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Dear Sir/Madam

Review of the Aboriginal Heritage Act 1972 – Response to Phase 2 Discussion Paper

1. General comments on the Proposals

- 1.1 It is Central Desert Native Title Services Ltd's (**Central Desert**) view that the proposals which would form the basis of new heritage legislation (**Proposals**) do not go far enough to ensure Aboriginal People are in control of matters that affect their culture and ultimately their community's health and well-being.
- 1.2 Aboriginal People continue to assert their rights under the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) and it is unfortunate that the principles set out in the UNDRIP were not embodied in the Proposals.
- 1.3 As an organisation which provides representation and support to Traditional Owner groups whose combined country covers approximately one third of Western Australia, Central Desert believes it is necessary to continue to advocate in the strongest possible terms for the right of Aboriginal People to self-determination, including the right to make decisions about their cultural heritage.
- 1.4 It is well documented that strong links to culture improves the health and wellbeing of Aboriginal People and Aboriginal communities. The "Closing the Gap" initiative, launched by the Federal Government in 2008 recognised:

Efforts to Close the Gap in Indigenous disadvantage must recognise and build on the strength of Indigenous cultures and identities¹

furthermore,

The destruction of Indigenous Australian culture has resulted in ongoing grief, despair and confusion... cultural values and pride, disruption of kinship networks and support

¹ Council of Australian Governments, National Reform Agreement 2008, p A-20

*systems, and confusion of people forced to balance between two, often irreconcilable cultures*²

- 1.5 Destruction of Aboriginal heritage through government imposed and sanctioned mechanisms has contributed to, and continues to contribute to, the harm inflicted on Aboriginal People. Aboriginal People need to be in control of matters that affect their lives and communities and, specifically in the context of cultural heritage, they need to be supported so they are able to fulfil their cultural obligations to protect country in accordance with their traditional law and customs.
- 1.6 The State Government has invested significant time and resources into the current review process and it represents a unique opportunity to design world leading, best practice Aboriginal cultural heritage protection mechanisms. However, the Proposals to date lack coherency and an overall strong strategic direction which puts protection and promotion of Aboriginal heritage and culture at its centre. There also appears to still be lack of understanding of, or an unwillingness to accept, the interconnectedness of native title rights and interests and Aboriginal heritage.
- 1.7 Any new heritage legislation cannot be considered without regard to the *Native Title Act 1993* (Cth) (**Native Title Act**). In particular we note that:
 - a) In the context of a successful native title determination, the right to protect and maintain Aboriginal heritage is a native title right and interest recognised in law. Any act which affects this right is deemed a future act under the Native Title Act.
 - b) As elucidated in the Timber Creek decision,³ the destruction of heritage will significantly increase the liability for compensation payable under the Native Title Act. Consequently, we submit that it is in the interest of all stakeholders to confront the seriousness of destruction of heritage not only as a moral but also an economic imperative.

2. Proposal 1: Repeal the *Aboriginal Heritage Act 1972* and deliver new Aboriginal heritage legislation

- 2.1 Central Desert has previously submitted that given the age and ineffectiveness of the current *Aboriginal Heritage Act 1972* (WA) (**AHA**), it should be replaced with new heritage legislation. It was also Central Desert's submission that new legislation should ensure that Aboriginal People are the ones making decisions about matters affecting their cultural heritage.
- 2.2 The objects of the new legislation (set out on page 10 of the Discussion Paper) may be seen as an improvement on the current AHA. What is missing, however, is a clear statement which puts Aboriginal People in control of what happens to their cultural heritage.
- 2.3 Furthermore, the object of having a "clear framework for the protection, conservation and management of Aboriginal Cultural heritage" is linked to land use and development decisions. This begs the question of whether the new legislation is focussed on protection of Aboriginal culture or is just a shinier version of the existing AHA, which is effectively just a land use approvals process. None of the 4 objects set out in Proposal 1 provides solely for the protection, conservation and promotion of Aboriginal heritage.

