



Joint Submission on the review of the *Aboriginal Heritage Act 1972 (WA)* from
Nyamba Buru Yawuru Ltd
Karajarri Traditional Lands Association Aboriginal Corporation RNTBC
Walalakoo Aboriginal Corporation RNTBC
and
Kimberley Land Council Aboriginal Corporation

Introduction

1. This joint submission is made by Nyamba Buru Yawuru Ltd (**NBY**), Karajarri Traditional Lands Association Aboriginal Corporation RNTBC (**KTLA**), Walalakoo Aboriginal Corporation RNTBC (**WAC**), and Kimberley Land Council Aboriginal Corporation (**KLC**). Together, these corporations strongly believe and advocate that Aboriginal people are and should be recognised as the decision makers in respect of their own heritage. As such, our organisations will support legislation that underpins this fundamental tenet.
2. KLC and NBY provided initial responses in the first round of consultation. These submissions are intended to provide a further detailed response in relation to the Minister's Consultation Paper March 2019. Where a submission was included in the initial responses from either KLC or NBY, they are not repeated here, unless more detail is provided.

Kimberley Land Council

3. The KLC was formed in 1978 by Kimberley Aboriginal people as a political land rights organisation. Today, the KLC has grown to become the peak Indigenous body in the Kimberley region working with Aboriginal people to secure native title recognition, conduct conservation and land management activities, and develop cultural business

enterprises. The KLC is the recognised Native Title Representative Body (**NTRB**) for the Kimberley Region under section 203AD of the *Native Title Act 1993* (Cth) (**NTA**). Given the subject matter of the **Review** of the *Aboriginal Heritage Act 1972* (WA) (**AHA**), the KLC's statutory functions, and the KLC's membership prerogative, the KLC is particularly well placed to make submissions in relation to the Review.

Karajarri Traditional Lands Association Aboriginal Corporation RNTBC

4. KTLA was registered in 1998 as the prescribed body corporate for Karajarri country. The Karajarri native title determinations cover approximately 3,009,160 hectares of land and sea, from the Great Sandy Desert out to the coast of the South West Kimberley. Since its formation KTLA has worked closely with KLC to ensure that the right people speak for country, promote cultural heritage through the Karajarri ranger program and enter into stringent Heritage Protection Agreements (**HPA**). More recently, KTLA has taken steps to play an even greater role in the Karajarri communities cultural heritage management. KTLA is now negotiating its own HPAs, arranging its own heritage surveys and pursuing a number of key projects to advance Karajarri culture. KTLA, and the Karajarri Native Title Holders, will be directly impacted by the proposed legislation. Karajarri people have a key interest in ensuring that the new legislation is in line with advances in Aboriginal rights and that KTLA's position in protecting Karajarri heritage is strengthened rather than eroded.

Nyamba Buru Yawuru Ltd

5. Nyamba Buru Yawuru Ltd (**NBY**) contributes to the following submission on behalf of the Yawuru Native Title Holders Aboriginal Corporation RNTBC (**Yawuru PBC**). The Yawuru PBC holds native title on trust for the Yawuru community over some 530,000 hectares of land and waters in and around Broome. Yawuru native title is grounded in the power and richness of *Bugarrigarra*, the spiritual force that has existed since time immemorial that links Yawuru land, law and people.
6. In NBY's view, the AHA under review has operated in isolation from and in division with the NTA. It is imperative that the proposed legislation reflects the advancement of Aboriginal peoples' legal rights in the 46 years since the AHA was enacted.
7. The Yawuru PBC considers the review as an opportunity to align the proposed legislation with the NTA creating contemporary legislation that is culturally and

socially sustainable. Managing and protecting sites of heritage significance is a living cultural responsibility for Yawuru people and their organisations.

Walalakoo Aboriginal Corporation RNTBC

8. WAC contributes to the following submission on behalf of the Nyikina Mangala Native Title Holders. WAC holds native title on trust for the Nyikina Mangala community over some 26,000 square kilometres of land and waters in and around the Fitzroy River catchment area.
9. WAC is also of the view that the AHA under review has operated in isolation from and in division with the NTA. It is imperative that the new Act reflects the advancement of Aboriginal peoples' legal rights in the 46 years since the AHA was enacted.
10. WAC also considers the review as an opportunity to align with the AHA with the NTA creating contemporary legislation that is culturally and socially sustainable. Managing and protecting sites of heritage significance for Nyikina Mangala people is a cultural responsibility. Protecting places of cultural and heritage significance is crucial to WAC's mission of advancing culture. It's important that anyone who works with WAC or accesses our native title area for mining or exploration understands this. Some of our key principles in relation to heritage protection include a moratorium on uranium exploration and mining, an insistence on 'no means no' in our heritage protection agreements, no fracking without our consent, and we ask that companies stay away from our river.

