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Review of the Aboriginal Heritage Act 1972 (WA)

To whom it may concern,

I am writing to express my thoughts regarding the current review of the *Aboriginal Heritage Act 1972* (WA). The proposed review of the AHA is a welcome initiative, and I am particularly appreciative of the process of consultation and the open engagement with Aboriginal groups, heritage practitioners and industry.

To provide some context, Snappy Gum Heritage Services Pty Ltd (SGH) is a heritage consultancy that has been operating for seven years. We are a small team of professional archaeologists and anthropologists who regularly undertaken heritage surveys across WA, engaging with native title groups and a broad range of developers. My comments herein come from an 'on-the-ground' perspective.

Snappy Gum Heritage Services Pty Ltd advocates the design of new legislation, rather than another series of amendments. The current *Aboriginal Heritage Act 1972* (AHA) was implemented in an environment a long distance from where we stand now. There have been numerous formal and informal attempts by the Department of Planning, Lands and Heritage or its forerunners to make a 'square peg fit into a round hole.'

Since 1972, the Aboriginal heritage landscape has changed markedly:

- *Native Title Act 1993* has been implemented and incorporated into general practice;
- Native title groups are increasingly becoming determined under native title and self-managed;
- Native title groups regularly engage in dialogue with the mining industry and the broader community;
- The nature of the heritage industry has changed in terms of what is considered a heritage site (which is not the same as that determined by the Aboriginal Cultural Material Committee – ACMC under Section 5 of the AHA);
- The amount of heritage investigations that take place on a daily basis has no-doubt exceeded any expectations held at the time the AHA was implemented; and
- The number of heritage places recorded and the rate of applications for a notice under Section 18 of the AHA has likewise exceeded all expectations; and
- Research practices on heritage sites has also changed, using a set of new technologies that were not imagined in the 1970s. This research is only now starting to be communicated to the broader public using a variety of media.

It is now time to adopt new legislation to herald a new era in heritage management.

What do we need?

There are numerous principles which I would like to see adopted into new Aboriginal Heritage legislation. Most of these are discussed in brief in the following pages, but there are five issues which Snappy Gum Heritage Services Pty Ltd consider particular concerns from our experience.

Consistency with the universal legislation.

SGH are of the belief that any new AHA should adhere to the principles outlined in the United Nation's 2007 'Declaration on the rights of Indigenous Peoples'. This discusses among other things:

- The recognition of colonisation in preventing indigenous peoples from exercising agency to develop in accordance with their own needs/interests;
- Encouraging co-operation and consultation between State and indigenous peoples;
- Allowing indigenous peoples, the right to self-determination; and
- The recognition that respect for traditional culture, knowledge and traditional practices contributes to sustainable and equitable management of the environment.

A newly drafted Act should also consider the 2013 'Burra Charter'. This discusses among other things:

- The incorporation of aesthetic, historical, scientific, social and spiritual values into cultural significance assessments. Cultural significance is also empowered within places: within their fabric, setting, use, associations, meanings, records, related places and related objects. While this is nominally represented in Section 39(2) of the AHA, this is not recognized elsewhere in the legislation. At a minimum, the definition of what constitutes an Aboriginal Site needs to be updated to accommodate them;
- Understanding the cultural significance of a place before developing a management plan; and
- The in-situ preservation of contents, fixtures and objects that contribute to the cultural significance of a place.

More clarity about what constitutes an Aboriginal Site.

One of the issues that plagues us on a regular basis is the lack of clarity about what is considered an Aboriginal Site under Section 5 and what is to be protected. As heritage consultants, we operate in the middle between the traditional owners and developers.

Our decisions impact on both parties: we run the risk of destroying a place the traditional owners see as important or we run the risk of protecting unnecessary areas that have time and cost-implications for the proponent. We have heard complaints in the past from proponents who had to protect areas that were later dismissed by the ACMC as 'Not a Site.' Conversely, it is a regular but difficult discussion between archaeologists and traditional owners, where the archaeologist is required to say "I don't think this will pass as a site under the ACMC." This vagueness and ambiguity does not add confidence to the overall heritage process.