² Kryszyska, K., G. Martin, and N. Sheehan, 2009, *Identity, Voice, Place: Suicide Prevention for Indigenous Australians—A Social and Emotional Wellbeing Approach*, The University of Queensland

³ *Northern Territory v Griffiths* [2019] HCA 7

- 2.4 By comparison, the Victorian *Aboriginal Heritage Amendment Act 2016* (Vic) places Aboriginal People and the protection of, and respect for, Aboriginal heritage front and centre of the legislation. The main purposes of the *Aboriginal Heritage Act 2006* (Vic), as amended, are:
- a) to provide for the protection of Aboriginal cultural heritage and Aboriginal intangible heritage in Victoria;
 - b) to empower Traditional Owners as protectors of their cultural heritage on behalf of Aboriginal People and all other peoples;
 - c) 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; and
 - d) to promote respect for Aboriginal cultural heritage, contributing to its protection as part of the common heritage of all peoples and to the sustainable development and management of land and of the environment.
- 2.5 Furthermore, the Objects of the amended *Aboriginal Heritage Act 2006* (Vic) are focussed on Aboriginal People, their culture and the prevention of harm. Central Desert submits that any new legislation for Western Australia should be as emphatic about the protection of Aboriginal culture and heritage as the Victorian legislation.
- 2.6 In drafting any new legislation, careful consideration should be given to how a new heritage Act would interact with other intersecting legislation such as the Native Title Act and both State and Federal heritage and environmental legislation.

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

- 3.1 Central Desert submits that if new legislation is drafted, there would be little point in retaining the archaic definitions and scope of the existing AHA. Therefore, Central Desert supports in principle, the proposal to update the definitions and scope of new Aboriginal heritage legislation subject to the definitions and scope being culturally appropriate and in line with heritage protection and management best practice. To this end, aligning definitions of 'place' with the Burra Charter is a positive start.
- 3.2 Central Desert supports the inclusion of processes to deal with ancestral remains, however, submits that the relevant Traditional Owner group needs to be central to such processes and have decision-making powers over how remains are ultimately dealt with.
- 3.3 The Discussion Paper lacks any discussion about the management of interconnected heritage places and landscapes and does not provide any information about how intangible heritage, and interconnected heritage places and landscapes will be represented on the Register. There continues to be a focus on places and objects.

4. Proposal 3(A): Local Aboriginal Heritage Services

- 4.1 Proposal 3(A) does not address the fundamental tenet that Aboriginal People should be the only persons making decisions about their cultural heritage. The proposal, by requiring engagement with relevant Traditional Owner groups, may be an improvement on the current AHA, but it does not go far enough.
- 4.2 Proposal 3(A) seems overly concerned about ensuring that the "right people" are speaking for country, and the accompanying review documentation uses references to knowledge holders, native title holders and Traditional Owners as if Aboriginal People themselves aren't able to properly decide who is able to speak for what. Proposal 3(A) should be more concerned about

ensuring that proponents are properly engaging with authorised representative structures, such as PBCs and NTRBs/NTSPs.

- 4.3 There is no doubt that there are different people with different levels of knowledge and authority regarding an area, and that those people may belong to a different Traditional Owner group but for reasons of seniority or succession, possess particular relevant knowledge. It is already the role of representative structures like PBCs, NTRBs/NTSPs and working groups to abide by traditional governance systems in the exercise of native title rights and interests, which includes the right to protect places and areas of significance. Where native title does not exist, it is still the case that a traditional governance system exists. It must be borne in mind that native title is a “white fella” construct and therefore an absence of native title does not equate to an absence of traditional governance systems. Traditional law and custom which informs traditional governance systems will dictate who needs to be consulted about a particular matter. It is not up to the State to dictate or decide who are the “right people” to speak for an area.
- 4.4 The focus on the “right people” in the Proposals also ignores the fact that Aboriginal heritage and decision-making processes, and rights under traditional law and culture, are generally communal. The State should not confuse unanimity of decisions with communal decisions. No community will ever make unanimous decisions, but that does not mean that the “wrong” people have been chosen to represent the views of the community.
- 4.5 More often than not, issues about who speaks for country arise where proponents are working in ways which circumvent established processes in order to obtain outcomes in their favour. High profile instances where intra-indigenous disputes and competing heritage claims have led to the destruction of areas and sites of significance are the result of external forces and pressure. New legislation needs to ensure that it is proponents who are properly engaging with already recognised representative entities, rather than suggesting that the issue lies with Traditional Owner groups selecting, or not selecting, the “right people”. Traditional Owner groups have the right to make autonomous decisions about who speaks for, and about what, on their traditional lands.
- 4.6 With regards to the proposed functions set out on page 13 of the Discussion Paper, many of these functions are already undertaken by the relevant entities as a result of the functions imposed on them by the Native Title Act. Additionally, it is of concern that Proposal 3(A) brings entities such as PBCs under the supervision and management of the Department of Planning, Lands and Heritage (**Department**) with regards to heritage. This compromises the independence of such entities, and in the case of PBCs, may conflict with its obligations to native title holders.
- 4.7 Even where there are no PBCs, a Traditional Owner group is not represented by a NTRB/NTSP, or in areas where native title does not exist, these Traditional Owner groups have representative structures or formal entities in order to engage on matters which affect their traditional lands.
- 4.8 Traditional Owner representative organisations need to be properly resourced to be able to engage with proponents, including by placing an onus on proponents to ensure that engagement happens at the earliest stages of land use planning. Both the State and proponents need to view Aboriginal People as partners in land use and development, not just another box to tick, or approval to obtain. Proper engagement, on a genuine level, is a value add to projects in terms of potential time and cost savings, and social corporate responsibility.
- 4.9 The Proposal appears to place a great deal of responsibility on Local Aboriginal Heritage Services entities (**LAHS**) (and Aboriginal People) but not the same level on proponents and