Native Title Act 1993 (Cth)

11. There have been significant advances in Aboriginal land rights since the AHA was first introduced. One of the widest reaching developments has been the recognition Aboriginal and Torres Strait Islanders pre-existing native title rights and interests.
12. The new legislation should not only recognise such native title rights and interests, but facilitate those rights and interests being realised. Aboriginal people are the most appropriate decision makers in respect of their own heritage, in accordance with their traditional customs and beliefs and this should be recognised by the proposed legislation. Due to the current operation and significance of the NTA there needs to be clarity around the how the proposed legislation will interact with it. This interaction,

and the pre-eminence of native title holders with respect to making decisions about their cultural heritage, should be explicitly stated within the proposed legislation.

Interaction with other existing legislation

13. Further it is crucial that the interaction between the proposed legislation and other State and Commonwealth legislation be clarified. In particular, we seek clarification regarding the interaction of the proposed legislation with the following extant pieces of legislation:

- *Planning and Development Act 2005* (WA)
- *Land Administration Act 1997* (WA)
- *Conservation and Land Management Act 1984* (WA)
- *Racial Discrimination Act 1975* (Cth)

Proposal 3(A) – Local Aboriginal Heritage Services

14. Proposal 3(A) provides for the creation of Local Aboriginal Heritage Services (**LAHS**). LAHS would be selected through an expression of interest process and be appointed and overseen by the AHC.

15. The proposal envisions that prescribed bodies corporate (**PBC**) would nominate as LAHS. This is explicitly stated in the background to Proposal 3(A) and is implicit in the criteria outlined in the Discussion Paper that requires the Rules of an LAHS to be “consistent with the requirements imposed on PBCs especially in terms of obligations to consult on certain decisions.”¹ If this is a reference to PBC obligations of consultation and consent with common law native title holders under regulations 8 and 9 of *Native Title (Prescribed Bodies Corporate) Regulations* (1999) this should be stated and the interaction of these provisions with the proposed legislation should be addressed.

16. Our organisations welcome the recognition that PBCs are the most appropriate bodies to manage and protect Aboriginal heritage. As the NTRB for the Kimberley region, the KLC has consistently advocated for PBCs to take on a more significant role in areas such as Aboriginal heritage management. NBY, KTLA and WAC all have considerable internal expertise to undertake identification and protection of cultural heritage sites on their respective countries.

¹ Review of the Aboriginal Heritage Act 1972 Consultation Paper March 2019 p7.

17. However, the proposal for PBCs to nominate as LAHS requires government support and funding to build the capacity of PBCs to competently fulfil this role. Funding should be ongoing, in recognition of the ongoing duties of LAHS in respect of matters under the new legislation. In the absence of ongoing funding towards general capacity building, or specific funding to enable PBCs to focus on functioning as LAHS, it is likely that PBCs, who are generally underfunded and unfunded for such work, will be stretched to undertake these legislated roles. Further without adequate funding commitments, it is likely that PBCs will not be in a position to compete with commercial service providers who may be more able to realise the commercial opportunity in establishing themselves as LAHS.
18. Clearly conflict in relation to the appointment and function of LAHS must be mitigated and managed effectively. One option would be to adopt an approach which prioritises native title holders. PBCs should be prioritised as the preferred or only entity capable of being a LAHS, followed by any organisation which exists for the benefit of or in which relevant registered native title claimants have a share, followed by Traditional Owners who have not initiated a claim and then, finally, any other Aboriginal people who can demonstrate relevant cultural knowledge for the relevant area. Such an approach would clarify to a degree the interaction of the NTA – and native title holders – with the proposed legislation by ensuring that native title holders are prioritised and there is no conflict between recognised native title rights and interests and the function of LAHS.
19. The legislation must also be capable of addressing a situation where an entity is recognised as a LAHS in the absence of a PBC but a PBC is subsequently determined for a LAHS area. The legislation must provide for a process which enables the PBC to assume the role of the LAHS, if it is capable and wishes to do so. Such a process is needed to protect and ensure the place of native title holders as decision makers on their recognised and determined country. This approach would ensure that the cultural and communal integrity of decision-making processes based on customary law and practice are respected and sustained in accordance with the NTA.
20. In the absence of a LAHS it is proposed that the Department of Planning, Lands and Heritage (**DPLH**) perform the function of a LAHS. This is contrary to the stated desired outcomes of Proposal 3(A), which include the active involvement of Traditional Owners and ensuring that consultation and agreement making processes are culturally appropriate. Clearly the DPLH is unable to demonstrate the

requirements for a LAHS ². Further there is a conflict between the duties and responsibilities of LAHS and the role of Government. Accordingly, it is inappropriate for DPLH perform the functions of a LAHS.

