on the appropriate register and, to gain registration, prescribed qualifications must be held.

The Victorian model more closely resembles the proposal contained in the Discussion Paper and would appear more appropriate to the general model being considered currently in Western Australia. This being the case the main issues that have arisen in practice in Victoria go to:

- The level and nature of prescribed qualifications, including ensuring recognition of the existing knowledge of Traditional Owners and pathways for Traditional Owners to pursue necessary qualifications;
- Measures to ensure the ongoing quality of work undertaken by registered consultants; and,
- Questions as to whether regulation of consultants' fees is appropriate in circumstances where an LAHS service charges many also be regulated.

The NNTC would be pleased to discuss these matters at greater length in a future appropriate forum

Proposal 4 - Aboriginal Heritage Register

Generally, the proposal is supported. Experience in other jurisdictions suggests that some issues that may arise that will require, perhaps regulatory, attention include achieving a balance between Traditional Owners' desire to maintain the secret-scared nature of information contained on the register against its role as a public information source of cultural heritage data. In part the role of qualified, registered Aboriginal Cultural Heritage professionals can assist in achieving this balance as arrangements can be put in place to ensure that restricted data is only made available to relevant Traditional Owners and to

professionals in the context of work they are contracted to perform. If the proposal to establish the AHC as a separate independent statutory authority discussed above is adopted, maintenance of the register would be one of the functions undertaken by that authority. The authority would require adequate resourcing to effectively discharge this function.

Proposal 5 – Managing Land Use Proposals

Again, generally the proposal is supported. This support is subject to the following comments. The model of adopting a general prohibition, enforced by criminal sanction, against interfering with Aboriginal Cultural Heritage unless with reasonable excuse creates an effective motivation for land use proponents to adopt a sensible risk assessment in determining the level of Aboriginal Cultural Heritage assessment appropriate for a proposal. This model is frequently adopted in other legislation; for example, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth.) and the NTASSA. Having an appropriate authorisation under the proposed legislation would, of course, operate as a reasonable excuse for the purposes of the potential offence. However, simply being unaware of the presence of Aboriginal Cultural Heritage would not.

This foundational model can be enhanced through regulation that requires the conduct of an Aboriginal Cultural Heritage assessment in the context of certain types of development or in certain prescribed land types (for example in or adjacent to a waterway). This latter enhancement is adopted under the Vic AHA.

In the NNTC submission this dual approach supports the risk-based tiered assessment contemplated in the Discussion Paper.

Proposal 6 – Agreement Making

The consideration given to this issue and the appreciation of the interaction of this matter with agreements reached under the NTA is considered prudent. In accordance with the international standards and principles derived therefrom the NNTC believes that the self-determination of Traditional Owners extends to conclusion, through their representative organisations, of Aboriginal Cultural Heritage Management agreements without the

oversight of a ministerially appointed statutory body. The general model outlined in response to Proposal 3 above is reflective of this.

The NNTC acknowledges however, the accuracy of the discussion regarding the inadequacy of some historical (or 'legacy') agreements – that is agreements concluded before the commencement of the new legislation. In the NNTC's submission this particular issue can be dealt with by adopting a procedure whereby an LAHS *may* refer a legacy agreement to the AHC for assessment against the criteria under the new legislation. In this instance the AHC would be empowered to impose additional conditions upon a land use proponent consistent with the provisions of the new legislation. In instances where there was no LAHS a legacy agreement could be referred to the AHS by the relevant Traditional Owners or Native Title Representative Body or Service Provider.

Proposal 7 - Transparency and Appeals

It must be accepted that any person or body exercising statutory decision-making functions is subject to judicial review. Contemporary administrative law accepts that many disputes relating to administrative (delegated statutory) decision making are best dealt with by a specialist administrative tribunal rather than a formal court. As such, in general, the matters contained in discussion around this proposal are supported subject to clarification of the contemplated timeframes and specific bases of appeal or review. The proposal contained in this submission for LAHS to themselves exercise a statutory function suggests one caveat to this support, however. That is that a LAHS should only be required to provide reasons for its decision in the event these are requested by an aggrieved land use proponent. This proposal may operate to reduce the administrative burden placed on an LAHS but also serves to highlight the need to provide sufficient resources to an LAHS in order for it to be able to effectively discharge its proposed statutory functions.

Proposal 8 – Enforcement Regime

Some comments in relation to the new offence regime were made above in relation to Proposal 5. The NNTC would recommend that a review be undertaken of similar legislation (for example environmental and pollution as well as cultural heritage) to ensure that the final form of the proposed offence provisions is in conformity with the current jurisprudence in regulatory enforcement. Such review should extend to current penalty/incarceration rates and periods. This stated, it is not immediately apparent why a time limitation for the commencement of enforcement provision other than that applied

to the general criminal law would be adopted. The potential (geographic) remoteness of relevant 'crime scenes' and consequent difficulty in preparing a brief of evidence would support this conclusion.

Beyond criminal sanctions, one further matter in relation to this proposal requires comment. This goes to enforcement personnel. Experience from other jurisdictions suggests that the matter of offences under Aboriginal Cultural Heritage legislation and, more importantly, the prevention of them, are time critical. Under many Aboriginal Cultural Heritage agreements, Traditional Owners will have a role in monitoring the observance of conditions under the agreement. This suggests that appropriate representatives of an LAHS can usefully also perform the function of an authorised officer with (time) limited power to issue enforceable stop orders. Contravention of a stop order itself constitutes an offence. Such a model is adopted commonly in workplace health and safety legislation and also, to a limited extent, in the Vic AHA. The model should also be considered in the context of this new legislation.

Proposal 9 – Protected Areas

Subject to greater elaboration of greater detail, the proposal is generally supported. One additional matter though goes to the procedure to be adopted in the declaration of new Protected Areas or the variation or revocation of existing Protected Areas. In the view of the NNTC, and consistent with the standards and principles elaborated in this submission such declaration, variation or revocation should only occur with the consent of the relevant affected Traditional Owners.

Conclusion

The NNTC appreciates the opportunity to make the current submission. It would also welcome any opportunity to make further submissions in relation to any draft legislation that may be prepared arising from this current consultation.

Dr Matthew Storey
Chief Executive Officer
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