ignores the fact that native title has already established mechanisms and processes by which Aboriginal People and proponents deal with heritage matters.

5. Proposal 3(B): The Aboriginal Heritage Council

- 5.1 Central Desert supports the abolishment of the Aboriginal Cultural Material Committee (ACMC), however, is concerned to ensure that any new reiteration of an overarching body is focussed with the protection and proper management of Aboriginal heritage.
- 5.2 The Aboriginal Heritage Council (AHC), as proposed, would appear to have a very broad ranging set of functions which raises the question of whether the State has considered how it intends to ensure that the AHC, and the Department to which functions may be delegated, is properly resourced and funded. Additionally, the ability of the AHC to make decisions about some land use proposals does not address the issue of people who have no cultural authority making decisions about a Traditional Owner groups' heritage, which was a major issue that many stakeholders had regarding the ACMC.
- 5.3 There are a number of positive functions outlined in the Discussion Paper, for example having the promotion of conservation of Aboriginal heritage being at the forefront of what the AHC does. Some of the proposed functions, however, are questionable and are at odds with each other; for example, the AHC is to promote the conservation of Aboriginal heritage while also making decisions or recommendations to impact Aboriginal heritage, or, providing advice to the Minister about significant commercial projects of State importance. The focus of a well constituted AHC needs to be about protecting and promoting Aboriginal heritage first and foremost.
- 5.4 Proposed AHC function (ii) sets standards for services provided by LAHS and Heritage Professionals. Central Desert would oppose any attempts by the AHC to undertake the same sort of "standard" setting akin to that of the Department of Mines, Industry Regulation and Safety in relation to its promotion of the highly unacceptable Regional Standard Heritage Agreement. Additionally, in setting these standards, are the AHC going to provide mechanisms for resourcing which ensures that LAHS are able to meet standards?
- 5.5 The Discussion Paper states that the AHC may approve an activity which is demonstrated to be low impact *or* is acceptable to the relevant Aboriginal People. The Discussion Paper does not discuss what "low impact" means. Central Desert submits that low impact should be in the context of Aboriginal heritage values and traditional law and culture of the relevant group, not western Eurocentric notions of "low impact". To that end, the relevant Aboriginal group should be determining the acceptability of impact on their heritage.
- 5.6 Function (x) requires the AHC to assess the evidence of the importance of Aboriginal heritage which will be impacted by land use. What will this involve and through what cultural lens will the evidence be considered? It is unclear what safeguards will be put in place where gender restricted evidence needs to be provided and there exists the potential that this evidence will be subject to Freedom of Information inquiries? Is there potential that the AHC may determine that a site isn't important despite evidence provided by the relevant Aboriginal People to the contrary?
- 5.7 None of the proposals remove one of the fundamental objections expressed by Aboriginal People which is that people and bodies without the requisite cultural authority are making decisions about their land and their culture.
- 5.8 There is also concern about the role that the AHC will play in negotiations and agreement making between Traditional Owners and proponents. Processes under the Native Title Act or alternative settlement agreements already provide for agreement making. The requirement

for agreement making processes to be conducted in good faith is supported, however, how is this policed and determined? For example, the Native Title Act requires that proponents and a native title group conduct good faith negotiations, however, the meaning of good faith has been watered down so significantly over time that it almost renders the requirement meaningless, and there have been a number of proposed amendments to the Native Title Act which would embed good faith criteria in the Act. If the AHC determines there has been a lack of good faith, what then? Central Desert's view is that if that were the case then the approval should not be made unless good faith is demonstrated by the proponent.

