National Native Title Tribunal

Submission of the National Native Title Tribunal

Review of the Aboriginal Heritage Act 1972

1. This submission is made in response to the invitation of the Director General, Department of Planning, Lands and Heritage to 'share (your) views on the proposals' contained in the March 2019 Discussion Paper. The invitation was extended to the Hon. John Dowsett AM, President, National Native Title Tribunal, by letter dated 11 March 2019.

2. The interest of the National Native Title Tribunal ('the Tribunal') in the 'Proposals for new legislation to recognise, protect and celebrate Western Australia's Aboriginal Heritage' is in whether any proposal might have a bearing on current practice in matters before the Tribunal.

3. The particular matters are those where the operation of 'heritage legislation' is relevant, specifically, the right to negotiate process, including the expedited procedure, and possibly matters the subject of Indigenous Land Use Agreements being mediated or facilitated by the Tribunal, or are subject to registration testing by the Tribunal.

4. The operation and effectiveness of 'heritage legislation' may be relevant to criteria described in s39 (criteria for making arbitral body determinations) and s237 (criteria relevant to the application of the expedited procedure) of the *Native Title Act* (Cth) *1993* (NTA).

5. As for the potential for proposals to have broader consequences for the native title system, the Tribunal makes no comment but would expect the Commonwealth government to address.

6. This submission provides some general information relevant to the matters referred to above, and presents 'by proposal' views which may be of assistance as further consideration is given to the proposals. The Tribunal is available to provide further written material should it be requested.

The Expedited Procedure

7. The 'right to negotiate' is a process under the *Native Title Act* that must be followed to ensure certain future acts are validly done, insofar as they affect native title. The right to negotiate applies to the grant of exploration and mining tenements

(including oil and gas interests) and some compulsory acquisitions, unless the 'expedited procedure' or fast-tracking process applies.

8. The expedited procedure is a fast-tracking process for the grant of some tenements that are seen to have a lesser impact on native title. If the government party (the State of Western Australia) believes the grant of a tenement invites the expedited procedure, this is stated in the notice of intention to do a future act ('section 29 notice') and, if unchallenged or not successfully challenged, the right to negotiate will not apply.

9. A registered native title claimant or registered native title body corporate ('a native title party') can object, based on the criteria in s237 NTA, to the grant of a tenement being fast-tracked once they receive a section 29 notice which asserts that the proposed act attracts the expedited procedure.

10. Once an objection is lodged and accepted, the Tribunal will commence the inquiry process to determine whether the expedited procedure should apply to the tenement. If the parties inform the Tribunal that there is a high likelihood that the objection will be resolved by agreement within a reasonably short timeframe, the Tribunal will allow time for an agreed outcome to be pursued. If the inquiry proceeds, the Tribunal will set directions. These directions require each party to provide submissions and evidence about whether the expedited procedure should apply to the tenement.

11. Once the parties have had the opportunity to provide submissions, the Tribunal will make a determination about whether the expedited procedure applies. In making its determination, the Tribunal will consider the criteria described in s237 NTA, that is, whether the grant of the tenement is likely to:
    - interfere directly with the community or social activities of the native title holders or claimants
    - interfere with areas or sites of particular significance to the native title holders or claimants
    - involve, or create rights whose exercise is likely to involve, major disturbance to land or waters.

12. Upon request the Tribunal can provide mediation assistance to parties seeking to reach agreement in the expedited procedure (s150 NTA).

13. In the calendar year 2018, the State of Western Australia published 2613 notices asserting the expedited procedure, in respect of which 1035 objections were lodged. Each objection lodged with the Tribunal is subject to payment of a fee. The objection is often lodged by the relevant Native Title Representative Body ('NTRB') on behalf

of the native title party, or by a legal representative. Applicants who are assisted by an NTRB are exempt from payment of the fee. In other cases, the fee is often waived due to the impecunious circumstances of the applicant. Objection applications are considered for acceptance and, if accepted, are case managed through the inquiry process.

14. A native title party may base its objection on any or all of the s237 criteria. In almost every case the principal basis of objection concerns the possible interference with areas or sites of particular significance to the native title holders. It is the understanding of the Tribunal that in the matters where agreement is reached, the main subject of the negotiated agreement concerns the recognition and protection of cultural heritage.

