A SUBMISSION BY

THE COUNCIL OF TRIBAL ELDERS

TO THE *ABORIGINAL HERITAGE ACT 1972* REVIEW

Question 1: Long Title

The current Long Title raises two issues for us. Firstly, as noted in the Minister's Foreword, the Act is 45 years old and needs to be modernised in a way that is respectful of Aboriginal people and their culture. Given its age, it is an artefact of the late period of the Native Welfare era; when non-Aboriginal people, many of whom were well-meaning, made laws and policies that they believed would benefit our people. Their expressed aim was to "uplift" our people and that was to be achieved, not through consultation and our involvement, but through a "from the top down" passing of laws and creation of policies that were believed to be for our benefit. The disastrous removal of the "Stolen Generation" of children from their parents and their removal to Missions and other such institutions was one of those policies. The very fact that our current State Treasurer is one of our people shows that that era and its associated thinking have passed into history. The Long Title, where it preserves "places and objects" on behalf of the community rather than on behalf of the Aboriginal people of WA reflects the thinking of that era.

Secondly, and flowing from our first point, as academics were heavily involved in its drafting, the current Act is an uneasy and ungainly attempt to merge the interests of an academic archaeological community with those of the Aboriginal community of WA. This has led to confusion and, we believe, abuses and needs to be remedied in any future amendments to the Act. We no longer need academics to teach us about our culture or to "assist" us in preserving it: we are more than capable of doing that ourselves. We have noted a litany of abuses, but list only the following:

- Young women academics walking through the bush with our young girls "looking for" Aboriginal cultural material – this is unheard of in our culture, where the religious life of men and women is age-graded and also complementary but separate;
- Young women academics intruding into our sacred areas without permission or supervision;
- Taking "information" regarding our heritage and associated sites from persons not qualified under traditional Aboriginal Law, with the result that nonsense is being recorded as genuine Aboriginal lore (the fiasco at Lake Yindarlgooda is a good example of this).

We suggest that the Act should be brought up to date and all confusion removed by altering the Long Title to read: "an Act to make provision for the preservation of places and objects of importance and significance to the Aboriginal people of WA". The sole criterion will (and should always) be significance to our people.

Question 2: Consultation

Currently, consultation regarding Aboriginal heritage generally takes place against a background of imminent developments, the purpose being to ensure that proposed works do not constitute a breach of Section 17 of the Act. That being the case, it is clear that the major criterion for the selection of Aboriginal consultants should be knowledge of the Aboriginal heritage of the proposed development area. Only Category (d) of the list on Page 7 of the Review Consultation Paper guarantees (by definition) the inclusion of such knowledge holders. Category (c) may or may not include such persons. Inclusion of Categories (a) and (b) is an attempt to align the Act with the Native Title Act procedures. That inclusion, we believe, has led to an abuse. Where Aboriginal consultants are chosen by Land Councils or Prescribed Bodies Corporate, a system of "taking turns" has developed, in order to endeavor to satisfy the demands of all families making up the Native Title Holders [Category (a)] or the Registered Claimants [Category (b)]. This has led to a situation, in cases of which we are aware, where young people with no knowledge of the Aboriginal heritage of an area are "given their turn" to participate as consultants in a pre-development consultation. Unless there are knowledgeable people present to balance the consultative process, this is clearly an unsatisfactory situation and an abuse of the process. Such a process amounts to paying money to people to buy their acquiescence in regard to a development, rather than genuinely consulting knowledgeable elders regarding the Aboriginal heritage of an area in order to ensure that no threat to that heritage arises from the development in question. A further issue is that the Native Title group(s) may not include any holders of knowledge of the sacred, ritual or ceremonial sites in a particular area – in areas where such title has been determined or where there is a Registered Native Title Claimant Group, it is not always the case that these are knowledge holders. We are aware of at least one example of an important Aboriginal sacred site being obliterated because of the exclusion from the consultative process of knowledge holders and total reliance upon Native Title holders.

Currently, if there is an Aboriginal site listed in the Register in a proposed development area, the developer or other parties involved in the planning process can apply to the Department of Planning Land and Heritage for a list of the names of the knowledge holders for that site. The current system, however, is haphazard, as in many cases there are no such names included in the Register, or the names of deceased persons are listed and, in any event, if no Aboriginal site is listed in the Register, then there is no such list of names.

