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NT Environment Protection Agency
GPO Box 3675
Darwin NT 0801

Dear Sir/Madam

SUBMISSION ON DRAFT ENVIRONMENTAL FACTOR GUIDANCE: CULTURAL AND HERITAGE

We thank NT EPA for the opportunity to provide submissions on the development draft *Environmental factor guidance: culture and heritage* (**draft Guidance**). We have significant and substantial concerns with the proposals, concerns borne of the collective decades of the experience of the authors of these submissions in environmental impact assessments and environmental impact assessment law, both in Australia and internationally, including approximately half the completed Environmental Impact Statements in the Northern Territory since 2016 and several currently undergoing assessment.

Our concerns are both with form and substance. For technical guidance to have any value it must be accurate and not misleading. The draft Guidance fails on both accounts. Why certain definitions are used is never explained. Descriptions of relevant legislation that should assist in establishing thresholds of significance is both inaccurate and misleading. Considerations for conducting assessments are incomplete. Some of the language in the document is not relevant to technical guidance on the assessment process. These deficiencies significantly diminish any utility of the draft Guidance.

1. Introduction

Footnote 2 is no utility and should be deleted because the definition of "environment" in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) is different than the definition in the *Environment Protection Act 2019* (**EP Act**), and expressly includes "heritage values" and "cultural aspects" in its definition:[1]

> ***environment*** *includes:*
> *(a) ecosystems and their constituent parts, including people and communities; and*
> *(b) natural and physical resources; and*
> *(c) the qualities and characteristics of locations, places and areas; and*
> *(d) heritage values of places; and*
> *(e) the social, economic and cultural aspects of a thing mentioned in paragraph (a), (b), (c) or (d).*

1.1 Purpose

The stated purpose fails to expressly state what should be the most obvious, guidance on definitions of culture and heritage. The document should also provide guidance on thresholds of significance, but the document is not clear in this regard.

[1] EPBC Act s 528.

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2. Legal context

Simply restating the general duty in section 43 of the EP Act, especially where the duty is readily self-explanatory, provides no guidance and is of limited utility.

To be fair, the duties in sections 43(a) through (d) are relatively easily understood and their relevance to an assessment of heritage and the cultural environment intuitive. They are also broadly alluded to in section 3.1 of the draft Guidance. That is not the case, though, for sections 43(e) through (g). What, for example, is the relevance of the waste management hierarchy to a pre-referral assessment of potential impacts on heritage and culture?

3. Defining the environment's cultural aspects

3.1 Cultural values

Why has NT EPA chosen definitions from a specific dictionary for culture and heritage? What other potential sources of definitions were consulted?

While it does not contain a definition of "culture" or "cultural value," we note the EPBC Act does contain a definition of heritage value:[2]

> ***heritage value*** *of a place includes the place's natural and cultural environment having aesthetic, historic, scientific or social significance, or other significance, for current and future generations of Australians.*

The last paragraph of page 6 beginning "The NT EPA will accept and be guided by determinations made under these laws…" has the process backwards. One generally doesn't get an Authority Certificate or a permit to carry out work on a heritage place in advance of an assessment by NT EPA. The assessment should inform the determinations necessary to avoid or mitigate potentially significant impacts.

What we believe would be the correct process is for NT EPA to be guided by the relevant legislative regimes to determine significance. For example, damaging, removing, or interfering with an Aboriginal archaeological place would likely be a significant imact under the *Heritage Act 2011* (**Heritage Act**). A project proponent (or NT EPA) would assess the risk of that impact potentially occurring and condition the action commensurate with the risk to avoid the impact or mitigate the potential impact to an acceptable level.

The draft Guidance provides at page 7 that the assessment process will consider "scrutiny of compliance with the existing laws and policies that give effect to the protection of heritage and Aboriginal cultural values." Is this a reference to the "fit and proper person test" in section 62 of the EP Act?

As a minor note on drafting, please use complete citations for a source referenced in the first instance so the reader knows what it is you are referring to. It would also assist to use complete definition or explain why only a portion of a definition is being used.

3.2 Legislative mechanisms to protect cultural values

Some of the discussion in this section is inaccurate and/or irrelevant. Even when technically correct, information is misleading when it is not complete. While a project proponent should always refer to the source legislation, technical guidance should not provide the public with inaccurate or misleading information.

Native Title Act 1993 (Cth) (**NTA**)

We first note that, as a mater of completeness, an ILUA is not the only form of agreement under the NTA.

[2] Ibid.

The list of native title rights provided on pages 7-8 is partially outdated. Beginning with *Fulton v Northern Territory* [2020] FCA 1271 (Nutwood Downs P/L), determinations involving pastoral leaseholds whose claimants are represented by the Northern Land Council use the following expression of native title rights and interests:

(a) to access, remain on and use the areas;
(b) to access and to take for any purpose the resources of the areas; and
(c) to protect places, areas and things of traditional significance.

