

# Submission on the NT EPA's Draft environmental factor guidance: Culture and Heritage



## Preamble

The Aboriginal Areas Protection Authority (the Authority / AAPA) is a statutory body established under the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) (Sacred Sites Act) and is responsible for the protection of Aboriginal sacred sites on land and sea across the Northern Territory (NT).

The protection of Aboriginal sacred sites is recognised by the Northern Territory Government and the broader Territory community as an important element in the preservation of the Territory's cultural heritage for the benefit of all Territorians. In accordance with the Sacred Sites Act the Authority seeks to strike a balance between the protection of sacred sites and development in the NT.

## Submission

The Authority is keen to contribute to the Northern Territory Environment Protection Authority's (NT EPA's) Draft environmental factor guidance: Culture and Heritage (the draft guidance). This submission specifically addresses aspects of the draft guidance relating to Aboriginal culture and heritage, not other types of culture and heritage.

The Authority understands that the purpose of the draft guidance is to help proponents identify Aboriginal cultural values, assess how these values may be impacted by development, and consider how any 'significant' impacts may be avoided or mitigated, and risks reduced. Achieving this purpose will increase certainty for proponents and the Northern Territory community at large. Broadly, the Authority considers that this draft guidance does not achieve this purpose. In contrast, the Authority considers that use of the draft guidance would put significant Aboriginal cultural values that exist in the Northern Territory in jeopardy, and diminish the trust that Aboriginal stakeholders place in the environmental assessment processes of the NT.

The Authority recommends the draft guidance be withdrawn from use as a guiding document for proponents and be substantially rewritten so as to provide clear and complete advice on the assessment of culture and heritage that is appropriate for consideration under the EP Act.

The reasons for this include:

1. The draft guidance focusses on compliance with other legislation as a mechanism for addressing the *Environment Protection Act 2019* (EP Act), and points primarily to complying with the Sacred Sites Act and the *Heritage Act 2011* (Heritage Act). This focus does not guide proponents on how to address Aboriginal culture and heritage in a manner that would satisfy all relevant sections of the EP Act, including the general duty established by Section 43 of the EP Act. The draft guidance lacks consideration of significant cultural values associated with, but not limited to, Aboriginal narratives of daily life, landscape, ceremony, mortuary, livelihoods, trade, kinship and family, economic survival, and a myriad of associated intangible cultural heritage values.
2. The draft guidance privileges the existence of an Authority Certificate in the assessment of cultural values by the NT EPA. The Authority is concerned that the NT EPA may rely solely on the existence of an Authority Certificate as adequate evidence of consultation with Aboriginal stakeholders, and perhaps as adequate protection of cultural values. However, an Authority Certificate issued in accordance with the Sacred Sites Act does not entail consent for development, and does not protect all cultural heritage values that may exist. Whilst the protection of sacred sites is a paramount concern of many Aboriginal people in the context of

development, there are significant other cultural heritage values that exist and that require consideration in the assessment of impacts, and require protection under the EP Act. Notably consideration of intangible cultural heritage values are absent from the draft guidance, despite national and international initiatives to capture the protection of such values in regulatory frameworks.

3. The draft guidance inaccurately describes the legislative framework of Aboriginal property rights in the NT and in doing so fails to acknowledge the scale and extent of Aboriginal cultural values that exist in the NT and legal mechanisms for their protection. Importantly, 53% of the Northern Territory, including 83% of the coastline, is Aboriginal freehold land under the *Aboriginal Land Rights (NT) Act 1976* (Land Rights Act) and the remainder of the Northern Territory is subject to Native Title rights under the *Native Title Act 1993* (Native Title Act). These significant property rights encompass, and are based upon a broad range of Aboriginal cultural values that are not acknowledged by the draft guidance.
4. The draft guidance adopts definitions of 'culture' and 'values' that are broad and simplistic. Guidance on definitions can be found in the various national and international standards relating to the protection of cultural heritage (see below).
5. The draft guidance does not refer proponents to contact the land councils. This is a major oversight as land councils are the key agencies that provide representation to Aboriginal people in the NT and support Aboriginal people to make decisions about activities on their land, or land on which they have Native Title rights. The draft guidance does not acknowledge the significant mechanisms of the Land Rights Act and the Native Title Act for the benefit of Aboriginal people and that encompass the protection of Aboriginal cultural values. The guidance should contain detailed information for proponents on engagement with these statutes and the land councils that administer them.
6. The draft guidance uses some language that could be considered offensive. For example 'consultation and surveys may result in the discovery of previously unknown cultural values' (p. 9) could be perceived as implying that people don't know about their cultural values until research 'discovers' them. Conversely, Aboriginal people have understood their cultural values for thousands of years irrespective of whether they have been documented or recorded by anyone else.