We suggest that it should be the duty of DPLH to maintain a Register of knowledge holders for areas of the State and to make that register open to the public. We suggest that at least some of those persons should participate in pre-development consultations in the areas for which they are listed. This relatively simple process would simplify such consultations and achieve a higher degree of certainty in regard to preservation of Aboriginal heritage than that achieved under the present Guidelines. Specifically, we suggest that:

- Following consultation with regional Offices of DPLH, the Registrar of Aboriginal Sites should maintain a Register of Knowledge Holders for all areas of the State and should make that Register available to developers; and that
- Any Aboriginal heritage consultation which does not include a proportion of

those knowledge holders should be deemed inadequate by the Department and, by extension, by the Aboriginal Cultural Material Committee.

We are aware that, in the first instance, the establishment of such a Register will be difficult and will involve detailed consultation with our people. However, the purpose of the Consultation Paper and our reply is to improve, clarify and simplify the current situation. Perceived difficulties should not deter us all from that aim.

Question 3: Honorary Wardens

In keeping with the aim of moving the Act into the modern era and showing respect for Aboriginal people and their culture, the role of Honorary Warden should be only available to Aboriginal people. As the Warden will have the right to protect Aboriginal heritage in a given area, (s)he should be a Registered Knowledge Holder as above. We are strongly opposed to the notion of appointing Honorary Wardens on the recommendation of Land Councils or Prescribed Bodies Corporate. The Act, when it is amended, should be a means of protecting our heritage in WA and not a means of establishing an additional level of control over our people by newly-established bureaucratic structures.

Question 4: Roles and Functions

We make no comment on the role of the Minister. Our comment on additional duties for the Registrar of Aboriginal Sites is given in our reply to Question 2. Our comments on the role of the ACMC are given in reply to Question 13 below.

Question 5: Definition of "Aboriginal Site"

This question and the material on Page 10 of the Review Consultation Paper brings to the fore the uneasy attempt to blend together the aspirations of academic archaeologists and the wishes of our people in regard to protecting our heritage. A glance at the archaeological definition of "significance" below, taken from an archaeological report shows how those two sets of aspirations are incompatible (the extract was taken from an archaeological report chosen at random from the DPLH Library).

The standard applied is based on a site's representativeness and research potential...Site significance is therefore assessed on the basis of present knowledge of sites within the area, archaeological techniques, theory and method, all of which may vary with time. ... During the survey, the significance of archaeological sites was assessed with regards to their potential to answer the following research questions:

- *When was the region initially occupied by Aboriginal people?*
- *What cultural shifts occurred to differing sea levels in the past?*
- *What stone tool technologies and reduction practices were employed in the area?*
- *What are the characteristics and what accounts for variables in stone tool production within assemblages and over time?*
- *What were the patterns of residential mobility and density in relation to coastal and semi-arid environments?*

The only mention of Aboriginal people in that passage is an intimation that they are suitable subjects for examination and study – rather like the "stone tools" also referred to. Well, the time for studying us as if we were part of the environment like trees or kangaroos is well and truly over. We are Australian citizens like any other Australians and the above nonsense is out-of-date and out of touch with present-day Aboriginal people. We have no objection to these archaeologists carrying out their studies of "stone tools", but the Universities from which they come are well funded and they should not be intruding into protection of our significant heritage under umbrella legislation which fails to distinguish between our spiritual life and its representation in the physical world and "stone tools". The mining industry and Public Sector developers should not have to pay out exorbitant sums to carry out "Aboriginal heritage surveys", when those surveys are in fact "archaeological heritage surveys". The amended Act should be very clear on this matter.

As an additional comment, we would point out that, at first reporting, the same level of protection is offered by the present Act to a small area containing a handful of stone flakes left behind after the manufacture of a stone tool in the past and to a male-restricted sacred Aboriginal site. Put bluntly, that is an insult to Aboriginal culture and religion and denigrates our people's spirituality. It is also worth noting that the majority of so-called "artefact scatters" are in fact scatters of debris and flakes left behind after the manufacture of artefacts.

A second comment we make is that the word "significance" is used loosely in Section 5(a) of the present Act. A place cannot be significant *per se*. In the dictionary meaning of that word, a place must be significant **to** a person or persons **for** a particular reason or reasons. Furthermore, a place can be significant to a person or category of persons and

not to another person or category of persons. Given those considerations, we believe that the primary criterion for inclusion of a place in Section 5(a) should be significance **to Aboriginal people**.