The list of activities on pages 7 and 8 are now viewed as expressions of the rights and interests rather than the rights and interests themselves, and the parenthetical in item 8 of the list is no longer included.

Native title claim applications in which the Central Land Council is representing the applicant are also now beginning to use a similar expression of native title tights and interests.

Moreover, critical to the determinations, if there is an inconsistency between the pastoral rights and interests and the native title rights and interests, the pastoral rights and interests will prevail over, but not extinguish, the native title rights and interests.

Additionally, while the first full paragraph on page 8 is technically correct it is misleading. It is technically correct to state "For NT pastoral leasehold land, proponent should be aware that native title co-exists with pastoral leases, regardless of whether determination native title has been made under the *Native Title Act 1993.*" It improperly suggests, though, that the processes for negotiation and agreement under the NTA are available even if no determination has been made or claim registered.

We also believe the second sentence of the paragraph is neither relevant nor correct. First, what is the relevance of notice provisions (as opposed, for example to the right to negotiate) to technical guidance on assessing the significance of cultural or heritage impacts? We do not believe there is any.

Second, is NT EPA suggesting that changes to a pastoral lease, which must be for a pastoral purpose in accordance with the *Pastoral Land Act 1992*, will require a referral based on potentially significant impacts to cultural or heritage values? If this is what NT EPA is suggesting, then it must be explicit on that point and provide far more detailed guidance, also recognising that certain primary production activity (including pastoral activity) is treated differently under the NTA than other activities that might be considered future acts. We believe, however, that any such suggestion is not correct.

Further, we think the failure to discuss potential interactions between mineral exploration licences sought under the *Mineral Titles Act 2010* and the NTA and the relationship to potential significance is a material omission from any guidance document.

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) (**Land Rights Act**)

The description/interpretation of section 73 is incorrect. The section is neither a mandate nor a limitation, either to the Northern Territory or any individual. It is simply an authorisation, permitting the Northern Territory to enact legislation reciprocal to Commonwealth legislation. In particular, section 73(1)(a) provides in part:

> *The power of the Legislative Assembly of the Northern Territory under the Northern Territory (Self Government) Act 1978 in relation to the making of laws extends to the making of:*
>
> *(a) laws providing for the protection of, and the prevention of the desecration of, sacred sites in the Northern Territory, including sacred sites on Aboriginal land, and, in particular, laws regulating or authorizing the entry of persons on those sites…and shall take into account the wishes of Aboriginals relating to the extent to which those sites should be protected.*

The Territory has taken advantage of this reciprocal authority in enacting laws such as the Heritage Act and the *Northern Territory Aboriginal Sacred Sites Act 1989* (**Sacred Sites Act**).

The public would also be better served by guidance documents that provides actual definitions rather than loose descriptions of the definition. Any guidance document should contain the definition of a sacred site in section 3 of the Land Rights Act in full:

> ***sacred site*** *means a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any land that, under a law of the Northern Territory, is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition.*

With regard to footnote 9, why is there a refence the *Aboriginal & Torres Strait Islander Heritage Protection Act 1984* (Cth)? That is the only place in the draft Guidance in which the Act is referred. With further regard to footnote 9, the statement that the Land Rights Act definition of sacred site is used "in the list of Native Title Rights used under the Native Title Act" is not correct. While determinations in the Northern Territory will generally make reference to places of significance under traditional laws and customs in the context of the right to protect those places, the term is not defined in the determinations.

Northern Territory Aboriginal Sacred Sites Act 1989 (NT) (**Sacred Sites Act**)

With respect to the issuance of Authority Certificates, the guidance document should provide that AAPA shall issue an Authority Certificate to an applicant where AAPA is satisfied that "the work or use of the land could proceed or be made without there being a substantive risk of damage to or interference with a sacred site on or in the vicinity of the land" or where "an agreement has been reached between the custodians and the applicant" See sections 22(1)(a) and (b).

The first full paragraph on page 9 begins "This process ensures that Aboriginal custodians inform the implications of the existence of a sacred site on a particular land use proposal…" What does this mean?

The process for registration of a sacred site is generally correct; however, the draft Guidance is a document designed to guide someone in determining whether an action has a potentially significant impact on cultural or heritage elements of the environment and what mitigation may be required. The process for registration of a sacred site has no relevance to a technical guidance document for the intended purpose and should be deleted.

As a drafting convention, it makes far more sense to include a definition of "sacred site" in the section on the Sacred Sites Act, even it is to state that it is the same definition as in the Land Rights Act, than to bury it in a footnote in the discussion of a different piece of legislation.