15. The Tribunal has on many occasions considered whether the protective provisions of the *Aboriginal Heritage Act* 1972 (WA) and associated procedures were sufficient to ensure that it is unlikely (in the sense of there being no real risk) of sites in the tenement application area being interfered with. The Tribunal has often but not necessarily always held this to be the case. Where the evidence establishes the existence of sites of particular significance on the tenement whose location is known to the native title party but not to other people, consultation with the native title party will generally be necessary to avoid damage to such sites. Although the Tribunal has generally accepted that, in the absence of evidence to the contrary, a grantee party will obey the law, applying what is known as the 'presumption of regularity', the existence of sites of particular significance to native title holders whose precise location is unknown to others has often resulted in a finding that there is a real risk of interference with those sites.

16. Accordingly, the extent to which the Tribunal has regard to and places weight upon the effectiveness of the (current) protective regime in deciding whether the expedited procedure applies to a particular proposal will depend on the particular facts.

The right to negotiate

17. The right to negotiate gives native title parties a chance to discuss the effect of the proposed future act with the proponent and the relevant State or Territory government, with the aim of reaching agreement about the act.

18. Any party to these negotiations may ask the Tribunal to provide mediation assistance (s31(3) NTA) to assist them in obtaining an agreement to the grant (s31(1)(b)). While commercial arrangements are a significant focus of negotiations, heritage protection, whether in relation to specific sites or in the form of broader heritage protection arrangements, feature regularly in such mediations.

19. A future act determination is a decision made by the Tribunal about whether a future act, attracting the right to negotiate may be done, subject to conditions, or must not be done.

20. When an application for a future act determination is made, the Tribunal will conduct an inquiry into the future act. The Tribunal must take into account the criteria set out in s 39 of the *Native Title Act*. The parties are asked to provide evidence and make submissions on those matters.

21. A key criterion is found in Section 39(1)(a)(v) which requires the Tribunal to take into account the effect of the doing of the act on any area or site, on the land or waters concerned, of particular significance to the native title parties in accordance with their traditions. The Tribunal accepts that the meaning of the expression 'particular significance' as found by Carr J in *Cheinmora v Striker Resources NL* (1996) 142 ALR 21 in relation to s237(b) also applies to the term as it appears in s39(1)(a)(v).

22. Accordingly, not dissimilar to the expedited procedure, the Tribunal is often required to consider the protective provisions of the *Aboriginal Heritage Act* 1972 (WA) and associated procedures in relation to the facts of a particular matter.

Proposal 2: Update definitions and scope of new Aboriginal heritage legislation

23. The proposal to adopt a new definition of "place" to align with the Australia ICOMOS Burra Charter definition of place that includes tangible and intangible dimensions has the potential to better link (with obvious advantages) with concepts of, and jurisprudence around, sites of particular significance as referred to in s237(b) and s39(1)(a)(v) NTA.

Proposal 3(A): Local Aboriginal Heritage Services

24. This proposal seems to stem from the requirement under the NTA for native title holders to establish a Registered Native Title Body Corporate (RNTBC) to manage their determined native title rights and interests leading to a growing number of locally constituted Aboriginal bodies with the representation and skills to take on a role in heritage management. The proposal is for these bodies to possibly fulfil the role of Local Aboriginal Heritage Services (LAHS). In many cases this already happens.

25. An identified function of a LAHS would be to make agreements regarding Aboriginal heritage management and land use proposals in their geographic area of

responsibility. Clarification regarding the reach of this proposal would be helpful. If it is proposed that an LAHS will have a role in relation to existing 'future act' agreements, such as those negotiated by a registered native title claimant/s in the right to negotiate process (s31 agreements or State deeds, ancillary agreements, Aboriginal Heritage Agreements), it may have some bearing on conditions already imposed by the Tribunal in a determination or on the way parties approach future act negotiations.

26. The proposal states: 'Where approached for input or advice, Local Aboriginal Heritage Services will have certain timeframes within which they must respond and will be entitled to charge a fee for that service.'

27. There is a power found in s60AB NTA for an RNTBC to charge a fee for certain functions including negotiating a s31(1)(b) agreement or an Indigenous Land Use Agreement (ILUA). Other functions can be specified by regulation. The Tribunal also draws your attention to s60AC NTA regarding the role of the Registrar of Aboriginal and Torres Strait Islander Corporations (ORIC) in providing an opinion concerning fees that may be charged.

28. Where a LAHS is an RNTBC it will be important that the basis for bringing the charge is certain – particularly if the structure of the arrangements are not similar.

29. Whilst there is a power to charge under s60AB, it has been argued in the context of the NTA that that does not impose an obligation to pay. If that is the intent, it could perhaps be made certain.

Proposal 3(B): The Aboriginal Heritage Council

30. It is proposed that the Aboriginal Heritage Council (AHC) will serve as the standard-setting, peak body for the provision of strategic advice on Aboriginal heritage matters and will ensure that LAHSs perform their functions properly. Where a LAHS does not perform its functions or where there is no such body recognised, the department will perform those functions. It is also proposed that the AHC may assist with resolving disputes between LAHSs, their members and/or proponents where necessary and the parties agree or don't have dispute resolution procedures in place.

