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RE: REVIEW OF THE *ABORIGINAL HERITAGE ACT 1972 (WA)* – CONSULTATION PAPER

INTRODUCTION

Nyamba Buru Yawuru (**NBY**) make 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.

Bugarrigarra shapes and gives meaning to the landscape and is maintained through the right to speak for and look after Yawuru Country. It continues in Yawuru cultural practice, relations and obligations. Connection to country is fundamental to having strong *liyan*, which relates to wellbeing and strong relationships. Yawuru law requires country, community and *liyan* to be maintained and protected.

The Rubibi determination that recognised Yawuru law was an 'epic struggle by Yawuru people to achieve recognition under Australian law of their traditional connection to, and ownership, of their country' that involved:

- 71 days of hearing;
- 7198 pages of transcript;
- 7 Federal Court judgements.[1]

The Yawuru PBC's comments and observations on the *Aboriginal Heritage Act* (**the AHA**) are inextricably linked to this epic struggle. Currently, the AHA operates in isolation from and in division with the *Native Title Act 1993* (Cth) (**the NTA**).The AHA needs to reflect the advancement of Aboriginal peoples' legal rights in the 46 years since the AHA was enacted.

The Yawuru PBC considers the review as an opportunity to unify the AHA with the NTA creating contemporary legislation that is culturally and socially sustainable. It is noted that comprehensive independent reviews of Aboriginal heritage legislation have been conducted previously. Of particular importance are the Evatt Report review of the *Aboriginal and Torres Strait Islander Heritage Act 1984* (Cth) conducted in 1996 and the Senior Report review of the AHA conducted in 1995.

The majority of the recommendations made in these reports have not been adopted and remain relevant today. In addition, any amendments to the AHA should be consistent with the minimum standards prescribed by International laws and regulations, including but not limited to the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**), which was endorsed by the Australian Government in April 2009.[2]

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[1] Rubibi Community v State of Western Australia (No.7) (2006) FCA 459 (159).

[2] Jenny Macklin MP Statement on the United Nations Declaration on the Rights of Indigenous People 3 April 2009. See http://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf

The UNDRIP identifies a number of rights of Indigenous people and obligations of States which are a minimum standard.[3]Free, Prior and Informed Consent (**FPIC**) is a specific right that is recognised in the UNDRIP that is of particular relevance. FPIC is not just a result of a process to obtain consent to a particular project; it is a process in itself, and one by which Indigenous peoples are able to conduct their own independent and collective discussions and decision-making.[4]

The following submission should be read in conjunction with the oral submissions made on the 7 May 2018 at the My Heritage, My Voice and Working with Our Aboriginal Heritage Workshop (**Heritage Workshop**) in Broome attended by Yawuru PBC representatives including the following points:

- That the AHA recognise and protect native title land;
- That there is increased consultation with PBCs, registered claimants and native title representative bodies in all evaluation processes;
- That a review of Protected Areas be undertaken;
- That there is increased resourcing for enforcement and monitoring of registered Aboriginal Sites;
- That the AHA be amended so that it is consistent with international laws and custom;
- That there be Aboriginal people in decision making roles;
- That a right to veto or establish No – Go Zones is established;
- That regionalised ACMC's be created;
- That there be an independent decision making body;
- That the Minister's power and role is reduced;
- That the AHA protect intangible cultural heritage;
- That the cultural landscape and intertwined environment values be acknowledged as Aboriginal cultural heritage;
- That the statute of limitations period is extended;
- That there are increased penalties for offences under the AHA;
- That compensation / reparation are made to Aboriginal community for offences under the AHA.

Yawuru also support the Kimberley Land Council's call for a complete overhaul of the Aboriginal Heritage Act.[5]

PURPOSE OF THE ACT

1. Is the long title an adequate description of what the amended Act should set out to do? If not, what changes should be made?

'An Act to make provision for the preservation on behalf of the community of places and objects customarily used by or traditional to the original inhabitants of Australia or their descendants, or associated therewith, and for other purposes incidental thereto.'

