



CENTRAL LAND COUNCIL

**Submission to the Northern Territory Environment
Protection Authority – Environmental factor
guidance: Culture and heritage**

June 2022

Introduction

1. The Central Land Council (“CLC”) welcomes this opportunity to provide a submission to the Northern Territory Environment Protection Authority (“NTEPA”) in relation to its draft “Environmental factor guidance: Culture and heritage” (“the Draft Guidance”).
2. The CLC is a corporate entity established under the *Aboriginal Land Rights (Northern Territory) Act 1976* (CTH) (“ALRA”). Amongst other functions, it has statutory responsibilities for Aboriginal land acquisition and land management in the southern half of the Northern Territory. Under section 23(1)(a) of ALRA the CLC has the function of ascertaining and expressing the wishes and the opinion of Aboriginal people living in its region as to appropriate legislation concerning their land. The CLC is also a Native Title Representative Body established under the *Native Title Act 1993* (Cth) (“NTA”).
3. Pursuant to the ALRA more than 50% of the Northern Territory is now held by Aboriginal Land Trusts on behalf of traditional owners. The CLC region covers approximately 780,000 km² of land, and 417,318 km² is Aboriginal land under ALRA. In addition, rights have been asserted and won under the NTA, and traditional owners unable to claim land under the ALRA have succeeded in obtaining rights to small areas known as Community Living Areas, under Northern Territory legislation.
4. Through its elected representative Council of 90 Aboriginal community delegates, the CLC continues to represent the aspirations and interests of approximately 17,500 traditional Aboriginal landowners and other Aboriginal people resident in its region, on a wide range of land-based and socio-political issues. Sacred sites are places of deep spiritual significance and are an integral part of Aboriginal culture. Their protection is vital for the continuation of religious and cultural traditions, for the maintenance of environmental balance and as a source of identity for Aboriginal people. The CLC has duties under the ALRA to assist traditional owners to protect sacred sites both on and off Aboriginal land, and also assists native title holders to negotiate land use agreements that include protections for cultural values including sacred sites.

Overview of CLC submission

5. The CLC’s position on the Draft Guidance is threefold:
 - a. The Draft Guidance unduly narrows the concept of cultural value to mere equivalency with sacred sites.
 - b. The Draft Guidance should refer proponents to the Land Councils and their processes, with recognition of any measures contained in land use agreements for Aboriginal land and native title land to protect sacred sites and other areas of cultural value.
 - c. The AAPA and its mechanisms, most importantly an Authority Certificate, do not provide sufficient protection of cultural values.

6. As a consequence, the CLC's ultimate position is that the Draft Guidance should not be amended, and instead, should be entirely re-written with involvement from Land Councils.

Cultural Values and Sacred Sites

7. In point 3 of the Draft Guidance, the NTEPA gives the word "culture" a broad definition: "relating to the sum total of ways of living built up by a group of human beings, which is transmitted from one generation to another".¹ The word "values" is given a similarly broad definition: "the things of social life towards which the relevant community have an affective regard".²
8. The Draft Guidance goes on to say that the NTEPA will be guided by determinations made under various legislation when making decisions in relation to a potentially significant-impact project. The laws discussed are the NTA, the ALRA, *Underwater Cultural Heritage Act 2018* (Cth), the *Heritage Act 2011* (Cth) and the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) ("NTASS Act").
9. It is concerning to the CLC that the Draft Guidance then goes on: "the NTEPA will place significant weight on an AAPA Authority Certificate given the comprehensive regulatory regime in the NTASS Act."³ The NTEPA then states the general process for undertaking an environmental impact assessment, which includes a recommendation that the AAPA be consulted early with a view to applying for an Authority Certificate.
10. It is unclear precisely why, at a level of principle, sacred sites (via an Authority Certificate) are solely equated with cultural values. As is initially noted in the Draft Guidance, and as discussed above, "cultural values" are broad. Whatever the rigor of the NTASS Act, it is part of a broader legislative scheme of protection, including important pieces of legislation such as the NTA and the ALRA. The NTASS Act does not stand alone, it must be viewed in context.
11. A broader recommendation process, which looks beyond satisfaction of sacred site status, and to cultural values in their complete sense, should underpin the re-writing of the NTEPA's guidance to proponents.
12. It is acknowledged that there are six steps outlined in undertaking an environmental impact assessment,⁴ however, on a current reading of the Draft Guidance, this appears to be largely anchored on an Authority Certificate being obtained.
13. The CLC is concerned that, given the primacy the language of the Draft Guidance gives to an Authority Certificate, proponents will see that step as the essential (and potentially determinative) element in satisfying the NTEPA that their proposed action will protect cultural values. More concerning is that this may be the intent of the Draft Guidance, despite the reference to a raft of legislation including the ALRA and NTA.

¹ Draft Guidance, p 6 (citing the Macquarie dictionary).

² Draft Guidance, p 6 (citing the Macquarie dictionary).