- 5.9 The proposal that the AHC provides oversight to ensure that agreements reached safeguard intergenerational equity has benefits and disadvantages. There is no doubt that Aboriginal People are more often than not pressured into entering agreements which result in the destruction of their heritage. This pressure is not always overt pressure from the proponent but also the result of institutionalised and systematic bias. Apart from coming up against large, well-resourced entities, Aboriginal People know that the legal system provides no mechanisms which supports their right to say no. Under the Native Title Act, arbitral processes result in proponents getting their tenure almost all of the time; under the current AHA, proponents always receive authority to destroy or damage sites even where objections are made and extensive submissions are provided. Aboriginal People often feel like "something is better than nothing" and therefore enter into agreements which may be less than ideal.
- 5.10 It is not clear from the information provided, how the AHC intends to undertake this task, and what the consequences are for proponents who are putting undue pressure on Aboriginal People to make agreements. There also needs to be a massive shift in the psyche of proponents in order for best practice outcomes to occur, where Aboriginal People are seen as partners in the development of proposals and not an impediment to development, or Aboriginal heritage a 'box to be ticked'. This requires the State to actively promote Aboriginal culture and heritage and its importance to the broader community.
- 5.11 The bottom line is that even with new heritage legislation, proponents still retain the ability to obtain Ministerial approval to impact or destroy Aboriginal heritage. The systematic bias against Aboriginal People has not been removed.
- 5.12 The proposal on the other hand, requires the AHC to insert itself into the agreement making process and removes the autonomy of a group to make decisions about their cultural heritage. Further, it complicates the roles and responsibilities of the AHC and the LAHS and compromises the independence of organisations such as PBCs.

6. Proposal 3(C): Functions of the Minister

- 6.1 The functions of the Minister need to explicitly refer to the protection of Aboriginal heritage as its primary concern, not the facilitation of land use proposals as the functions set out in the Discussion Paper would suggest.
- 6.2 As mentioned above, the new legislation does not address one of the fundamental objections expressed by Aboriginal People which is that people and bodies without the requisite cultural authority are making decisions about their land and their culture.
- 6.3 The end result of Proposal 3(C) is that the Minister tasked with the role of protecting Aboriginal heritage is still making decisions about its destruction.

7. Proposal 3(D): The role of the Department

- 7.1 As discussed above, in order for the Department to properly undertake its functions, it needs to be properly resourced, particularly given the expansive range of functions set out in the

Discussion Paper. The Department needs to be proactive in its protection and management of Aboriginal heritage.

- 7.2 Central Desert questions the appropriateness of a government department performing the role of a LAHS.

8. Proposal 3(E): Heritage Professionals

- 8.1 Central Desert does not object in principle to measures being taken to improve the standards of those working as consultants in Aboriginal heritage and to ensure that those who are doing so are appropriately qualified and possess the requisite skills and experience. This can only be of benefit to the protection of Aboriginal heritage.

- 8.2 The Heritage Professional Directory and standards of reporting could work to ensure that Heritage Professionals are providing a service that is professional and quality in nature provided that the reporting standards being set by the AHC are high, ethical and in accordance with best practice in the relevant field.

9. Proposal 4: Retain the current form and function of the register of Aboriginal places and objects but rename it the Aboriginal Heritage Register

- 9.1 Central Desert does not oppose the renaming of the register of Aboriginal places and objects to the Aboriginal Heritage Register and supports the continuation of protection being afforded to all Aboriginal heritage regardless of whether they appear on the Register.

- 9.2 Central Desert cautions against the use of predictive modelling to highlight areas of likely Aboriginal heritage sensitivity. Information about whether an area contains Aboriginal heritage must be obtained from the Traditional Owners.

- 9.3 Proposal 4 is again another example where the focus is on 'places' and 'objects' and not cultural landscapes, precincts and things like songlines or dreaming tracks.

- 9.4 It will be important to ensure that where reporting standards are to be "improved", they are done so in a way that is culturally appropriate. The State will not be able to lessen Aboriginal People's distrust of the Register by imposing reporting standards which are inappropriate and may breach people's cultural obligations.