21. Where the relevant PBC does not wish to nominate as the LAHS or native title is yet to be determined it is submitted that a regional representative body such as the NTRB is best placed to perform the functions of a LAHS, including consultation with native title holders or claimants in relation to their heritage.
22. To be clear, the organisations making this submission categorically oppose a Government entity be appointed to be, or act as a default, LAHS in the absence of a nomination from native title holders or claimants.
23. It is also imperative that PBCs or NTRBs have a statutory right to recover costs from third parties when carrying out their heritage function as LAHS, and that there is a corresponding obligation on third parties to pay those costs. If the costs are not paid then there cannot be a right to undertake the activity which causes the impact on heritage. This needs to be explicit in any new legislation to ensure consistency with s 60AB of the NTA and Regulation 20 of the *Native Title Prescribed Bodies Corporate Regulations 1999*.

Proposal 3(B) – Aboriginal Heritage Council

24. Proposal 3(B) provides for the creation of a centralised expert body called the Aboriginal Heritage Council (**AHC**). The Minister will be responsible for the selection and appointment of council members.
25. The functions of the AHC are considerable.³ Given the significant role and power proposed to reside with the AHC, the AHC should be constituted of majority Aboriginal council members (with those individuals nominated regionally) with additional seats open to other expert members (Aboriginal or non-Aboriginal). This type of representation should be mandated in the legislation.
26. If the WA government is serious about recognising, protecting and celebrating Aboriginal heritage in WA they need to trust Aboriginal people to control and make decisions about their own heritage matters. Anything less than regionally selected, majority Aboriginal seats on the AHC is contrary to the principle of self-determination

² Review of the Aboriginal Heritage Act 1972 Consultation Paper March 2019 p7 11(a)-(f).

³ Review of the Aboriginal Heritage Act 1972 Consultation Paper March 2019 p15 and 16.

and does not meet the expectations of Kimberley Aboriginal people. The AHC could have access to particular areas of expertise provided to them, either via subcommittee, or directly, rather than have such non-Aboriginal experts on the Committee itself.

27. Such an approach would be consistent with the situation in other Australian jurisdictions, including Victoria, South Australia and the Northern Territory. In these jurisdiction every member of the relevant heritage Council is Aboriginal. In all cases, these councils are comprehensively supported by a secretariat, and have access to expertise as is required.

28. The AHC must be, as far as possible, independent from government; for this to occur, the AHC should be independently funded.

Proposal 3(C) The Minister's Role

29. There must be an avenue for applications to be made to the Minister to issue a "stop work order" where Aboriginal heritage is at imminent risk whether or not the work is authorised.

Proposal 5 Tiered assessments of proposed land uses

30. The decision as to whether or not a land use is likely to have low impact on Aboriginal heritage should be made by the LAHS. A tiered assessment process is problematic at best, and at risk of being fundamentally flawed, if the result is that a land use proposal is assessed as having or likely to have a low impact on Aboriginal Heritage by someone other than the relevant traditional owners.

Proposal 6 Agreement making

31. Agreement making in relation to the proposed legislation should be based on the principles of free, prior and informed consent, rather than imposing a standard agreement which is not endorsed or supported by Traditional Owners and LAHS. The unequal bargaining power of the parties needs to be acknowledged and addressed specifically through the appropriate resourcing of LAHS to enable them to adequately engage in any agreement making process. Further where there are existing agreements made under the NTA that adequately address heritage matters, those agreements should be implemented to avoid the need for duplication.

32. The legislation should address a situation where an act impacts the heritage in one area and also has an impact on heritage in another area. There are many sites, both registered and unregistered, within the Kimberley region which traverse vast expanses of land and have significance to multiple Traditional Owner groups. The legislation should establish a process which enables LAHS to communicate with regard to such issues with the potential for triparted agreements. Such an approach would ensure that all Traditional Owners can adequately protect their cultural heritage.

Concluding remarks

33. Our organisations welcome the repeal and redrafting of the AHA. The current act has been unworkable for all interested parties for decades. The repeal and redrafting of the Act is an opportunity to fully recognise the advances in Aboriginal lands rights since the 1970s and bring the Act into line with international law.
34. Accordingly, Aboriginal people's control over their own heritage should be at the forefront of the proposed legislation. This includes not only recognising but adequately funding, PBCs, NTRBs and other Aboriginal organisations, to carry out the functions of LAHs, legislating for at least the majority of AHC members to be Aboriginal and for those people to be regionally nominated, and ensuring that the proposed legislation complements other existing legislation.
35. We look forward to the opportunity to review the draft bill and to ensure our concerns have been adequately addressed.