³ Draft Guidance, p 9.

⁴ Draft Guidance, p 9-11.

14. As outlined in the Draft Guidance, native title rights are broad, and to a large extent reflect the broad range of Aboriginal cultural values that are imbedded in a landscape. Aboriginal cultural values includes the ability to hunt and gather natural resources, conduct ceremonies and hold meetings, conduct cultural practices of looking after country such as burning, be on country with family, and teach younger generations about country. The potential impact of a development on the exercise of these important cultural values is not identified in an Authority Certificate.

Involvement of Land Councils

15. The second issue that the CLC takes with the Draft Guidance is that in terms of institutional support, it recommends only AAPA to proponents, and does not refer to the Land Councils, and specifically the CLC's expertise in relation to sacred site protection and protection of cultural values more broadly. The example of sacred site processes is itself apposite to demonstrate the deficiency of this approach.

16. The CLC has over many years taken a proactive role to assist traditional owners to protect their sacred sites and has developed a more robust process for sacred site clearances. Consistent with section 23(1)(ba) of ALRA, the CLC assists Aboriginal people to protect their sacred sites both on and off Aboriginal land by ensuring that every development proposal that comes before the CLC (including exploration and mining, infrastructure and road works) is subject to a Sacred Site Clearance ("SSC") on Aboriginal land and on native title land when the CLC has negotiated an agreement on behalf of native title holders with the proponent.

17. A SSC must be completed prior to the commencement of the work. Through the clearance process, traditional owners gain a sound understanding of the proposed work and its impact on their land, enabling them to make an informed decision.

18. Only the Land Councils have statutory duties to consult the traditional owners and seek their consent for proposed works. AAPA does not have this statutory function and cannot provide consent for works on any tenure of land. The Land Council processes are able to incorporate the broader protection of cultural values, not just the more confined issue of sacred site protection which is the only issue that AAPA has a role to investigate.

19. Consent from traditional owners to development on Aboriginal land is required regardless of the possession of an Authority Certificate. Many projects on native title land also require an agreement with the native title holders, and as the representative body for its region, the CLC usually assists native title holders and Prescribed Bodies Corporate to negotiate these agreements.

20. It is CLC's experience that traditional owners and native title holders are adamant that sacred site procedures and protection of key cultural values need to be included in agreements for both Aboriginal land and native title land. It is difficult to separate issues of site protection from consent to the project, as the impact on land and sites are so interrelated. The SSC process is a key component of the CLC fulfilling its function of ensuring that traditional owners are providing free, prior and informed consent to developments.

21. Given the crucial statutory duty of the Land Councils to obtain the consent of the landowners for use of their land, it is the CLC's view that the Land Councils and their processes should form an important consultative recommendation of the NTEPA, including recognition of any measures contained in land use agreements for Aboriginal land and native title land to protect sacred sites and other areas of cultural value.

Issues with Authority Certificates

22. It is concerning that the guidance states that great weight will be placed on an AAPA Authority Certificate "given the comprehensive regulatory regime in the NTASS Act".⁵ There are a number of issues that impact on the ability of Authority Certificates to properly protect Aboriginal cultural values:

- As previously stated, Authority Certificates only protect sacred sites, not the broad range of Aboriginal cultural values. The NTASS Act was only intended to be a part of a regulatory regime for the protection of Aboriginal interests. The guidance needs to recognise the key role of the ALRA and the functions of the Land Councils, as well as the important protection of native title rights afforded under the Native Title Act.
- Authority Certificates can be granted without the consent of the traditional owners of the relevant area, as the AAPA is only required to take the wishes of custodians into account, not required to consult the traditional owners to see if they consent.
- Proponents can ask for a review of an Authority Certificate, and the Minister can override the wishes of traditional owners by granting a Minister's Certificate.⁶

Conclusion

23. The cultural values of Aboriginal people in the Northern Territory are enduring, important and, thankfully, subject to legislative protections. The CLC is concerned that the Draft Guidance in its current form, initially recognises these factors in theory, but then rolls back reliance on them in practice.

24. A reading of the Draft Guidance is likely to give proponents of a potentially impactful environmental activity the perspective that an Authority Certificate is the "be all and end all" when it comes to protecting Aboriginal cultural values.

25. This approach contains three issues. It erroneously equates sacred sites with broader cultural values (whether intentionally or not), removes the Land Councils and their expertise from the process and does not recognise the mitigation measures that are likely to be included in land use agreements on Aboriginal land and native title land.

⁵ Draft Guidance, p 9.

⁶ *Northern Territory Aboriginal Sacred Sites Act 1989* (NT), s 30(1).

26. The CLC submits that the Draft Guidance should be entirely re-written, with involvement from the Land Councils. That re-writing would de-emphasise the role of an Authority Certificate in the determination process, and recommend consultation with Land Councils, who are able to advise with respect to an assessment of a broader range of cultural values.