Yamatji Marlpa
ABORIGINAL CORPORATION

Our Ref: GEN033
Office: Perth

14 August 2013

The Hon. Peter Collier MLC
Minister for Aboriginal Affairs
10th Floor, Dumas House
2 Havelock Street
WEST PERTH WA 6005

Dear Minister

PROCEDURAL FAIRNESS IN THE PROTECTION OF ABORIGINAL HERITAGE

As you would be aware, Yamatji Marlpa Aboriginal Corporation (YMAC) is the Native Title Representative Body for the Murchison, Gascoyne and Pilbara regions. It is also one of the largest providers of Aboriginal heritage services in Western Australia. We are the nominated Heritage Service Provider for many native title groups in the Pilbara and Geraldton regions and we provide cultural heritage protection advice and support to claimant groups in the course of our native title service delivery.

I am writing to bring to your attention a number of concerns arising from both long term practices and more recent procedural changes to the administration of the *Aboriginal Heritage Act 1972* (AHA). Specifically, there is an urgent need to introduce procedural fairness for informants who lodge information with the Department of Aboriginal Affairs (DAA) for site identification and registration purposes; as well as affected native title groups and other relevant Aboriginal people, in relation to the handling of notices lodged under section 18 of the *Aboriginal Heritage Act 1972* (WA). This letter contains several propositions for your consideration and response.

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The dilemma for Aboriginal informants

There is nothing new in the dilemma currently faced by Aboriginal people relying on the AHA to protect their heritage. Custodians (often senior members of native title groups) work with proponents to identify significant cultural sites, with the expectation that this process of survey and identification will result in that site being better protected. However, the consequence of this sharing of sensitive cultural knowledge is that proponents are then able to apply, under section 18 of the AHA, for permission from yourself as Minister to use that land in a way that is can disturb or destroy that site.

The irony of this situation is not lost on Aboriginal people: the very process established for identifying Aboriginal heritage sites for their protection, in fact makes them highly vulnerable to destruction. Herein lies a clear disincentive for Aboriginal people to register sites with your Department. Additionally, it remains completely unjust that a decision on a s18 application can be appealed by the developer but not the effected Aboriginal people.

Compounding the issue is the absence of any formal requirement (outside of a negotiated heritage agreement) to directly notify Aboriginal informants, native title parties or their representatives that a section 18 notice has been lodged. It is extremely onerous to identify when relevant matters are scheduled for consideration by the Aboriginal Cultural Materials Committee (ACMC), given notices are only listed in public newspapers. In our experience, it is impossible at this stage to contribute relevant information to the ACMC, in a timely or effective manner, to inform their recommendations to you as decision-maker. In addition, there is no formal requirement to notify Aboriginal informants, native title parties and their representatives of the outcome of your decision, nor of any conditions you might have placed on the use of the land.

Contrast this with the requirements for public advertisement, public submissions and notification provided in the *Town Planning Regulations 1967 (WA),* in relation to Development Schemes and Town Planning Schemes (see in particular Regulations 15-17). Consistent with the "hearing rule" outlined in the WA Ombudsman's 'Guidelines on Procedural Fairness' (see Attachment A), these Regulations provide requirements whereby "...a person be told the case to be met and given the chance to reply before a government agency makes a decision that negatively affects a right, an existing interest or a legitimate expectation which they hold.'

An opportunity to introduce procedural fairness

The recent introduction of the Heritage Information Submission Form (HISF), while in some ways further truncating the evidence that can be provided to support the protection of significant heritage sites, does provide an opportunity to address the lack of procedural fairness outlined above.

As officers within your Department have noted, the HISF will lend consistency to the site identification and registration process and streamline the assessment process for the ACMC. We propose that you use the introduction of the HISF to establish clear and consistent processes to notify relevant Aboriginal informants and native title parties that may be negatively affected by the outcome of a section 18 application.

We understand that much information that is lodged with the Registrar is now out of date and may include details of deceased peoples. However, the HISF clearly lists relevant parties that should be notified and provided opportunity to contribute evidence to decision makers, along with their current contact details.