Some consultants advocate having the ACMC removed from the decision process and focus on the Section 18 applications instead. SGH support this notion but would suggest that heritage consultants who are members of a professional body such as the Australian Association of Consulting Archaeologists Inc. (ACAAI), be licensed to operate and make on-the-ground decisions about what is considered a heritage place worthy of protection. Instead, professional people can make arguments under Section 39 about the relevant values in any given area.

Changes to the Section 18 process.

SGH see problems with the Section 18 process. The main concern is the lack of openness, particularly towards Aboriginal people. Currently, Aboriginal people are consulted at the start of the process but have little to no input thereafter. While the Department of Planning, Lands and Heritage (DLPH) do check to ensure the work has been approved under the fair practices principle, the final decision about whether a place is considered an 'Aboriginal Site' is generally not conveyed to either the heritage practitioner or the native title group.

Even a standard Section 18 Notice limits its information only to those places that are considered Aboriginal Sites. Places *not* considered Aboriginal Sites are not listed, which creates difficulties about open engagement in the field while undertaking mitigation practices. There have been many occasions where SGH archaeologists have had to salvage artefactual material from an area subject to a Section 18 Notice. As some of the unlisted heritage places were not considered Aboriginal Sites under the Act, SGH had to talk to the proponent to ensure they were not inadvertently damaging heritage sites.

Of greater concern is that only landowners have a right of refusal under Section 18(5) of the AHA: there is no such right for a native title representative body. This should be remedied as a matter of fair work practice.

In addition to the above, there is no time limit on a Section 18 Notice: once received, it is currently held in perpetuity. This also needs to change as the sites' values change – whether they are cultural, scientific or spiritual.

Increased onus on mitigation, heritage interpretation and public education

There is currently no legislated approach to mitigating heritage values after an object or place has been disturbed, beyond seemingly *ad hoc* references in Conditions of Consent listed in a Section 18 notice. For the most part, mitigation practices are usually either archaeological excavation or artefact salvage. Specialist mitigation practices are undertaken as negotiated between the proponent and the native title group.

At SGH, we think there should be some legislated onus on a proponent to provide information back to the wider community to mitigate against any impacted values. Books, such as the *Kakutungutanta to Warrie Outcamp: 40,000 years in Nyiyaparli country book* written by The Nyiyaparli Community with Caroline Bird and Edward McDonald, can help in the long run by educating the general public. Similarly, heritage interpretation signage or other media can inform local communities about a place or object. At BHPBIO's Warrawandu Village near Newman, SGH implemented the *Warrawandu Walking Trail* which informed local miners about Nyiyaparli culture. SGH think that projects such as these two examples increase public awareness and understanding about Aboriginal heritage, with a long-term aim of

increasing overall public appreciation about the importance of heritage to Western Australia. Again, these sort of activities are usually undertaken as part of an agreement between the proponent and the native title group.

Specialist mitigation works or heritage interpretation projects are currently negotiated between the developer and the native title group. SGH are of the view that these should be legislated as part of the Section 18 process. While the end result is the same, there is a difference. Without legislation, the proponent is placed in a position of benefactor; with legislation, there is a requirement. The distinction is important during the negotiation process.

In conclusion

Snappy Gum Heritage Services Pty Ltd advocates the need for the drafting of a new Aboriginal Heritage Act. The current Act was legislated in an environment where Aboriginal heritage management was in its infancy. It has since been subject to minor amendments and informal regulations to keep it nominally up-to-date.

We welcome the opportunity to participate in this discussion and praise the Minister for Aboriginal Affairs for his open consultation and inquiry. To this end, we at SGH have raised four issues of the most concern to us being:

- Consistency with the universal legislation such as the United Nations 2007 Declaration on the Rights of Indigenous Peoples and the ICOMOS 2013 Burra Charter;
- More clarity about what constitutes an Aboriginal Site;
- Changes to the Section 18 process; and
- Increased onus on mitigation, heritage interpretation and public education.

It is hoped that these measures will ensure that Aboriginal people feel less alienated in the management of their own cultural identity. This will also empower communities to be more active within heritage interpretation and will result in better practices within Western Australia.

We wish you the best of luck in your changes to the *Aboriginal Heritage Act 1972* or the drafting of a new one. It is not an enviable task and wish you all the best in your endeavours.

Yours sincerely,

Ryan Hovingh

Managing Director