In the light of the above comments, we make the following suggestions.

- The current Section 5(b) is in fact the most important part of the definition of "Aboriginal site" and should remain unchanged and become 5(a) in the amended Act.
- The current Section 5(a) should be moved to second position as 5(b) of the amended Act and should clarify "significance" as follows: "any other place of importance and significance to persons of Aboriginal descent". The criterion again is significance to our people, although that significance is wider than "sacred, ritual or ceremonial". It will therefore include paintings, engravings, burial places, water sources and other areas of historical or domestic significance to us. This will remove the nonsense of having debris from artefact manufacture delaying developments.
- Section 5(c) should be removed, as the major criterion for inclusion is now significance to our people, which is covered by (a) and (b).
- Section 5(d) should be clarified fully and amended back to what we believe was its original intention, to read "any place where sacred, ritual or ceremonial objects to which this Act applies are traditionally stored, or to which, under the provisions of this Act, such objects have been taken or removed".

Question 6: Definition of "Aboriginal Objects"

In our opinion, Section 6 does not adequately describe the sorts of objects that should be protected under the amended Act, as it has been read to date as placing debris from the manufacture of stone tools on the same level as sacred religious objects.

Our sacred objects require protection in their own right and should not be confused with academic interests. We therefore suggest in this case a simple amendment that removes this insult to our culture and religious life. It should read: "the Aboriginal Heritage Act applies to all objects, whether natural or artificial and irrespective of where found or situated in the State, which are or have been of sacred, ritual or ceremonial significance to persons of Aboriginal descent, or which are or were used for, or made or adapted for use for, any purpose connected with the traditional religious life of the Aboriginal people past or present".

The amendments suggested in response to Questions 5 and 6 would have the effect of removing over 60% of the current entries in the Register of Aboriginal sites. They would also achieve the aim of shifting the focus of the legislation away from academic elites, to the Aboriginal people of WA, in keeping with the Minister's intentions noted above. Given the above discussion of archaeological significance, as opposed to Aboriginal significance, it is clear that an amended Act should not include consideration of archaeological material such as stone debris left over from the manufacture of stone tools. That would also streamline the pre-development processes, as the mining industry and Public Sector developers would no longer have to fund "treasure hunt" surveys for such material.

Question 7: Protected Areas.

Other than reiterating that the thrust of the amended Act should be protection of genuine places and objects of significance to our people, whose presence of absence can be readily ascertained by consultation with knowledge holders, we make no specific comment on the subject of Protected Areas.

Question 8: Ancestral Remains.

Our people's ancestral remains would now be included under our suggested Section 5(b) of the amended Act. Such remains are either known to present-day Aboriginal people, or else are discovered accidentally by developers during excavation or other ground disturbance. In the former case, the specific grave sites may not be accurately known and a general area in which burials are known to have taken place is recorded in the oral history. Some of these may already be listed on the Register of Aboriginal Sites. If not, they can potentially be thus listed. In those cases, unless other arrangements can be made with the relevant knowledge holders, they should command the same community respect as current graveyards. Signage and/or fencing may be required to notify the public of their existence. We support such actions.

In the second case, where skeletal material is accidently uncovered, there already is a formal mechanism in place to deal with such an eventuality. We support that formal mechanism.

Question 9: Activities Requiring Ministerial Consent

We believe that Section 17 of the Act, as it stands, is quite thorough and should not be amended. If our suggestions regarding clarification of what places and objects are covered by the amended Act are actioned, then Section 17 would only apply to places or objects of significance to Aboriginal people.

However, if those suggestions are rejected and the amended Act continues to include places and objects which are not of significance to our people, but rather to academic archaeologists, then we suggest a two-tiered consent/permission process. This will be detailed in our reply to Question 13 below. Those comments are also relevant to Question 10.

Question 11: Sacred Sites

We believe that this question is based on a misconception of the nature of Aboriginal sacred sites of a mythic nature. By and large, such sites are readily identified features of the landscape, ranging in size from small gnamma holes to large hills. That being the case, "impacts" can be readily assessed, as varying from total destruction to minor disturbance. We believe also that the knowledge holders for any particular site should be the ones whose opinions should be given paramount consideration by the ACMC in its assessment of such sites.