Specifically, we propose that formal procedural mechanisms be introduced so that, from the date of their introduction, the Department of Aboriginal Affairs is required to:

i. Notify informants, native title groups and their representatives of the lodgement of a section 18 application;

ii. Provide those relevant parties with a fair and effective avenue to provide additional information (beyond that contained in the HISF) on whether the application should be granted;

iii. Notify those relevant parties of the outcome of the section 18 application, including any conditions that may have been applied, and

iv. Provide the above parties with an opportunity to appeal the final decision, equal to that of the applicant.

Ideally, these mechanisms for notification and appeal would be prescribed in law, setting limited time periods for notification and comment in order to give certainty to all parties. One suggestion would be to model it around section 24HA(7) of the *Native Title Act 1993* (Cth), which provides a requirement for notification and comment in relation to applications for miscellaneous licences:

> S24HA
>
> (7) Before an act covered by subsection (2) is done, the person proposing to do the act must:
>
> > (a) notify, in the way determined, by legislative instrument, by the Commonwealth Minister, any representative Aboriginal/Torres Strait Islander bodies, registered native title bodies corporate and registered native title claimants in relation to the land or waters that will be affected by the act, or acts of that class, that the act, or acts of that class, are to be done; and
> >
> > (b) give them an opportunity to comment on the act or class of acts.

The notice should provide a level of information to Aboriginal informants, native title parties and their representatives similar to that which proponents provide to DAA on the template section 18 application.

For example, the notice should:

- Describe the nature of how the proposal may require the excavation, destruction, damage, concealment or alteration of an Aboriginal site that might be on the land.

- Identify which Aboriginal sites are to be effected by the proposal and describe the level of impact for each site (e.g., partial, total)

- Explain any relationships between the impacts at a local, regional or cumulative level, detail how the proposal has been developed to avoid, minimise or manage direct and indirect impacts, including the identification of viable alternatives and or locations.

- Describe in detail commitments by the applicant and proposed management actions to protect and preserve Aboriginal heritage within the project area, and

- Provide an indication of the capacity for sustainable management of Aboriginal sites over the life of the operation.

Such procedures would mean that Aboriginal custodians of unique, highly significant cultural sites would be a party to decision-making processes that may negatively affect them. They are also proportional to the nature of the decision and therefore consistent with the WA Ombudsman's Guidelines on Procedural Fairness.

Review of the Regional Standard Aboriginal Heritage Agreement (RSHA)

On a separate matter, please note that the Regional Standard Aboriginal Heritage Agreement for the Yamatji and Pilbara regions has not been reviewed since 2005, despite a requirement to review every three years. This is one reason that several of our clients instruct us to negotiate an alternative heritage agreement on their behalf.

The settlement of fee schedules in the Government Standard Heritage Agreement between YMAC and the State as part of the broader State ILUA negotiations provides an ideal starting point for reviewing the RSHA and bringing that into line with industry and native title groups' standard practices and expectations.

We anticipate that updating the RSHA would contribute to expediting the exploration tenement application process for all parties, consistent with the policy initiatives being driven by the Department of Mines and Petroleum, the Department of Premier and Cabinet and the National Native Title Tribunal. YMAC welcomes an opportunity to discuss the next steps in progressing this review, with the relevant agencies.

YMAC appreciates the ongoing communication, at officer level, with your Department on the development of the HISF and rollout of the Due Diligence Guidelines. We note the substantial changes to the Due Diligence Guidelines since their inception, which appear to incorporate feedback from Native Title Representative Bodies. In particular, we welcome the recognition of the interaction between heritage protection and native title processes, including the need to negotiate and comply with heritage agreements.

The proposals outlined here seek to build on this move toward a more collaborative approach to heritage protection in WA. We understand that legislative changes to the AHA are planned in the near future and strongly urge you and your Department to engage with YMAC prior to their introduction to ensure their workability and to prevent any unintended negative consequences for Aboriginal custodians. We also encourage you to consider if the

proposals outlined above might be incorporated into any legislative amendments you may be contemplating.