The purpose of the AHA should not be constrained within the long title and should be addressed separately. Currently, the long title unsatisfactorily delegates Aboriginal people to the periphery of Aboriginal heritage protection, this needs to be amended. The purpose of the AHA should at a minimum:

- Recognise Aboriginal peoples as key beneficiaries of the AHA;
- Empower traditional owners as protectors of their cultural heritage on behalf of Aboriginal people and all other peoples;

[3] Article 43 provides that the rights recognised in the Declaration "constitute the minimum standards for the survival, dignity and well-being of the Indigenous people of the world".
[4]United Nations Division for Inclusive Social Development Indigenous Peoples, 'Free, Prior and Informed Consent – An Indigenous Peoples Right and a Good Practice for Local Communities', 14 October 2016 http://www.fao.org/3/a-i6190e.pdf
[5] Kimberley Land Council, 'KLC Calls for Aboriginal Heritage Act Rewrite', Media Release, 29 May 2018.

- Harmonise the AHA with the NTA to ensure the primary right of native title holders to protect cultural heritage and ensure consistency across the two Acts; and
- 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.

These amendments would ensure that traditional owner's interests in particular native title holders in preserving their cultural heritage is appropriately weighed. As Senator Pat Dodson noted in his recent Native Title Opinion Piece 'pragmatism, efficiencies and procedures…should no longer be weighted in favour of third parties and to the detriment of native title holders'.[6]

ROLE OF ABORIGINAL PEOPLE

2. What do you think are they best ways to ensure the appropriate people are consulted about what Aboriginal heritage places should be protected, and how a proposal may impact those places?

The role of Aboriginal people in the AHA should not be limited to mere consultation. As noted above Aboriginal people have the right to participate in decision-making in matters which affect their rights, and States have the corresponding obligation to consult and cooperate in good faith with Aboriginal peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent.[7]

Harmonising the AHA with the NTA will ensure that the appropriate Aboriginal groups and people are consulted. The AHA should be structured and administrated in a tiered approach which prioritises native title interests. Specifically, the interests should be ordered as follows:

i) Determined native title holders;
ii) Registered native title claimants;
iii) Those traditional owners who have not initiated a native title claim;
iv) Any other Aboriginal people who can demonstrate relevant cultural knowledge in a particular area.

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. However the limitations of the NTA should not be imposed on the AHA. The status of native title within a determination area should not dictate the level of consultation with an Aboriginal group. For example, different levels of cultural heritage protection should not be afforded to areas of exclusive and non-exclusive native title; nor should the right of consultation be removed if native title rights have been extinguished.

The 'Registered Aboriginal Party' model, utilised by the *Aboriginal Heritage Act 2006* (VIC), is an example within Australia where Aboriginal cultural heritage legislation has successfully been aligned with the NTA.[8] In Victoria, traditional owners have been appointed as Registered Aboriginal Parties for specific geographical areas.[9] This model provides clarity for proponents by identifying the appropriate Aboriginal groups to consult with and gain consent from.

3. To what extent has the provision to appoint honorary wardens been effective and how can it be improved?

The role of Aboriginal people in managing and protecting their own cultural heritage should never be honorary. The role of Aboriginal people in enforcing the AHA is discussed further at question 15.

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6 Senator Patrick Dodson, 'Native Title Act Changes Challenged', Land Rights News Northern Edition February 2018, 7 March 2018, 20 – 21.

7 UNDRIP article 18 & 19.

8 Aboriginal Victoria, 'Aboriginal Heritage Act 2006 Information Sheet: Role of Registered Aboriginal Parties, See https://www.vic.gov.au/aboriginalvictoria/heritage/registered-aboriginal-parties.html

9 Ibid.

4. Are the roles and functions assigned under the Act sufficiently clear and comprehensive to fulfil the objectives of the legislation to preserve Aboriginal heritage places and objects? If not, what changes in roles and functions would you suggest?