Question 12: Consent or Authorisation

This question does not make clear whether it refers to the early consultative process, where Aboriginal people may be asked to consent to developments which could potentially damage sites of significance to them, or to the present process where the Minister gives (or withholds) consent for that development.

If the question refers to the consultative process, then our answer is "the Aboriginal people and only the Aboriginal people". Land Councils or Prescribed Bodies Corporate should not be allowed to take over this role. Of course, the Aboriginal people involved must be relevant to the particular site in question. That relevance must be based primarily on knowledge, that is, the Registered Knowledge Holders should have been involved in the consultative process from which the authorisation arose. A lower layer of relevance would be native title holders or claimants, although, on a practical level, the second layer may, in most cases, include the first.

If the question refers to the final granting or withholding of consent, then we see no reason why the onus of making such a final decision should not continue to rest with the Minister who is, after all, appointed initially by voters and then by colleagues to be the final arbiter.

Question 13: Section 18 Process

We believe that, for sites of significance to Aboriginal people, it is important that a Committee made up largely of Aboriginal persons should have the responsibility of discussing whether, or to what extent, developments should be allowed to proceed in cases where such developments will have an impact on such sites. If, as stated in our reply to Question 12, the Minister will continue to be the final arbiter, then we are satisfied that the Committee should make recommendations to him.

We acknowledge that the present Section 18 process is slow, but it is hard to see how that can be improved if procedural fairness is to be extended to all relevant Aboriginal people in each case and an invitation to make a submission on the particular development/Aboriginal site interface is sent to those people.

However, if our radical suggestions regarding the definitions of Aboriginal sites and objects are actioned, then the number of Section 18 Notices submitted to the ACMC will be greatly reduced. If our suggestions are ignored, the Section 18 process could still be simplified by having a two-tiered authorisation regime. Sites of significance to our people could still be considered and discussed by the ACMC and recommendations in their regard could still be relayed to the Minister for final approval or rejection. However, if the archaeological lobby continues to use for their benefit the legislation to protect our culture, then all applications to disturb/destroy stone debris scatters should be scrutinised by an Officer of the DPLH appointed to that role and authorised to give that consent without submission to the ACMC or Minister. We do not consider this suggestion to be as satisfactory as the suggestion that the amended Act should deal only with places and objects of significance to our people. However, it would still have the effect of speeding up the approvals process.

Question 14: Alternative Arrangements: See our reply to Question 9.

Questions 15 and 16: Enforcement Provisions and Penalties

We believe that a limitation period of 12 months is inadequate in this case. A clever lawyer can delay procedures sufficiently to negate totally any prosecution under the Act for that period of time. Without committing ourselves to a specific limitation period, as that is a matter for legal experts to debate, we believe that a significantly longer limitation period than that arising from the current Act should be written into the amended Act. In respect of penalties, the current stipulations appear adequate to us. In respect of Section 62 of the current Act, it seems perfectly reasonable to us that a person should not be prosecuted for a breach of Section 17 if (s)he had no knowledge that (s)he was committing an offence. This, of course, raises the question of what should reasonably be expected of a member of the public to ascertain whether a place of importance and significance to Aboriginal people is in the path of a proposed development. All of our suggestions above should lead to a situation where a developer will be able to avail of a list of qualified knowledge holders for any given area and will be able to consult with them, either directly or through an intermediary.

Question 17: Section 7(1)(b)

The gender and initiation status aspects of certain facets of Aboriginal religion are well known and we do not therefore reiterate them here. Those aspects of our traditional religion also incorporated rules of secrecy which are binding on our people in respect of certain places and objects. The application of the English word "Law" to our religious practices signifies that certain sanctions, some of which are quite severe, will apply to persons in breach of those rules of secrecy. Any amendments to the Act, which require our people, under threat of judicial punishment, to breach rules of secrecy by disclosing classified information would be placing such people in a situation of double jeopardy. If the amended Act is to be in line with the Minister's comments noted above, it should not include such a stipulation. In any event, knowledge holders generally work in conjunction with developers to ensure protection of our heritage without divulging classified information.

