

Environmental Impact Assessment – A Tool for Promoting Indigenous Interests?

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Introduction

In Western Australia Aboriginal heritage is principally recognised and protected by the operation of the provisions of the *Aboriginal Heritage Act 1972* (WA). However, as the Aboriginal and Torres Strait Islander Social Justice Commissioner has noted¹, this Act is based on a limited conception of Aboriginal heritage and therefore does not provide comprehensive recognition or protection to Aboriginal heritage. Specifically, the Act focuses on the preservation of particular objects and places and does not deal with social, economic or cultural issues. Further, the Act permits a proponent to commence development without taking any prior measures in relation to indigenous heritage, and has relatively weak enforcement mechanisms.

There is, however, another legislative tool which may be used to recognise and protect Aboriginal heritage in WA - environmental impact assessment under the *Environmental Protection Act 1986* (WA). Environmental impact assessment is the primary mechanism for the assessment of the likely environmental impacts of major development proposals and can include an assessment of the likely impacts of proposals upon Aboriginal heritage. Elements of the environmental impact assessment process include:

- ∉ It is not constrained by the limited conception of Aboriginal heritage which the *Aboriginal Heritage Act* is;
- ∉ Any person can refer a proposal to the Environmental Protection Authority (“EPA”) for assessment at any time – there is no need for a developer to apply for approval to interfere with an Aboriginal site before the *Environmental Protection Act* is triggered;
- ∉ Once the EPA has decided to formally assess a proposal, no approvals can be granted, and therefore the proposal cannot go ahead, until the EPA has completed its assessment and the Minister for the Environment has made her decision about the proposal; and
- ∉ The EPA assessment process includes several avenues for public comment and appeals by members of the public.

This paper explores the opportunities for recognition and protection of Aboriginal heritage in the environmental impact assessment process, outline the environmental impact assessment process (including the avenues for participation in the process), and describes the limitations of the process.

¹ Aboriginal and Torres Strait Islander Social Justice Commissioner *Native Title Report 2001* Human Rights and Equal Opportunity Commission, at 30. See also the Commissioner's submission to the Independent Review Committee's "Review of the Project Development Approvals System – Final Report" April 2002 referred to at page at 79 – 80 of the Report.

What is Aboriginal heritage?

The heritage of indigenous peoples has been defined as comprising of all indigenous objects, sites and knowledge, the nature or use of which has been transmitted from generation to generation and which pertains to particular people². Tangible heritage includes those sites or objects which are important to indigenous people as part of their customary law. Intangible heritage includes each community's oral history, the details of certain rituals and ceremonies, and knowledge of the natural environment. Aboriginal heritage is therefore dynamic, continually evolving and, importantly, not restricted to the past³.

The *Aboriginal Heritage Act* is constrained by a limited view of indigenous heritage. It is essentially confined to considerations of particular sites and objects which are of significance to Aboriginal people because of some past event or association⁴. The consideration of Aboriginal heritage in the environmental impact assessment of proposals pursuant to the *Environmental Protection Act* is not so confined.

Aboriginal heritage under the *Environmental Protection Act*

The *Environmental Protection Act* provides that the EPA must assess "environmental factors" as defined in that Act. "Environment" is defined in the Act to mean:

"living things, their physical, biological and *social surroundings*, and interactions between all of these"⁵. (italics added)

"Social surroundings" are further described as the aesthetic, cultural, economic and social surroundings of a person to the extent that those surroundings directly affect or are affected by that person's physical or biological surroundings⁶.

The definition of environmental factors in the *Environmental Protection Act* means that environmental impact assessment can include an assessment of factors which are covered by the *Aboriginal Heritage Act*, such as sites and objects which are of significance to Aboriginal people because of some past event or association. However, environmental factors are defined widely enough to also include consideration of current social, economic and cultural issues which are directly affected by a particular proposal. For example, if a proposal is likely to affect the distribution of a native fauna species in an area currently used for indigenous hunting, this will be a cultural matter which is directly affected by interference with a person's biological surroundings, and can therefore be considered in any environmental impact assessment of that proposal. Similarly, if a proposal is likely to affect an indigenous tourism enterprise in a particular area, this will

² Taubman "Protecting Aboriginal Sacred Sites: The Aftermath of the Hindmarsh Island Dispute" *Environmental Planning and Law Journal* Volume 19 No 2 at page 141- 142.

³ Taubman "Protecting Aboriginal Sacred Sites: the Aftermath of the Hindmarsh Island Dispute" *Environmental Planning and Law Journal* Volume 19 No 2 at page 142.

⁴ See sections 5 and 6 of the *Aboriginal Heritage Act 1972*.

⁵ Section 3 *Environmental Protection Act 1986*

⁶ Section 3 (2) *Environmental Protection Act 1986*

be an economic matter which is directly affected by interference with a person's physical surroundings, and can therefore be considered in any environmental impact assessment of that proposal.