Role of the ACMC

The ACMC is comprised of 7 people who meet 11 times a year, and are also responsible for dealing with evaluating Aboriginal Site applications as well as section 16 and 18 applications. There have been reports about the ACMC's lack of capacity and failure to undertake their due diligence obligations. For example, in 2012, The Yamataji Marlpa Aboriginal Corporation (**YMAC**), the Native Title Representative Body for the Pilbara and Geraldton, noted that the ACMC had considered at least 13 section 18 applications and over 4,200 pages of evidence, in just over an hour.[10] YMAC reported that a large portion of those section 18 approvals were recommended without any conditions.[11]

More recently, in 2016, Greens MLC Robin Chapple identified that the ACMC had an unmanageable workload.[12] Mr Chapple told ABC Local Radio that around 15,800 sites were awaiting assessment.[13] It was estimated that the ACMC would take 80 years to undertake the assessments.[14] A Department spokesman confirmed the backlog and estimated 80- year timeframe to the ABC.[15] It is clear that the ACMC, as it currently operates, is not resourced sufficiently to fulfil its role under the AHA. The ACMC's systemic deficiencies have accelerated Aboriginal cultural heritage loss within the State.

The ACMC composition needs to be altered to ensure independence and integrity. The AHA should require the ACMC to be a separate, independent decision making body that is primarily comprised of Aboriginal people. There should be increased transparency for decisions made by the ACMC. These changes would ensure that decision making is consistent, unbiased and given appropriate consideration. Additionally, the Department should consider creating, and adequately resourcing, regional ACMC's in order to reduce the untenable workload that is delegated to the existing ACMC.

Role of the Minister for Aboriginal Affairs

The role of the Minister for Aboriginal Affairs should be reduced and the decision-making role of traditional owners/native title holders elevated in a corresponding way. The Minister should only become involved if the decision of the ACMC is appealed. This will diminish the potential for decisions being circumvented by political or economic pressures. The Minister should also be accountable for decisions made, as such, all decisions and reasoning should be transparent.

The Northern Territory Aboriginal Sacred Sites Act 1989 (NT) has already delegated decision making power to the equivalent body of the ACMC, the Aboriginal Areas Protection Authority (AAPA), in the Northern Territory. The AAPA evaluates an application and makes a decision to grant authority to carry out works proposed by a proponent on the basis of whether 'the work…could proceed… without there being substantive risk of damage or interference with a sacred site.'[16] Adopting a similar provision in the AHA will help the State become compliant with international human rights law.

Role of the Registrar of Aboriginal Sites

The Act specifies that the Registrar must maintain a Register of:

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[10] Yamataji Marlpa Aboriginal Corporation, 'Submission to the review of the Aboriginal Heritage Act 1972', 26 June 2012, 4.
[11] Ibid.
[12] Rebecca Curtin, Sam Tomlin 'Eighty – year backlog in Aboriginal Heritage Assessments Across Western Australia, ABC (online) 26 July 2016.
[13] Ibid.
[14] Above n12.
[15] Above n12.
[16] NTSAA s.22(1)(a))

- All protected areas;
- All Aboriginal cultural material; and
- All other places and objects to which the Act applies

The State should not represent that the Registrar maintains a definitive list of Aboriginal cultural heritage within the State as the DPLH website infers.[17] The AHA and the DPLH website need to recognise that the Register does not maintain a Register of all Aboriginal cultural material and that it is an incomplete recording of Aboriginal cultural heritage in the State. The statement will reinforce the need for proponents to consult with the appropriate Aboriginal peoples about areas and sites that have been not been disclosed to DPLH for cultural or other reasons.

ABORIGINAL SITES

5. Does section 5 adequately describe the sorts of places or sites that should be protected under the amended Act? If not, how can it be improved?

Currently, the AHA views Aboriginal sites through a standardised western lens that focuses on physical manifestations of cultural heritage. Yawuru views Aboriginal cultural heritage holistically.

> *'All Yawuru country is significant as described in the following Yawuru Cultural Management Plan Walyjala-jala buru jayida jarringgun buru Nyamba Buru Yawuru ngan-ga mirlmirli (YCMP) excerpts:*
>
> *From Bugarrigarra, our country is imbued with a life-force from which all living things arise. Within the country our rayi (spirits) and our ancestors live. It is from the country that our people, our language, our stories and our Law arise.*
>
> *Buru means much more than the physical land to which Yawuru belong. Buru is a physical expression of Bugarrigarra, in which the features of Yawuru country were formed long ago.*
>
> *These features are not just surface phenomena, such as hills, trees, animals, creeks, marsh, sand dunes and bays. They include subterranean features and their behaviour, for example groundwater and its flow, or rock formations and associated activity such as earth tremors, and the sea–land interface.'*

As a result of these foundations, the Yawuru Community considers all of Yawuru Country to be a 'significant site' as it is part of their living cultural landscape. Yawuru is cognisant of the fact that it is not practical to register all of Yawuru Country as a Site or expand the definition of a Site so broadly that this could occur. However, environmental values are often inseparable components of Yawuru cultural heritage and greater protection must be afforded to those significant cultural and environmental sites.