I understand that you are attending the upcoming meeting of the WA Alliance of Land Councils in late August. I request an opportunity to meet with you and your Department to discuss the proposals canvassed here in more detail prior to this meeting. We will then be in a position to feed back relevant information to the wider group.

Yours faithfully

SIMON HAWKINS
CHIEF EXECUTIVE OFFICER

Ombudsman Western Australia

GUIDELINES

Procedural fairness (natural justice)

Revised May 2009

What is procedural fairness?

Procedural fairness is concerned with the procedures used by a decision-maker, rather than the actual outcome reached. It requires a fair and proper procedure be used when making a decision. The Ombudsman considers it highly likely that a decision-maker who follows a fair procedure will reach a fair and correct decision.

Is there a difference between natural justice and procedural fairness?

The term procedural fairness is thought to be preferable when talking about administrative decision-making because the term natural justice is associated with procedures used by courts of law. However, the terms have similar meaning and are commonly used interchangeably. For consistency, the term procedural fairness is used in this fact sheet.

Does procedural fairness apply to every government decision?

No. The rules of procedural fairness do not need to be followed in all government decision-making. They mainly apply to decisions that negatively affect an existing interest of a person or corporation. For instance, procedural fairness would apply to a decision to cancel a licence or benefit; to discipline an employee; to impose a penalty; or to publish a report that damages a person's reputation.

Procedural fairness also applies where a person has a legitimate expectation (for example, continuing to receive a benefit such as a travel concession). Procedural fairness protects legitimate expectations as well as legal rights. It is less likely to apply to routine administration and policy-making, or to decisions that initially give a benefit (for example, issuing a licence in the first instance).

In some rare circumstances, the requirement to provide procedural fairness is specifically excluded by Acts of Parliament (for example, section 115 of the *Sentence Administration Act 2003*).

The rules of procedural fairness require:

- a hearing appropriate to the circumstances;
- lack of bias;
- evidence to support a decision; and
- inquiry into matters in dispute.

What is "the hearing rule"?

A critical part of procedural fairness is 'the hearing rule'. Fairness demands that a person be told the case to be met and given the chance to reply before a government agency makes a decision that negatively affects a right, an existing interest or a legitimate expectation which they hold. Put simply, hearing the other side of the story is critical to good decision-making.

In line with procedural fairness, the person concerned has a right:

- to an opportunity to reply in a way that is appropriate for the circumstances;
- for their reply to be received and considered before the decision is made;
- to receive all relevant information before preparing their reply. The case to be met must include a description of the possible decision, the criteria for making that decision and information on which any such decision would be based. It is most important that any negative information the agency has about the person is disclosed to that person. A summary of the information is sufficient; original documents and the identity of confidential sources do not have to be provided;

- to a reasonable chance to consider their position and reply. However, what is reasonable can vary according to the complexity of the issue, whether an urgent decision is essential or any other relevant matter; and
- to genuine consideration of any submission. The decision-maker needs to be fully aware of everything written or said by the person, and give proper and genuine consideration to that person's case.

How does procedural fairness apply to an individual who may be negatively affected by a government decision?

If you are going to be negatively affected by a government decision, you are entitled to expect that the decision-maker will follow the rules of procedural fairness before reaching a conclusion. In particular, you are entitled to:

Be told the case to be met (for example, that an agency is considering withdrawing an existing entitlement or benefit such as a rebate or an allowance), including reasons for this proposal and any negative or prejudicial information relating to you that is to be used in the decision-making process.

The case to be met could be a letter or a draft report, or it could be a summary of the issues being considered by the decision-maker. It is not necessary for you to receive copies of all original documents or the identity of confidential sources be revealed.