Heritage Act 2011 (NT)

The definitions of both an Aboriginal or Macassan archaeological place and Aboriginal or Macassan archaeological object are incomplete. The failure to provide complete definitions results in misleading guidance.

Relating to the past human occupation of the Territory by Aboriginal or Macassan people is only the first prong of the definition of an Aboriginal or Macassan archaeological place. The site must also have been modified by the activities of the occupiers. See section 6(2).

A relic relating to the past human occupation of the Territory by Aboriginal or Macassan people is only the first prong of the definition of an Aboriginal or Macassan archaeological object. The object must also be in an Aboriginal or Macassan archaeological place or stored in a place in accordance with Aboriginal tradition, including, for example, in an Aboriginal keeping place. See section 8(2).

Using complete definitions reinforces the place-based notion of heritage value lacking in the draft Guidance discussion of the Heritage Act. Additionally, the protections are not presumptive. Our understanding is that if the place or object meets the requisite definition, the processes and protections provided for in the legislation are considered automatic.

The last paragraph of the section on the Heritage Act notes a process by which an official declaration of an Aboriginal or Macassan heritage place can be made. Setting aside that anyone can avail themselves of the process and that it is not limited to Aboriginal or Macassan heritage places, it has little or no relevance to a document designed to guide someone in determining whether an action has a potentially significant impact on cultural or heritage elements of the environment. The entire paragraph should be deleted.

4. Considerations for conducting a cultural impact assessment

We understand the intent of the second paragraph, but to lead with a statement that "proponents are encouraged to design proposals to comply with the laws to protect cultural values" has no utility. What the paragraph should say is that proponents are encouraged to consult early with the relevant parties in order to ensure that design proposals comply with all laws that protect cultural values. We note that this may include more than just consultation with AAPA. It may also include the Heritage Branch and Aboriginal consultation through the relevant Land Council. The almost total absence of any mention of the role Land Council's may play is a material omission from any guidance document involving Aboriginal cultural or heritage impact assessment.

In stating that it is for AAPA to determine if there are grounds to justify a need for an Authority Certificate, the paragraph suggests that AAPA may require a proponent to secure an Authority Certificate. That suggestion would be incorrect.

We understand the intent of the last sentence on page 9. For proposals that have the potential to impact the cultural environment, including heritage, seeking professional expertise is recommended. The level of expertise should be commensurate with the complexity of the baseline cultural environment. The sentence, though, is awkward. Please consider rewriting it to make it less so.

The draft Guidance provides a recommendation that AAPA should be contacted with a view to determine if there are any sites of significance in the vicinity of the proposal. Any guidance should note the ways that this can be done, including through securing an abstract of records or reviewing AAPA registers. Any guidance, however, should also note that this will only indicate sacred sites known to AAPA.

The dot point immediately following that recommendation is not clear. Is the draft Guidance recommending that an Authority Certificate be applied for if any known sacred site is recorded or registered in the vicinity of the proposal? What does the draft Guidance mean by "vicinity"?

The paragraph on page 10 beginning "Aboriginal heritage places and objects, and sacred sites are protected by law…" is unnecessary and should be deleted. It is simply a repeat of that which does or should appear in section 3.2. It also unnecessarily repeats the guidance provided elsewhere that AAPA and the Heritage Branch should be consulted. Use of the word "imperative" in technical guidance document also inserts an unwarranted level of subjectivity into the guidance.

Subsections 4-6 (pages 10-11) relate to mitigation and are awkward, with different subsections relating to the same thing. We would suggest simplifying it in the following manner:

> *…Mitigation measures may include:*
>
> - *Securing an AAPA authority certificate which specifies the conditions under which works on or in the vicinity of a sacred site may take place, if at all.*
> - *Authorisations required from, or measures recommended by, the Heritage Branch of DTFHC in relation to heritage places or objects.*
> - *Measures to ensure access to the relevant land, especially where that access is not already guaranteed by law.*
> - *Management controls to prevent or reduce any potentially significant impact to cultural and heritage values to an acceptable level.*

- *Monitoring, reporting, and adaptive management strategies to demonstrate that potentially significant impacts to cultural and heritage values have been eliminated or reduced to an acceptable level.*

NT EPA may require that management controls monitoring, reporting, and adaptive management strategies be contained in a Cultural Heritage Management Plan.

With regard to the dot point addressing access to land, we note access by Aboriginals to sacred sites in accordance with Aboriginal tradition is already guaranteed by section 46 of the Sacred Sites Act.

5. Environmental approval

In the paragraph beginning "In its assessment report…" the word "measures" by itself has little utility because monitoring, reporting, and on-going stakeholder engagement are all types of measures. Please consider more specificity such as "project management measure and operational controls."

Again, we thank the NT EPA for the opportunity to provide these submissions and look forward to the responses to our questions and comments. Please contact the undersigned if you have any questions.

Yours faithfully
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