10. Proposal 5: Introduce a referral mechanism to facilitate tiered assessments of proposed land uses

- 10.1 A tiered assessment process idea comes directly from industry as a means of being able to quickly obtain approvals for land use where in their view, Aboriginal heritage is not or only minimally impacted. The flaws in this should be obvious.

- 10.2 Proposal 5 would appear to require a great deal of guess work on behalf of the State and proponents to "know" or more alarmingly "predict" Aboriginal heritage values. The proposal also ignores the fact that the degree of impact to the land is not predictive of the degree of impact to Aboriginal heritage values of the land and fails to acknowledge that the impact on Aboriginal heritage may be broader than the geographical location of the proposal.

- 10.3 A tiered assessment process will not ensure that Aboriginal heritage values are identified early in land use planning. The way to ensure that Aboriginal heritage values are identified early and managed in accordance with the instructions of the Traditional Owners, is to ensure that the State actively promotes the importance of Aboriginal heritage. It is critical to bear in mind that what is being impacted on, or destroyed, are places of religious significance or worship to Aboriginal People.

10.4 Proposal 5 also appears keen to cement approvals for all time. This is problematic. Standards of work, particular proposals and acceptability of proposals change over time. Aboriginal culture is not static. Managing, maintaining and protecting Aboriginal heritage is an ongoing process for Aboriginal People and therefore needs to be an ongoing process over the life, and at the conclusion of, land use proposals. The State can't try and insert itself into agreement making to ensure "inter-generational equity" on the one hand, while implementing processes that fail to accommodate inter-generational participation.

11. Proposal 6: Encourage and recognise agreement making

11.1 In principle, Central Desert supports measures which encourage and recognise agreement making.

11.2 It must be recognised though that both the current and proposed system is inequitable. Commercial projects can be of 'State significance' but Aboriginal heritage cannot. There will always be an inequity in the balance of power between the State and well-resourced proponents on the one hand and Traditional Owners on the other. Aboriginal People are always going to be at a disadvantage where they cannot control and make decisions about their cultural heritage, free from the threat that proponents can apply to have Ministerial authorisation to destroy their cultural heritage.

11.3 The focus on agreements not being able to contract out of the legislation is somewhat nonsensical as no party is currently able to contract out of the need to obtain formal approvals. Parties cannot ignore legislative requirements.

11.4 Central Desert is also concerned about the level of power being granted to the AHC which allows the AHC to effectively insert itself into agreements reached between parties prior to the commencement of the proposed new legislation. And while there is merit to requiring minimum standards of heritage protection, it remains to be seen whether those standards are acceptable to Traditional Owner groups. Additionally, it would be a travesty if proponents used agreement review mechanisms to try and water down contractual heritage obligations because of new legislative minimum standards.

11.5 There is also a question as to how updating agreements to include new legislative provisions will occur in practice. Almost all agreements regarding Aboriginal heritage are actually made pursuant to the Native Title Act and are entered into with the authority of the native title claim group or native title holders. Any changes to such agreements will require re-authorisation of the agreement by the relevant group. This imposes a significant burden on native title parties, particularly in the Central Desert region, where authorisation meetings are logistically difficult and expensive to convene.

12. Proposal 7: Transparency and Appeals

12.1 Central Desert supports the implementation of mechanisms which provide transparency in decision making, including through the measures proposed in Proposal 7.

13. Proposal 8: A modernised enforcement regime

13.1 Central Deserts supports Proposal 8 but notes that the Department must be properly resourced to conduct monitoring of compliance with the Act, and initiate prosecutions for breaches under the new Act.

13.2 As previously suggested by Central Desert, the Department should contract out monitoring of compliance with Aboriginal heritage legislation to Aboriginal Ranger Groups on a fee for service basis.

14. Proposal 9: Protected Areas

14.1 Central Desert supports the retention of Protected Areas but believes that in order to properly achieve the intent of Protected Areas, there needs to be Traditional Owner led management plans to accompany declarations of Protected Areas, as well as management plans for existing Protected Areas. Additionally, the fact that Protected Areas can still be impacted on demonstrates that there needs to be tighter controls about land use proposals in these areas.

15. Summary

15.1 In summary, while Central Desert commends the engaging and transparent way that the State Government has conducted the review of the AHA, the Proposals fall short of ensuring that Aboriginal People are the decision-makers with regards to their Aboriginal heritage and that the object of the new legislation is to avoid harm to Aboriginal heritage and Aboriginal People.

Yours sincerely



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