Aboriginal Heritage Action Alliance

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The Hon Simon O'Brien MLC

Chair

Legislative Council Standing Committee on Environment and Public Affairs

Parliament House

Perth WA 6000

Dear Hon Simon O'Brien MLC,

Petition No 80 - Aboriginal Heritage Act Amendment Bill 2014

Thank you for your invitation to provide a written submission regarding Petition No 80 – Aboriginal Heritage Act Amendment Bill 2014 (the Bill), which was tabled by Robin Chapple MLC in the Legislative Council on 25 February 2015. The issues discussed in the petition have not been submitted to the Parliamentary Commissioner for Administrative Investigations (Ombudsman). We are sure that the issues raised below will assist the Standing Committee on Environment and Public Affairs (the Committee) with its preliminary investigations.

In particular, we wish to request that the Committee give detailed consideration to a legal opinion on the Bill provided to the Aboriginal Heritage Action Alliance by former Federal Minister for Aboriginal Affairs in the Fraser Liberal Government Ian Viner QC (see Annexure). Mr Viner has identified a series of extremely serious legal and administrative flaws in the Bill, and states that the Aboriginal Heritage Act Amendment Bill 2014 is:

'truly offensive; bad legislation and bad administrative practice; and fundamentally destructive of Aboriginal cultural heritage protection... At the least the Bill should, indeed must, be referred to a Select Committee of the Legislative Council. Really, in the interests of good governance and the Aboriginal people of Western Australia and their cultural heritage, and the Government not being regarded as cultural pariahs, the Bill should be withdrawn...The Bill is not only offensive to Aboriginal heritage but to modern international approach[es] to the protection and preservation of indigenous heritage and the cultural traditions of indigenous people for the benefit of the whole of a national society.'

Mr Viner's view on the substandard quality of the Bill is confirmed by the large number of submissions from practitioners, experts, professional bodies and Aboriginal organisations on the AHA reform process (92 responses in 2012)[1] and proposed AHA amendments (73 responses in 2014)[2]. The vast majority of these submissions were highly critical of the DAA 'reform process' and the June 2014 exposure draft of the Bill, and yet the subsequent Bill as presented to State Parliament in November 2014 was unchanged from the initial June 2014 exposure draft. This highlights the

[1] http://www.daa.wa.gov.au/en/Heritage-and-Culture/Aboriginal-heritage/Heritage-Act-Reform/Submissions/
[2] http://www.daa.wa.gov.au/en/Heritage-and-Culture/Aboriginal-heritage/Aboriginal-Heritage-Legislative-Changes/Submissions-recieved/

Government's unwillingness to address the many serious deficiencies in the Bill identified by peak professional, heritage and Aboriginal bodies including the Law Society of WA, Australian Anthropological Society, Australian Archaeological Society, Australian Association of Consulting Archaeologists, UWA Archaeology, National Trust of Australia (WA), Australia ICOMOS, Native Title Representative Bodies, and many others. We request that the Legislative Council give due consideration to the important matters raised in these submissions, which the Government has clearly ignored in framing the Bill.

In framing the Bill, the Government has taken no account of expert advice on the management of the AHA provided in several major reports: the 1995 Senior Review, 1996 Evatt Review & 1997 Casey Review. None of these reports was cited in Dr John Avery's April 2012 discussion paper. We request that the Legislative Council now consider these important reports in the framing of the Bill.

This legislation is also remarkable for its apparent intention of 'streamlining' the WA Aboriginal heritage process for the benefit of industry by excluding expert input into this process by:

- Aboriginal people themselves (who are of course the main 'experts' on their own cultural heritage);
- Anthropological and archaeological experts (the Bill abolishes the current mandatory Specialist Anthropologist position on the ACMC);
- Appropriate expert independent review of Aboriginal heritage decisions without fear or favour by the Aboriginal Cultural Materials Committee (the functions of which are marginalised to the point of irrelevancy under the Bill, as highlighted in Mr Viner's advice).

Although AHAA of course recognises the necessity of creating an efficient and transparent Aboriginal heritage process which does not cause unreasonable delays and expense to developers conducting legitimate activities, the Bill is unreasonably weighted towards the interests of developers, and to the detriment of Aboriginal people's rights to protect places of significance to them, rights which have been clearly established as an incident of native title under the NTA and Commonwealth case law.[3]

Greg McIntyre SC has also provided legal advice to the Aboriginal Heritage Action Alliance that the Bill, if passed, 'would also enable "future acts" to take place without according procedural rights provided to Aboriginal people under the Native Title Act, and is thus likely to be invalid, due to its inconsistency with Commonwealth legislation'. Furthermore, Tim Robertson SC has provided legal advice to Friends of Australian Rock Art and the Aboriginal Heritage Action Alliance stating that the s 18 provisions of the current and amended AHA might be successfully challenged under the Commonwealth *Racial Discrimination Act* (on the basis that s 18 provides a right of appeal to a developer seeking to destroy an Aboriginal heritage site, but not to the Aboriginal custodian or native title holder of such a site).

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[3] 'Any form of native title which did not recognise the need to protect sacred and significant sites would debase the whole concept of recognition of traditional rights in relation to land.' (*Hayes v Northern Territory* [1999] FCA 1248, para 51. See also s 237 (b) of the NTA).

In a surprising interpretation of s 5(b) of the AHA, DAA has published Guidelines (and also is adopting a view in communications with the public and advice to the Aboriginal Cultural Materials Committee) that an Aboriginal sacred site is not protected under the AHA unless there is evidence of 'religious activity' at the site. This interpretation of s 5(b) of the AHA (provided to DAA by the State Solicitor's Office) is currently under challenge in the *Diana Robinson v ACMC* case before the WA Supreme Court.

Rather than fulfilling the original objectives of the legislation to protect Aboriginal heritage, the current Bill's apparent intention is to make it easier to destroy it, in a '360 degree reversal of the original intention of the 1972 Berndt legislation', to again quote Mr Viner. On the basis of legal advice received from Ian Viner QC and other matters discussed above, AHAA's view is that the current Bill is so flawed as to not be capable of meaningful amendment. We therefore respectfully request the Legislative Council and the State Government to:

1. Withdraw the Aboriginal Heritage Act Amendment Bill (2014);
2. Establish an inquiry into DAA's management of Aboriginal heritage in WA;
3. Form a Select Committee to develop of a proper framework to reform the AHA by
    - involving Aboriginal peoples in meaningful ways (e.g. as custodians of Aboriginal heritage, not just as 'stakeholders'); and
    - building on excellent previous suggestions for reforming the AHA (e.g. 1995 Senior Review; 1996 Evatt Review & 1997 Casey Review).

Yours sincerely,

Clayton Lewis

Spokesperson

Aboriginal Heritage Action Alliance