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Australian Heritage Strategy Project Team
Heritage Strategies
Heritage and Wildlife Division
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Dear Project Team,

Submission on the Australian Heritage Strategy Public Consultation Paper

Thank you for the opportunity to comment on the consultation paper on the Australian Heritage Strategy.¹

The Australian Network of Environmental Defender's Offices (**ANEDO**) is a network of nine community legal centres in each state and territory, specialising in public interest environmental law and policy. Protection of Aboriginal and Torres Strait Islander culture and heritage is a core concern of our offices. Through our litigation and law reform work, ANEDO's member offices have had substantial involvement with efforts to protect Aboriginal and Torres Strait Islander culture and heritage in Australia. Between them, our offices have provided legal advice and policy support,² and have represented Indigenous clients in cases before the Courts.³ While we primarily wish to provide comment on the Indigenous culture and heritage aspect of the Australian Heritage Strategy

¹ www.environment.gov.au/heritage/strategy/submissions.html#paper.

² ANEDO provided a submission to the Expert Panel on the Recognition of Aboriginal and Torres Strait Islander People in the Australian Constitution: see www.edo.org.au/policy/110929constitutional_reform.pdf. In November 2009, ANEDO provided a submission on the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*: see www.edo.org.au/policy/09106.pdf. In December 2011, EDO NSW contributed to the Aboriginal Culture and Heritage Reform Working Party on Aboriginal Culture and Heritage Legislative Review and Reform: see www.edo.org.au/edonsw/site/pdf/subs/111219culture_heritage_reform.pdf. EDO NSW has also prepared a discussion paper on reforming New South Wales' Laws for the Protection of Aboriginal Cultural Heritage: see www.edo.org.au/edonsw/site/pdf/subs/090000reforming_aboriginal_cultural_heritage_laws_discussion%20paper.pdf.

³ For example, EDO Tasmania assisted the Tasmanian Aboriginal Centre in its efforts to oppose the Brighton Bypass being built over a significant Aboriginal heritage site. EDO NSW has acted in a number of cases for Aboriginal clients seeking to challenge consents to destroy Aboriginal cultural heritage (see *Anderson & Anor v D-G, Department of Environment and Climate Change* [2008] NSWLEC 182; *Munro & Nean v Minister for Planning & Moree Plains Shire Council*).

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Consultation Paper, we also would like to first note the importance of Commonwealth leadership and oversight.

A clear Commonwealth role regarding heritage

We note with concern the threat to crucial elements of Australia's natural heritage that is posed by recent efforts to streamline environmental assessment of development projects between the Commonwealth and State governments. The Council of Australian Governments has announced that it will 'address duplicative and cumbersome environment regulation' and 'streamline the process for approvals of major projects'. Its processes of doing so will include fast-tracking the development of bilateral arrangements for accreditation of state assessment and approval processes.⁴ While the Commonwealth will retain its final approval responsibilities for projects affecting world heritage sites, it proposes to work with the States and Territories 'to improve the process for approvals of these categories, agreed bilaterally or collectively'.⁵

The recent dispute between the Queensland and Commonwealth governments regarding the appropriate standard of environmental assessment for the Alpha coal proposal highlights the crucial importance of retaining Commonwealth oversight of environmental assessment.⁶ A recent report of the UNESCO World Heritage Committee on the state of conservation of the Great Barrier Reef World Heritage Area expressed significant concern about the impact of major project developments in the vicinity of the reef on the reef's conservation. It also noted the lack of an overall plan for future sustainable development of the reef.⁷ ANEDO has advocated for the retention of strong environmental protection laws at all levels of government in Australia,⁸ and we urge that robust strategies for protecting Australia's natural heritage areas at the Commonwealth level form part of any national heritage strategy. We agree with the comment in the consultation paper that leadership by the Federal government in the protection of natural heritage is essential, especially if Australia is to continue being a 'leader in World Heritage management'.⁹

Indigenous culture and heritage

With regard to the protection of Indigenous culture and heritage, we emphasise the vital importance of implementing processes for protection of Indigenous culture and heritage that are substantive rather than symbolic; that facilitate Indigenous control of heritage outcomes; and that actively empower traditional owners and other Indigenous stakeholders to decide what constitutes their own culture and heritage. Culture and heritage protection must be extended not only to tangible objects,

⁴ Council of Australian Governments Meeting, Canberra, 13 April 2012, Communiqué, 2 www.coag.gov.au/coag_meeting_outcomes/2012-04-13/docs/COAGCommunique13April2012.pdf.

⁵ Council of Australian Governments Meeting, Canberra, 13 April 2012, Communiqué, 2-3, www.coag.gov.au/coag_meeting_outcomes/2012-04-13/docs/COAGCommunique13April2012.pdf. The Coalition has stated that if elected, it will go further in implementing an even more streamlined "one-stop shop" system for project assessment and approval including full administration of federal laws: see www.theaustralian.com.au/national-affairs/climate/tony-abbotts-environmental-one-stop-shop/story-e6frg6xf-1226333815692. This would mean that developments impacting world heritage would be the responsibility of the States to assess and approve.

⁶ See ABC News, *Burke slams 'shambolic' reef mine approval*, 07 June 2012, www.abc.net.au/news/2012-06-05/burke-labels-reef-mine-approval-a-shambolic-joke/4053188.

⁷ See UNESCO World Heritage Committee Report, 36th Session, Saint-Petersburg, 24 June – 6 July 2012, *State of Conservation of World Heritage properties inscribed on the World Heritage List*, WHC-12/36.COM/7B.Add, pp 22-25, <http://whc.unesco.org/document/116992>.