Assessment of Aboriginal heritage under the *Environmental Protection Act* can therefore include consideration of current social, economic and cultural issues which are directly affected by a particular proposal as well as consideration of particular sites and objects which are of significance to Aboriginal people because of some past event or association.

Note though that in considering "environmental factors", and therefore Aboriginal heritage, the EPA must look only at those factors which are *directly* related to the *physical area* involved in the proposal. That is, the EPA cannot consider the potential impacts of a proposal which are not related to an area which will actually be affected by that proposal. For example, in *ex parte Coastal Waters Alliance of Western Australia Incorporated*⁷, the Full Court of the Supreme Court held that the EPA could not consider any commercial matters associated with a proposal to dredge Cockburn Sound. Specifically, the Court held that the EPA could not consider the effect of the proposal on the commercial contracts of the proponent, or the effect of the proposal on the employment of the proponent's workforce. Such impacts were indeed a result of the proposal, but were not related to the specific area covered by the proposal – the impacts would have occurred regardless of where the proposal was situated. They were therefore not "environmental factors" for the purpose of the Act. On the basis of this case, whether or not Aboriginal people will be employed by a particular proposal will in all likelihood not be an "environmental factor" which the EPA could take into account.

EPA's policy on assessing Aboriginal heritage

The EPA has published a Draft "*Guidance for the Assessment of Environmental Factors on Assessment of Aboriginal Heritage*" (August 2001). Guidance statements such as this provide advice to proponents about the minimum requirements of an environmental impact assessment should address. The Guidance Statement was prepared by the EPA in consultation with the Department of Aboriginal Affairs.

The Guidance Statement states that Aboriginal heritage is a relevant factor in environmental impact assessment in circumstances where it is linked directly to the physical and biological attributes of the environment, and when the protection and management of those attributes are threatened as a result of proposed development. It provides that an environmental impact assessment must assess whether changes to the physical or biological environment will result in there being an impact on matters of heritage significance to Aboriginal people. If there will be such impacts, the environmental impact assessment must outline measures to manage those impacts.

In summary, the EPA has the power to consider all aspects of Aboriginal heritage, including social, economic and cultural issues, as long as those issues are directly associated with a biological or physical interference in the specific area of a proposal.

⁷ (1996) 90 LGERA 136

Environmental Impact Assessment Process

The EPA can assess proposals which are likely, if implemented, to have a significant effect on the environment⁸.

Proposals

“Proposals” are defined by the *Environmental Protection Act* to include projects, plans, programmes, policies, operations, undertakings or developments or changes in land use, or amendments of any of these things⁹. This definition is wide enough to cover not only development proposals, but also some government plans and policies which have legal effect.

However, the EPA cannot assess mere recommendations for future land use. As noted above, the *Environmental Protection Act* permits the assessment of proposals which are “likely, if implemented, to have a significant effect on the environment”. The Supreme Court has found that this means that management plans which are merely recommendations for future land use, as opposed to actual determinations of future land use, cannot be assessed by the EPA: *Environmental Protection Authority; ex parte Chapple*¹⁰. In that case, the EPA declined to assess the Burrup Peninsula Draft Land Use and Management Plan. The draft plan proposed to divide the Burrup into two land use zones – a conservation zone and an industrial zone. The Court found that the implementation of such a proposal could not be said to be likely to have a significant effect on the environment, as zoning itself merely classifies land rather than authorises any particular use.

Who can refer a proposal to the EPA?

Any person can refer a proposal to the EPA as long as the referral is in writing¹¹.

In addition, “decision-making authorities” - such as local governments considering an application for planning approval or the Minister for Mines in determining whether to grant a mining tenement - *must* refer to the EPA proposals that appear likely, if implemented, to have a significant effect on the environment¹². That referral must take place as soon as the proposal comes to the attention of the decision-making authority. If a decision-making authority makes a decision on an environmentally significant proposal without referring that proposal to the EPA, then that decision will be open to challenge in the Supreme Court¹³.

⁸ Section 38 *Environmental Protection Act 1986*

⁹ Section 3 *Environmental Protection Act 1986*

¹⁰ (1995) 89 LGERA 310

¹¹ Section 38 *Environmental Protection Act 1986*

¹² Section 38 *Environmental Protection Act 1986*

¹³ *Serpentine-Jarrahdale Ratepayers and Residents Association Incorporated v Minister for Mines* [2001] WASC 203

Who decides whether a proposal should be assessed?

The decision as to whether a proposal should be assessed is made by the EPA or a person to whom the EPA has delegated its decision-making power¹⁴. At present, the EPA has delegated its power to decide whether a proposal should be assessed to the Chairman of the EPA¹⁵.

When will a proposal be assessed?

The *Environmental Protection Act* does not specify what types of proposals should or should not be assessed. The EPA therefore has a wide discretion to decide whether or not a proposal should be assessed.