Question 18: Sections 39(2) and 39(3)

We believe that Sections 39(2)(a) and 39(2)(b) should be retained. Section 39(2)(c) reflects the attitudes of the earlier era to which we refer above. Section 39(2)(d) also reflects that attitude, although it leaves unspoken who should be the party or parties who assess the "aesthetic values". It should be removed from the amended Act, as it is an insult to our culture. We believe that Section 39(3) should be retained in the amended Act. Those actions would bring this section into alignment with our suggestions regarding Section 5 above.

Question 19: The Register of Aboriginal Sites

We make no comment on this question, as we believe that it is a bureaucratic matter, other than to note that steps should be taken to remove the large amount of archaeological sites from the Register, as these are not Aboriginal sites in any proper sense of the term and should not be there in association with our places of significance. If the Mining Industry and Public Sector developers are wealthy enough to fund archaeological "treasure hunts" for stone tool debris that should be done as a separate exercise and our culture should not be drawn into those exercises in order to justify them. The sole criterion for deeming a place to be an Aboriginal site should be importance and significance to Aboriginal people. All other extraneous criteria should be expunged from the amended Act.

Questions 20 and 21: Removal of Sections

Sections 40 to 46 of the current Act deal with "Aboriginal cultural material". The definition of that material given in Section 40 should be clarified in order to bring it into line with our reply to Question 6 above, which we repeat here for the sake of consistency. *Our sacred objects require protection in their own right and should not be confused with academic interests. We therefore suggest in this case a simple amendment that removes this insult to our culture and religious life. It should read: "the Aboriginal Heritage Act applies to all objects, whether natural or artificial and irrespective of where found or situated in the State, which are or have been of sacred, ritual or ceremonial significance to persons of Aboriginal descent, or which are or were used for, or made or adapted for use for, any purpose connected with the traditional religious life of the Aboriginal people past or present".* To achieve that consistency, we suggest that Section 40(a) should be retained, but that Sections 40(b) and 40(c) should be removed and replaced by a new Section 40(b) which reads as follows: "is or has been used for, or made or adapted for use for, any purpose connected with the traditional religious life of the Aboriginal people past or present".

Yours Faithfully

Aubrey Lynch

Bruce Hogan

on behalf of Council of Tribal Elders

A Lynch

B Hogan.

C/- Aubrey Lynch JP,
PO Box 2302,
Boulder,
WA 6432.

17 April 2018

Registrar of Aboriginal Sites,
Department of Planning, Lands and Heritage,
151 Royal Street,
East Perth.
WA 6004.

Dear Registrar,

Re: Riversgold Ltd Tenements at and near Lake Yindarlgooda

We are writing to you on behalf of the Council of Tribal Elders. As you may be aware, we represent the interests of initiated Tribal Law people in the Eastern Goldfields and work in with local traditional owners to ensure that all sites and places relevant to our sacred Law and stories are protected.

It has come to our attention that a so-called Aboriginal heritage survey has been carried out in the Lake Yindarlgooda area by the Goldfields Land and Sea Council on behalf of Riversgold Limited. The survey team comprised a number of non-initiated men and one person initiated into a different Law from a different area.

Study of the maps of their "Kurnalpi Holdings" on the Riversgold Ltd Website shows that their tenements include a number of sites on the Nyiru-Kungarangkarlpa Tjukurrpa. One of those sites is a restricted men-only area and is of the highest significance to our Tribal Law people.

We assume that Riversgold Ltd will submit a Section 18 (Aboriginal Heritage Act) Notice to your Department for their proposed drilling programme. I request that you notify the Aboriginal Cultural Material Committee of our concerns regarding potential damage to our sacred sites and ask that no recommendation should be made to the Minister in regard to such a Notice until such time as Riversgold Ltd involves the Council of Tribal Elders in an adequate Aboriginal heritage survey, whose aim would be to delineate "no-go" areas where mineral exploration should not take place.

We note that the Riversgold Ltd Website, under the heading "Community", states that they will "ensure that local communities are consulted regarding any activities proposed by the Company that may have an impact upon their community" and that they will "ensure that activities are

conducted in a manner that is acceptable regarding heritage and cultural issues". This has not occurred in this case.

We would be grateful also if you could notify Riversgold Limited that there are important sacred Aboriginal sites within their tenements and that the persons whom the Goldfields Land and Sea Council provided for the so-called heritage survey are not qualified to speak about those sites.

Yours faithfully,

BS Hogan Bruce Hogan
Lynch - Aubrey Lynch on behalf of Council of Tribal Elders