⁸ Australian Network of Environmental Defender's Offices, *COAG Environmental Reform Agenda: ANEDO Response – in Defence of Environmental Laws*, May 2012, www.edovic.org.au/downloads/files/law_reform/ANEDO%20response%20to%20attacks%20on%20environmental%20laws.pdf.

⁹ Australian Heritage Strategy Public Consultation Paper, 6, www.environment.gov.au/heritage/strategy/submissions.html#paper.

but also to the context required to make those objects meaningful. Furthermore, cultural practices and elements of traditional knowledge, such as those relating to environmental protection, should be recognised and protected as part of culture and heritage.¹⁰ These cultural practises must be facilitated by government in order to further their protection at the national level.

As EDO NSW has previously submitted,¹¹

Culture and heritage protection should be premised on facilitating Aboriginal peoples' ongoing practice of their cultural rights and maintenance of their unique identity. It is important that culture and heritage protection be holistic, based not only on the identification and protection of particular items, but also on allowing ongoing protection of the cultural and spiritual values attaching to those items.

Similarly, Schmider and James have noted that cultural heritage 'is not limited to material manifestations', and can also encompass 'living expressions and the traditions that countless groups and communities worldwide have inherited from their ancestors and transmit to their descendants'.¹²

We urge the Commonwealth government to provide leadership in developing a nation-wide framework for the protection of Indigenous culture and heritage as part of any heritage strategy. We have previously endorsed the establishment of a nationally consistent set of best practice standards to be implemented across all states and territories.¹³ A national framework must recognise Aboriginal and Torres Strait Islanders as the owners of their culture and heritage, and empower them to decide how this culture and heritage should be utilised. This includes ensuring that free, prior and informed consent is given to any proposal to deal in any way with Indigenous culture and heritage, and especially any proposal that involves destruction of such heritage.

It is elemental to any national framework that the nature of existing Indigenous culture and heritage is properly understood. As the Commonwealth *State of the Environment* report notes, present systems for surveying, assessing and listing Indigenous heritage places are inconsistent around Australia, with the result that 'there is no readily available national perspective on the nature and extent of the Indigenous resource – neither what is being listed nor what is potentially being destroyed'.¹⁴ We urge proactive action on the part of government, in consultation with Indigenous communities, to identify and register the key elements of Indigenous culture and heritage. In the development of any register, the owners of cultural knowledge must have full control of the use that is to be made of that knowledge.

Australia supports the *United Nations Declaration on the Rights of Indigenous Peoples*, and we urge the government to implement its provisions to the fullest extent possible. Doing so will include recognising that Australia's Indigenous peoples have the right to practice and revitalise their cultural traditions, including 'the right to maintain, protect and develop the past, present and future manifestations of their cultures'. It will also oblige the State to provide effective redress with respect to cultural, intellectual, religious and spiritual property taken from Indigenous communities without

¹⁰ See also Australian Network of Environmental Defender's Offices, *Submission on the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, November 2009, 16-19, www.edo.org.au/policy/110929constitutional_reform.pdf.

¹¹ Environmental Defender's Office (NSW), *Submission to the Aboriginal Culture and Heritage Reform Working Party on Aboriginal Culture and Heritage Legislative Review and Reform*, 19 December 2011, 12 www.edo.org.au/edonsw/site/pdf/subs/111219culture_heritage_reform.pdf.

¹² Joann Schmider and Peter James, *Essay: Whose Heritage is It?*5, www.environment.gov.au/heritage/strategy/pubs/essay-whoseheritageisit-schmider-james.pdf.

¹³ Australian Network of Environmental Defender's Offices, *Submission on the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, November 2009, 1, www.edo.org.au/policy/110929constitutional_reform.pdf.

¹⁴ Australian State of the Environment Committee, *Australia State of the Environment 2011*, 715.

their free, prior and informed consent.¹⁵ We also note that in its response to the Universal Periodic Review undertaken through the United Nations Human Rights Council, Australia has pledged to ‘continue to recognise and protect the culture and heritage of Indigenous peoples’ where appropriate in law and policy.¹⁶ A national heritage strategy is an appropriate policy forum in which to strengthen protective mechanisms around Indigenous culture and heritage.

Australia has also pledged to consider becoming a party to the International Labour Organisation *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*.¹⁷ The Convention requires, among other relevant provisions, the government to ensure that studies are carried out in co-operation with the peoples concerned to assess the social, spiritual, cultural and environmental impact on them of planned development activities, and that the results of these studies be regarded as fundamental criteria for the implementation of these activities.¹⁸

For further information, please contact Rachel Walmsley, Policy & Law Reform Director, EDO NSW on (02) 9262 6989 or rachel.walmsley@edo.org.au.

Yours sincerely,



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On behalf of The Australian network of Environmental Defender’s Offices

¹⁵ *United Nations Declaration on the Rights of Indigenous Peoples*, Art 11.

¹⁶ See United Nations General Assembly, Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, A/HRC/17/10/Add.1, www.hrlc.org.au/files/Australias-Formal-UPR-Response.pdf.

¹⁷ See United Nations General Assembly, Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, A/HRC/17/10/Add.1, www.hrlc.org.au/files/Australias-Formal-UPR-Response.pdf. See also the Commonwealth Government’s draft *National Human Rights Action Plan 2012*, 5, www.ag.gov.au/Documents/National+Human+Rights+Action+Plan+-+Consultation+version.pdf.

¹⁸ Article 7(3). The Convention is available at www.ilo.org/ilolex/cgi-lex/convde.pl?C169.