For example, the majority of jila (living waters) or springs located on Yawuru Country are thought to be inhibited by various jurru (metaphysical serpents), which are powerful beings and are to be respected and approached in prescribed ways.[18] Yawuru's living waters are physical evidence of the continuity of the Bugarrigarra in the present, and under Yawuru law it is Yawuru's responsibility to look after these sites.

The Yawuru Indigenous Protected Area (Yawuru IPA) that was declared last year warrants a similar level of protection. The Yawuru IPA represents both a symbolic and practical way of recognising Yawuru's commitment to care for all those inseparable cultural and natural values on Yawuru Country. The AHA definition of an Aboriginal Site should be expanded to allow for dedicated IPAs to be registered. Furthermore, those areas within an IPA that have the highest cultural value should be registered as a Protected Area under the AHA.

[17] Department of Planning, Lands and Heritage, Sites, https://www.daa.wa.gov.au/heritage/aboriginal-heritage/sites/

[18] Yawuru RNTBC, Yawuru Indigenous Protected Area: walyjalajala nagulagabu birragun buru, Plan of Management 2016 – 2026, 2017, 59.

Section 5 of the AHA should be expanded to reflect a contemporary understanding of cultural heritage. It is no longer acceptable to focus purely on physical manifestations of Aboriginal cultural heritage. Intangible Aboriginal cultural heritage must be acknowledged in the AHA. The United Nations Educational, Scientific and Cultural Organisation's (**UNESCO**) 2003 Convention for the Safeguarding of Intangible Cultural Heritage defines 'intangible cultural heritage' as:[19]

> *'the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognise as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity...'*

Intangible cultural heritage, as defined above, is manifested inter alia in the following domains:[20]

i) Oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
ii) Performing arts;
iii) Social practices, rituals and festive events;
iv) Knowledge and practices concerning nature and the universe;
v) Traditional craftsmanship.

The protection of intangible Aboriginal cultural heritage has been legislated in Victoria. Once Aboriginal intangible heritage is registered under the *Aboriginal Heritage Act 2006* (VIC) anyone who wants to use intangible heritage for commercial purposes has a legal responsibility to seek permission from the traditional owners, and enter into an Aboriginal intangible heritage agreement.[21] Similar protections should be legislated to safeguard Aboriginal peoples' intangible cultural heritage in Western Australia.

ABORIGINAL OBJECTS

6. Do section 6 Part VI adequately describe the sorts of objects that should be protected under the amended Act? If not, how can they be improved?

The AHA should be expanded to include collections held by Museums. Moreover, the AHA should ensure that objects of sacred, ritual or ceremonial significance in possession of Museums are displayed in a manner that is consistent with relevant Aboriginal laws and customs and such objects should be repatriated to the relevant Aboriginal groups if possible in appropriate circumstances.

PROTECTED AREAS

7. Is the declaration of a Protected Area under the Act the best way to deal with Aboriginal sites of outstanding importance?

Department of Planning, Lands and Heritage (DPLH) representatives at the Heritage Workshop reported that no Protected Areas have been declared since the 1980s. The absence of recent declarations is not evidence that all Aboriginal Sites of outstanding importance have been identified. On the contrary, it demonstrates that the Protected Areas provision under the AHA has not been effectively utilised to protect Aboriginal sites of outstanding importance. It is noted that other interest holders, including but not limited to other governmental departments, have opposed the declaration of Aboriginal Sites as Protected Areas. The AHA should be amended

[19] United Nations Educational, Scientific and Cultural Organisation, 'Convention for the Safeguarding of Intangible Cultural Heritage', 17 October 2003, Article 2.1, https://ich.unesco.org/en/convention
[20] Ibid, Article 2.2.
[21] Aboriginal Victoria, Aboriginal Intangible Heritage in Victoria, https://www.vic.gov.au/aboriginalvictoria/heritage/aboriginal-intangible-heritage-in-victoria.html

to ensure that Protected Areas are evaluated purely on their merits. The process should be independent of political and economic coercion.

