GOLDFIELDS LAND AND SEA COUNCIL

Aboriginal Corporation (Representative Body)

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31 May 2018

Assistant Director General
Heritage Services
Department of Planning, Lands and Heritage
PO Box 7479
Cloisters Square PO
WA 6850

Via email: **AHAreview@dplh.wa.gov.au**

Dear Assistant Director General,

REVIEW OF THE *ABORIGINAL HERITAGE ACT* 1972 - CONSULTATION PAPER

The Goldfields Land and Sea Council ('GLSC') is the principal voice for Aboriginal people from the Goldfields-Esperance region on matters to do with land and waters, governance, social and economic development, heritage and other matters of justice. The GLSC is the Federal Government appointed Native Title Representative Body for the region, enjoying widespread support from communities, organisations and individuals throughout the area.

The GLSC provides this submission in response to the March 2018 Consultation Paper on the Review of the *Aboriginal Heritage Act 1972* (WA) ('AHA'). The GLSC is committed to working constructively with all levels of government on native title and heritage protection matters to enable Aboriginal people to pursue their social, cultural and economic aspirations. The GLSC welcomes the State Government review process and Consultation Paper and supports the need to address deficiencies and inequity evident in this outdated Act.

It is understood that the AHA was drafted in direct response by Aboriginal People to the impact of a prospector who was given approval to mine and sell sacred stones from the Weebo site, known as the Weebo Stones, in 1969. Weebo is within the GLSC representative body area and this event has come to define the GLSC commitment to protecting sites and places of significance and importance to Aboriginal people.

The GLSC holds the view that the AHA, being from a pre-native title and pre-racial discrimination legislation era, is fundamentally flawed and should be repealed and replaced by a statute which is consistent with the United Nations Declaration on the Rights on Indigenous People, the *Native Title Act 1993* (Cth), and the *Racial Discrimination Act 1975* (Cth). The GLSC recognises precedents in other states such as Victoria, South Australia and Queensland in relation to modernising their Heritage Acts through broad repeals.

The AHA should be based on the premise that traditional owners are recognised as an integral part of the decision-making process and the overriding purpose of the legislation should be the protection of Aboriginal sites for the benefit of Aboriginal people and not directed at processes that provide lawful damage to, and the destruction of, Aboriginal sites.

Any proposed amendments or new legislation should necessarily address and incorporate the following:

1) The principles in the UN Declaration of Rights of Indigenous People including:

    - Article 11, which provides that Indigenous peoples have the right to practice and revitalise their cultural traditions and customs, including the right to maintain and protect archaeological and historical sites and artefacts;

    - Article 12, which provides that Indigenous peoples have the right to maintain, protect, and have access in privacy to their religious and cultural sites, and the right to use and control their ceremonial objects;

    - Article 19, which provides that States should consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them; and

    - Article 31, which provides that Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions. This article also provides that States should, in conjunction with Indigenous people, take effective measures to recognize and protect the exercise of these rights.

2) All traditional owners (those who can show a connection to country) that may be affected should be guaranteed rigorous consultation, and a formal, if not a determinative decision making role in the process of determining any Aboriginal sites, protected areas and whether consent to affect those sites (e.g., damage, destroy, conceal or alter) should be recommended.

3) Applications to alter Aboriginal sites (e.g., destroy, damage, alter or conceal) are never or rarely rejected. For example, since June 2017, 35 applications have been decided and all have been consented to, with or without conditions by the Minister. This, together with the lack of requirements concerning consultation, is the reason for the "no means no rule" in some of the Heritage Protection Agreements negotiated between traditional owner groups and other parties. The Act provides an inadequate and biased appeals process that enables mining companies to seek a review of decisions but arguably not Aboriginal people.

4) In determining the existence of any Aboriginal sites, protected areas and whether consent to affect those sites should be granted, rigorous consultation with, and the consent of, all affected native title holders. This would be consistent with consultation requirements under the *Native Title Act 1993* (Cth). At a minimum, consultation should require meetings with affected native title holders, heritage surveys and a cultural heritage management plan.

5) All tenement and landholders should be required to resolve applications to damage, destroy, conceal or alter Aboriginal sites with the relevant native title holding group or recognised traditional owner groups where native title does not exist.

6) Make clear that all affected Aboriginal people have the ability to seek a review of decisions, rather than just the proponent, as is the case currently, including independent oversight of decisions through avenues to appeal to civil and administrative tribunals or the courts.

7) New definitions of interest holders that include: NTRB/SPs, Common Law Native Title Holders, Recognised Aboriginal Parties/Bodies, PBCs.

8) Recognition of cultural water flows as part of the legislation.

9) Invest local Aboriginal Wardens, with powers to stop works.

10) Recognition of custodial rights.

11) Promote co-management regimes.

12) Protocols for working within heritage areas and landscapes.

13) Values-based rather than objects and sites-based.

14) Include a broad definition of cultural heritage that includes protection for both tangible and intangible aspects of Aboriginal culture.

15) Provision for the reporting and return of Aboriginal human or ancestral remains, requiring institutions to report on collections of Aboriginal ancestral remains.

16) Decision-making powers are conferred on, and exercised by, Aboriginal people, particularly in regards to setting conditions for use of Aboriginal heritage places and granting of any permits.

17) Recognise and make provision for Aboriginal control over day to day functioning of the aspects of legislation which affect their interests in Aboriginal heritage.

18) Provision of automatic / blanket protection to areas and sites.

19) Separate processes for assessing significance and decisions concerning land use. An independent Aboriginal heritage body should determine whether a site is significant and should make recommendations or set conditions concerning its protection.

20) Any decisions that allow the impact upon Aboriginal heritage must have regard to the wishes of Aboriginal people, supported by compelling reasons of public interest beyond just a simple economic argument and taking the social and cultural effects into consideration and be subject to accountability.

21) Opinions of an independent Aboriginal heritage body should be binding on the Minister.

22) Not issuing permissions for development until a cultural heritage management plan (protocol, agreement, assessment) has been submitted. E.g. the Victorian Act mandates that heritage impacts of a development must be ascertained prior to obtaining a permit to proceed to work. Section 52 of that Act specifically prohibited third party approvers (such as local governments) from granting authorisation for a development activity requiring a cultural heritage management plan until that plan had been approved. This is a critical provision ensuring Aboriginal cultural heritage was thoroughly considered as a part of the development application process, rather than as an afterthought after works started.

The GLSC looks forward to future consultation and advice on the progress of the relevant legislation. Furthermore, we take this opportunity to thank the State government for considering the repeal of the AHA and implementing new legislation, which will protect Aboriginal heritage and allow Aboriginal people more input into the management of their heritage.

Should you have any questions regarding this matter, please do not hesitate to contact me on 90 911 661 or at hans.bokelund@glc.com.au

Yours sincerely,

Hans Bokelund
Chief Executive Officer