A real chance to reply to the case to be met, whether that be in writing or orally. The type of hearing should be proportional to the nature of the decision. For instance, if the consequences of the proposed decision are highly significant, a formal hearing process may be warranted. In contrast, if the matter is relatively straightforward, a simple exchange of letters may be all that is needed. Generally, in any oral (or face-to-face) hearing, it is reasonable to bring a friend or lawyer as an observer, so you may wish to consider this.

In your reply, you may, amongst other things, wish to:

- deny the allegations;
- provide evidence you believe disproves the allegations;
- explain the allegations or present an innocent explanation; and
- provide details of any special circumstances you believe should be taken into account.

You must have the chance to give your response before the decision is made, but after all important information has been gathered. This is so you can be given all the information you are entitled to and be aware of the issues being considered by the decision-maker.

The decision-maker should have an open mind (be free from bias) when reading or listening to what you have to say.

How does procedural fairness apply to an investigator?

If you are investigating a matter or preparing a report for a decision-maker, it is good practice to consider the requirements of procedural fairness at every stage of your investigation.

Procedural fairness is an essential part of a professional investigation and benefits both parties. As an investigator, acting according to procedural fairness can help you by providing:

- an important means of checking facts and identifying major issues
- comments made by the subject of the complaint that can expose weaknesses in the investigation
- advance warning of areas where the investigation report may be challenged.

Depending on the circumstances, procedural fairness requires you to:

- inform those involved in the complaint of the main points of any allegations or grounds for negative comment against them. How and when this is done is up to you, depending on the circumstances
- provide people with a reasonable opportunity to put their case, whether in writing, at a hearing or otherwise. It is important to weigh all relevant circumstances for each individual case before deciding how the person should be allowed to respond to the allegations or negative comment.

- In most cases it is enough to give the person opportunity to put their case in writing. In others, however, procedural fairness requires the person to make oral representations. Your ultimate decision will often need to balance a range of considerations, including the consequences of the decision
- hear all parties to a matter and consider submissions
- make reasonable inquiries or investigations before making a decision. A decision that will negatively affect a person should not be based merely on suspicion, gossip or rumour. There must be facts or information to support all negative findings. The best way of testing the reliability or credibility of information is to disclose it to a person in advance of a decision, as required by the hearing rule
- only take into account relevant factors
- act fairly and without bias. If, in the course of a hearing, a person raises a new issue that questions or casts doubt on an issue that is central to a proper decision, it should not be ignored. Proper examination of all credible, relevant and disputed issues is important
- conduct the investigation without unnecessary delay
- ensure that a full record of the investigation has been made.

Of course, wherever there is a requirement to apply particular procedures in addition to those that ensure procedural fairness, the terms of that statutory obligation must also be followed.

The Ombudsman recommends that whenever it is proposed to make adverse comment about a person, procedural fairness should be provided to that person before the report is presented to the final decision-maker. This should be done as a matter of best practice.

There is no requirement that all the information in your possession needs to be disclosed to the person. However in rare cases, such as a serious risk to personal safety or to substantial amounts of public funds, procedural fairness requirements may need to be circumvented due to overriding public interest. If you believe this exists, make sure you seek expert advice and document it.

How does procedural fairness apply to the decision-maker?

Except in rare circumstances where procedural fairness is excluded by statute, if you are making a decision which will affect the rights, interests or legitimate expectations of a person, you must comply with the rules of procedural fairness. In other words, you must ensure:

- you allow the individual a fair hearing (or verify that the individual has been granted a fair hearing) that is neither too early or too late in the decision-making process; and
- you are unbiased. This includes ensuring that from an onlooker's perspective there is no reasonable perception of bias. For example, personal, financial or family relationships, evidence of a closed mind or participation in another role in the decision-making process (such as accuser or judge) can all give rise to a reasonable perception of bias. If this is the case, it is best to remove yourself from the process and ensure an independent person assumes the role of decision-maker.

If you are relying on a briefing paper that summarises both sides of the case and makes a proposal, it is often a good idea to disclose a draft of the briefing paper to the person, even though a hearing has earlier been held.

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