As discussed above, at a minimum, areas identified as having significant cultural and environmental value in dedicated IPAs should be declared as Protected Areas under the AHA. The dedication of IPAs is recognition that land is central to the cultural identity of Aboriginal and Torres Strait Islander peoples. Declared IPAs emphasise the Commonwealth Governments and Indigenous Land Corporations commitment to assist Indigenous people acquire and manage land of cultural and environmental significance and protect and maintain the cultural and environmental values of land. It is requested that the State also make a commitment to protect and maintain cultural and environmental values of declared IPAs by endorsing their declaration as Protected Areas under the AHA.

ABORIGINAL ANCESTRAL (SKELETAL) REMAINS

8. Should the Act provide the management of Aboriginal Ancestral (Skeletal) Remains? If so, what needs to be considered?

The proper acknowledgement and care of deceased ancestors and Aboriginal Ancestral Remains is an important part of Aboriginal culture. The AHA should include specific provisions that cover the discovery and management of Aboriginal Ancestral Remains as determined by the relevant traditional owners/native title holders.

PROTECTION AND ENFORCEMENT

9. What sort of activities that may affect Aboriginal site should require consent or authorisation?

For Yawuru, the most important cultural protocol is '*Show Respect and Ask First'*. There are some areas that are culturally sensitive or secret so it is not appropriate for any physical presence or activity even those categorised as 'low ground disturbance'. The Yawuru Cultural Management Plan explains:

> *'This ensures that Yawuru people and strangers visiting Yawuru country are protected from the power of spirit beings who can cause catastrophic events such as cyclones, death and destruction, but also create life.*
>
> *Showing respect to elders, culture and country, and asking permission to enter certain parts of country or to use the resources of country, are the most important ways of managing the power of our country.*
>
> *Following our protocols ensures that we are able to protect culturally sensitive areas which can only be accessed by authorised people.'*

It is culturally offensive and paternalistic for the Government or proponents to purport to have the requisite knowledge to assess whether or not Yawuru cultural heritage will be impacted on pre-conceived notions about what types of activities can impact Aboriginal cultural heritage. All activities that may affect Aboriginal cultural heritage should require in the first instance notification and proper consultation. It is through this consultation process that the traditional owner group concerned will assess whether a particular activity should require consent or authorisation utilising for example a Work Programme Clearance methodology – see below.

10. What should be the criteria against which to evaluate an activity that may affect a site (e.g a proposal to use or develop land)?

The Yawuru Registered Native Title Body use the Work Programme Clearance (**WPC**) methodology developed for Aboriginal heritage protection by legal and anthropological staff of the Pitjantjatjara Council in the early 1980s.

It was subsequently used and adopted by the Kimberley Land Council and is now standard practice throughout the Kimberley and elsewhere in Australia particularly northern Australia.

WPC requires the proponent of a development to identify:

- The location of the development activity;
- The precise nature of the development; and
- Any likely effects of the development activity.

The impact of the activity on Aboriginal cultural heritage is then assessed by the Yawuru survey team and the proposed activity is then certified as 'cleared', "cleared with conditions' or 'not cleared'. No sensitive cultural information is revealed in this methodology.

11. How can 'impact' arising from proposals for land use on sacred sites that do not have a physical cultural heritage element be assessed?

The above mentioned methodology does not discriminate or favour one form of Aboriginal cultural heritage. Traditional owners hold the requisite knowledge about intangible cultural heritage and are therefore uniquely positioned to assess the impact arising from proposals.

12. Who should provide consent or authorisation for proposals that will affect Aboriginal Sites?

As discussed above, Yawuru operates under the WPC methodology, which assesses the impact of the activity on Aboriginal cultural heritage and determines if the proposed activity is 'cleared', "cleared with conditions' or 'not cleared'. Currently, this methodology operates concurrently, and in separation, to the AHA. Therefore, proponents have to seek consent and authorisation from both Yawuru and under the AHA before a proposed activity can commence.