## Recommendations

The Authority recommends that some of the inadequacies in the draft guidance be addressed by referring to international and national concepts and documents. For example:

1. International standards establish that the views of Aboriginal and Torres Strait Islander people be central in the determination of matters concerning Aboriginal cultural heritage, and that such views and consent be sought by means of free, prior and informed consent (FPIC).<sup>1</sup>
2. Concepts of cultural heritage have enjoyed formal international recognition and protections for many decades. Instruments of particular relevance include:
  - the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which enshrines the principles of FPIC, particularly in relation to the development of indigenous peoples lands territories or resources (Article 32.2);
  - article 27 of the International Convention on Civil and Political Rights;
  - articles 6(2), 13(1) and 14(1) of the International Labour Organisation's Indigenous and Tribal Peoples Convention 169, and
  - the Convention on Biological Diversity (CBD).

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<sup>1</sup> Free, prior and informed consent (FPIC) is a key principle for the protection of cultural values/heritage, consistent with the United Nations Declaration on the Rights of Indigenous peoples (UNDRIP) to which Australia is a signatory, and the convention on Biological Diversity and the International Labour Organisation Convention 169.

3. The Akwe: Kon Guidelines<sup>2</sup> are born out of the CBD, and provide a collaborative framework for ensuring the full involvement of indigenous and local communities in the assessment of cultural, environmental and social impacts of proposed developments. They apply to sacred sites and traditionally occupied lands and waters and detail how to take into account traditional knowledge, innovations and practices in impact assessment processes.
4. Acknowledgement of the Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander Heritage in Australia<sup>3</sup> which is a guiding document developed by the Heritage Chairs and Officials of Australia and New Zealand (HCOANZ), and the supporting document the Best Practice Standards in Indigenous Cultural Heritage Management and Legislation.<sup>4</sup>
5. The findings and recommendations of the Juukun Gorge Inquiry<sup>5</sup>.

Combined, these instruments and their supporting material should provide a convincing argument as to the significance of Aboriginal peoples' rights to cultural heritage protection and practice, and that any proposed interference with these rights results in a 'heightened duty to conduct consultation, accommodate Indigenous peoples' concerns and seek FPIC at each stage of a project<sup>6</sup>.

Further, the Authority recommends that the NT EPA consult directly with Aboriginal organisations, including land councils, before rewriting the guidance.

## Conclusion

The Authority considers that the draft guidance does not provide appropriate advice for proponents on how to assess Aboriginal culture and heritage values and potential impacts on them in accordance with the EP Act. The Authority recommends that the draft guidance be withdrawn from use as a guiding document for proponents and be substantially redeveloped before being made publicly available.

The Authority would welcome the opportunity to discuss the draft guidance and offer constructive feedback on its further development.

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<sup>2</sup> Secretariat of the Convention on Biological Diversity, Akwe: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities (Montreal, 2004).

<sup>3</sup> <https://www.agriculture.gov.au/parks-heritage/heritage/publications/dhawura-ngilan-vision-atsi-heritage>

<sup>4</sup> *ibid*

<sup>5</sup> A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukun Gorge. Joint Standing Committee on Northern Australia, Parliament of the Commonwealth of Australia. October 2021, Canberra.

<sup>6</sup> Stuart Butzier and Sarah Stevenson, 'Indigenous Peoples' Rights to Sacred Sites and Traditional Cultural Properties and the Role of Consultation and Free, Prior and Informed Consent' (2014) 32 Journal of Energy and Natural Resources Law 297, 333.