31. The Tribunal has a number of assistance functions under the NTA, including assistance to RNTBCs in certain circumstances. NTRBs provide a range of services to native title holders, including support to RNTBCs. RNTBCs are incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 1996* (Cth) ('CATSI Act'). ORIC supports and regulates the corporations that are incorporated under the CATSI

Act. Where a LAHS is an RNTBC, and a dispute of the kind referred to in the proposal arises, it is clearly desirable for there to be effective dispute resolution options available. It is also desirable that there is some certainty about who and how dispute resolution services would be delivered.

32. The proposal states that the AHC will also assess land use proposals (and agreed outcomes relating to them) that may impact on Aboriginal heritage values and make decisions on their acceptability where such proposals, amongst other outcomes, demonstrate a low impact on heritage or where mitigation actions will result in a low impact on heritage.

33. The relationship between this proposal and the basis upon which the State of Western Australia would make the 'expedited procedure statement' might benefit from clarification. For example, whether 'low impact on heritage' is intended to have the same meaning as 'not likely to interfere with areas or sites of particular significance' (s237 NTA).

34. It is also proposed the AHC will provide advice to 'other decision making authorities to ensure that development approvals under their ambit appropriately consider Aboriginal heritage'. The meaning of 'development approvals' and the timing of this advice will be relevant. Currently, the State of Western Australia routinely makes the 'expedited procedure statement' (s29(7) NTA) in relation to mineral exploration tenement applications on native title land. The expedited procedure statement is an assertion that the grant of the particular tenement 'is not likely to interfere with areas or sites of particular significance'. AHC advice will have a bearing on whether the statement ought to be made.

35. The Tribunal has been conducting inquiries and has delivered determinations concerning the application of the expedited procedure for nearly 25 years. There has been considerable evidence considered in the context of particular exploration proposals and areas or sites of particular significance (in accordance with their traditions) to the persons who are the holders of the native title in relation to the area. Consideration could perhaps be given to providing copies of future determinations to the AHC to assist in their advisory function.

Proposal 5: Introduce a referral mechanism to facilitate tiered assessments and approvals of proposed land uses

36. It is stated in the proposal that 'new legislation should focus on assessing activity and aim to reduce its impact on Aboriginal heritage rather than trying to assess how a place fits with criteria that are seen as inconsistent with living Aboriginal culture'.

37. The AHC is proposed to have a central role in providing early advice on land use proposals to proponents and setting standards for any consultation and/or research necessary to support development approvals processes.

38. It appears an aim of the proposal is to encourage early notice of proposed land use activities. To support this, there is a proposed risk-based tiered assessment of land use proposals and encouraging agreement making between proponents and LAHSs to reduce regulatory burdens. It also aims to identify potential heritage values early in land use planning. Proponents will be required to take steps to identify whether their land use proposal will have a negative impact on Aboriginal heritage, based on Register information, previous studies or processes embedded in a heritage agreement.

39. It is unclear if the term 'land use proposal' is intended to include exploration activities. The proposed tiered assessment system does not appear to be based on the type of permit or authorisation, but rather reflects the extent to which prior land uses have already impacted upon known or predicted heritage. If actual impact is a criteria then assumptions based on a history of prior tenements ('overlap analysis') would be largely irrelevant. A positive outcome of the tiered assessment system might be that the native title party will have access to more information regarding the level of impact of a project before negotiations start.

Proposal 6: Encourage and recognise agreement making

40. In this proposal both the AHC and the Minister will have regard to heritage outcomes agreed between proponents and the relevant LAHS or other Aboriginal body when assessing the acceptability of land use proposals. The discussion paper acknowledges that many of these agreements will have been negotiated as part of compliance with the NTA and may not have been tailored to suit the new legislation and may not meet the AHC's requirements.

41. A proponent wishing to rely on an existing agreement to expedite approvals under this proposal must submit it to the AHC for formal ratification. Where an agreement to be ratified was made prior to the establishment of the relevant LAHS (for example with a registered native title claimant), the AHC would seek advice from the LAHS

as to the agreement's suitability. Could this subvert the intention, objects and purpose of the agreement?

42. It is common practice for parties to structure agreements that allow for a deed of variation to 'add in' tenements. This appears to be a quite efficient way to manage exploration on native title land in highly prospective regions. The ratification process proposed could have unintended consequences.

National Native Title Tribunal
31 May 2019