Proponents are often confused about their obligations under the AHA and view the legislative requirements as burdensome when they have already acquired consent. To add to the confusion in some cases the "knowledge holders" for a registered Aboriginal site may not necessarily be the traditional owners or native title holders of the area upon which the site lies. To address this issue consent and authorisation for any proposal that will affect Aboriginal Sites must always be provided by the appropriate traditional owner group, for example the PBC representing the native title holders and this process should be a "one stop shop".

This proposal would align procedural rights under the AHA with rights under the NTA's future act regime. Under the AHA in the absence of an agreement between the parties the decision could then be appealed to the ACMC for further deliberation and decision, independently assessing the reasonableness of the traditional owners' preliminary decision.

13. To what extent is the current section 18 application process effective and how can it be improved?

The section 18 process disempowers and marginalises the rights of traditional owners.

As of 2002, 957 applications had been assessed by the ACMC since the AHA was implemented in 1972.[22] Of those 957, 702 were recommended for approval.[23] However, the Minister refused zero.[24] During 2008 – 2013, a further 646 applications were made.[25] Of those 646, only one was refused by the Minister.[26] The incapacity of the ACMC to evaluate sites and applications has already been documented above. The increased number of applications made during the 2008 – 2013 period indicates the ACMC continues to be overburdened.

[22] Maddison Barnsby, 'The Effectiveness of the Aboriginal Heritage Act 1972', A Parliamentary Internship Report Prepared for the Hon Robin Chapple MLC, December 2013
[23] Ibid.
[24] Above n20.
[25] Above n20.
[26] Above n20.

It also affirms that Minister does not follow the recommendations of the ACMC, and therefore, does not make decisions that favour Aboriginal people or Aboriginal cultural heritage. As suggested above, traditional owners/native title holders should provide consent or authorisation for proposals that will affect Aboriginal Sites, this should include approving or rejecting section 18 applications. The State should allocate sufficient resources to enable traditional owners/native title holders to carry out these functions.

The appeals process is inherently unfair to Aboriginal people and needs amendment. Only the applicant can appeal a decision by the Minister. Aboriginal people have no avenue to appeal the destruction of their cultural heritage. Moreover, the AHA fails to recognise native title holders and traditional owners' rights in land. Conversely, the AHA elevates the holder of mining interest to 'landowner' status. Clearly, this process is discriminatory and needs to be remedied.

14. What provisions could be included in an amended Act to ensure the long-term protection of Aboriginal sites where alternative statutory arrangements do not apply?

The *Heritage of Western Australia Act 1990* is incorporated into the *Planning and Development Act 2005* (WA).[27] Consequently, State heritage protection is integrated in the Western Australian planning system. Unsatisfactorily, the AHA is not mentioned in the *Planning and Development Act 2005* (WA) and is therefore less integrated into the States planning system.[28]

Aboriginal cultural heritage is generally not listed on local government municipal inventories of heritage.[29] The inequalities between the *Heritage of Western Australia 1990* (WA) and the AHA need to be addressed. The inclusion of additional provisions in the amended AHA is not sufficient. Alternative statutory arrangements need to be pursued to ensure that Aboriginal cultural heritage is managed and protected equitably.

PENALTIES

15. Are the enforcement provisions under the Act adequate to protect sites? If not, how can they be improved?

The limited number of prosecutions demonstrates that enforcement provisions under the Act are not adequate. The Honourable Wayne Martin, Chief Justice of Western Australia in an address to the National Environmental Law Association WA State Conference noted in 2011 that:[30]

> *'It seems inevitable that many of those places (protected by the AHA) are being degraded in contravention of the Act without anyone's knowledge. It is very difficult to obtain reliable data on the number of prosecutions that have been brought for contravention of the AHA... This suggests to me that prosecution and punishment is not likely to be a particularly effective way of protecting Aboriginal heritage.'*

At the time of the Honourable Wayne Martin address only 6 prosecutions had been laid since the Act came into force in 1972.[31]

It is evident that practical problems confront enforcement in remote regions of Western Australia, such as the Kimberley. Therefore, enforcement powers should be delegated to regional authorities and organisations. For example, Yawuru Cultural Monitors are already engaged to assess potential impact on Aboriginal cultural heritage by proposed developments on Yawuru Country.

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[27] Todd Jones, 'Separate but unequal: the sad fate of Aboriginal heritage in Western Australia, The Conservation (online), 7 December 2015. https://theconversation.com/separate-but-unequal-the-sad-fate-of-aboriginal-heritage-in-western-australia-51561

[28] Ibid.

[29] Above n14.

[30] Honourable Wayne Martin, Chief Justice of Western Australia, 'The Role of Courts in Protecting the Environment' (Paper presented at the National Environmental Law Association WA State Conference, 23 September 2011).

[31] Ibid.

The AHA should support traditional owners through their representative entities, such as the Prescribed Bodies Corporates, to receive training to become inspectors under the AHA with relevant enforcement powers. Moreover, ongoing resources to sustain regular inspections should be provided by the State. This would empower traditional owner groups to be the guardians of their own cultural heritage as well as provide a way to monitor compliance of the AHA. The AHA could go further and provide resources for traditional owners to create Cultural Heritage Management Plans.

Additionally, the Act should stipulate and increase the limitation period for when a prosecution for an offence must commence. The 12 months provided under the *Criminal Procedure Act 2004* (WA) is not sufficient and was noted as a hindrance to successful enforcement and prosecution by DPLH representatives when they visited the Nyamba Buru Yawuru office in late 2017.

16. Are the current penalties under the Act adequate? If not, how can they be improved?

The penalties for destroying, damaging, concealing or altering Aboriginal sites or objects are inequitable and therefore unacceptable. Similar offences under the Heritage of Western Australia Act 1990 carry a maximum penalty of $1,000,000 and a daily penalty of $50,000.[32] These penalties are juxtaposed with those under the Act where the maximum fine is $100,000 for a subsequent offence by a body corporate.[33]

An individual who commits their first offence is $20,000.[34] Penalties should be standardised across the States heritage protection Acts. The systemic discrimination against Aboriginal cultural heritage needs to be dismantled. Moreover, precedents need to be set for prosecutions of breaches otherwise the penalty provisions of the Act will not serve as effective deterrents.

SITE ASSESSMENT AND REGISTRATION

17. Should a defence continue to be provided where the disclosure of information (section 15) is against customary laws/protocols?

The inference that the Department is prepared to remove this defence is extremely offensive and demonstrates a lack of understanding about Aboriginal cultural heritage protection. Compelling Aboriginal people to disclose information about Aboriginal cultural heritage which would breach their obligations under customary laws and protocols would be damaging to the very Aboriginal heritage values that the AHA is purporting to protect. The removal of this defence would result in Aboriginal people facing prosecution under the AHA, which is extremely counterproductive.

Irrespective of whether disclosure is against traditional laws and customs, Aboriginal people are naturally wary about providing sensitive cultural information. Currently, there is nothing in the Act to restrict or prevent the distribution of Aboriginal cultural information to a wide range of Government bodies or other interest holders. This should be the focus of amendment within the Act.

18. Are the criteria for assessing the significance of sites under section 39(2) and (3) adequate to evaluate whether a site should be added to the Register? If not, what should the criteria be to assess the significance of a site?

As discussed above, there are significant problems associated with the capacity of ACMC. Adequate resourcing and delegation of roles should allow for the efficient and effective evaluation of a Site.

THE REGISTER

19. What should be the steps to report, nominate, assess, enter, amend or remove an entry from the Register?

The Act should transition away from relying on persons named as informants on the Registrar to provide information about Aboriginal cultural heritage. Registration of an Aboriginal Site should only proceed if it has

[32] Above n14.
[33] Aboriginal Heritage Act 1972 (WA) s57(b)(ii).
[34] Aboriginal Heritage Act s57(a)(i).

received consent from the relevant traditional owner/native title group. The reallocation of roles under the Act should allow the ACMC to adequately assess each Site application. An Aboriginal Site should not be removed from the Register unless consent has been provided from the relevant traditional owner/native title group.

End.