The EPA has adopted administrative procedures¹⁶ which indicate that it will require environmental impact assessment where it considers that the potential environmental impact of the proposal is significant. The legal status of the administrative procedures is uncertain. It is likely that the EPA is not bound by those procedures, but that the EPA is required to at least have regard to them in making its decisions. The administrative procedures guide that the EPA's judgement as to environmental significance and include a consideration of the following factors:

- ∅ The environmental values of the area affected;
- ∅ The potential of the biophysical impacts to significantly and adversely affect the social surroundings of people;
- ∅ The ability of "decisionmaking authorities" to place conditions on the proposals to ensure required environmental outcomes; and
- ∅ The likely degree of public interest and the extent to which interested people have been consulted.

While there is no specific reference to Aboriginal heritage in the EPA's administrative procedures, the factors outlined in dot points above could encompass considerations of Aboriginal heritage. This means that if a person refers a proposal to the EPA on the basis that it is likely to have a significant impact on a matter of Aboriginal heritage, the EPA must consider whether those impacts are likely to be significant and therefore whether to assess the proposal or not.

Assessment processes

If the EPA decides to assess a proposal, the *Environmental Protection Act* provides that the form, content, timing and procedure of any environmental review is to be determined

¹⁴ Section 40 *Environmental Protection Act 1986*

¹⁵ Delegation dated 29/8/99, published at page 4636 Government Gazette 1999.

¹⁶ *Environmental Impact Assessment (Part IV Division 1) Administrative Procedures 2002* published at Government Gazette 2002 at page 565.

by the EPA¹⁷. The assessment process therefore varies in each particular case. However, the EPA's administrative procedures outline four general different types of assessment:

- Assessment on Referral Information (ARI)
- Environmental Protection Statement (EPS)
- Public Environmental Review (PER)
- Environmental Review and Management Programme (ERMP).

Assessment on Referral Information (ARI)

This form of assessment applies to proposals which raise only one or a small number of significant environmental factors which can be readily managed but where conditions set by another decision-making authority will not be sufficient. The EPA will normally publish its decision to set this level of assessment at the same time as it publishes its report and recommendations about the proposal to the Minister. There are limited opportunities for public participation in this level of assessment.

Environmental Protection Statement (EPS)

This form of assessment applies to proposals of local interest which raise a number of significant environmental factors which can be readily managed. The EPA will usually advertise its intention to set this level of assessment and seek public comment before finally making a decision about the level of assessment. Once this level of assessment is set, the proponent prepares and submits an EPS document to the EPA. The proponent may permit or seek public participation in the preparation of the EPS. Once it has assessed the proponent's EPS, the EPA submits a report on the proposal to the Minister setting out its recommendation as to whether the proposal should be approved, and if so, what conditions the proposal should be subject to.

Public Environmental Review (PER)

This level of assessment applies to proposals of local or regional significance that raise a number of significant environmental factors. The proponent must submit an Environmental Scoping document setting out the environmental factors associated with a project and the studies it intends to carry out and a Public Environmental Review (PER) document which adequately addresses all the environmental factors and studies identified in the Environmental Scoping document. The proponent may permit or seek public participation in the preparation of the PER. Once prepared, the PER is released for public review for a period of 4 to 8 weeks. The proponent must respond to any submissions from the public. The EPA must then submit a report on the proposal to the Minister for the Environment setting out its recommendation as to whether the proposal should be approved, and if so, what conditions the proposal should be subject to.

¹⁷ Section 40 *Environmental Protection Act 1986*

Environmental Review and Management Programme (ERMP)

This level of assessment applies to proposals of State interest which raise a number of significant environmental issues. The proponent must submit an Environmental Scoping document which may be subject to public review for 2 weeks and an ERMP which will be subject to public review for a period of 10 to 12 weeks. The proponent must respond to any submissions received from the public. The EPA will then prepare a report on the proposal for the Minister for the Environment setting out its recommendation as to whether the proposal should be approved, and if so, what conditions it should be subject to.

In addition, the EPA may set a level of assessment known as “Proposal Unlikely to be Environmentally Acceptable”. This level of assessment is designed to apply to proposals which are clearly in contravention of environmental standards and procedures, could not be reasonably modified to meet the EPA’s environmental objectives, or are proposed for a particularly sensitive location. Under this level of assessment, the EPA will issue a report as to why the proposal is unlikely to be found environmentally acceptable.

Finally, note that (with the approval of the Minister for the Environment), the EPA may choose to assess a proposal through a public inquiry¹⁸. A public inquiry may be conducted by the EPA, the EPA and others, or a committee appointed by the EPA. The persons conducting a public inquiry have the powers of a Royal Commission.

The Minister’s decision

Once the EPA has published its report and recommendations on a proposal, the Minister for the Environment makes a decision as to whether the proposal can be implemented or not. The Minister is obliged to consult with all other “decision-making authorities” (such as local government or the Minister for Mines) before making a final decision on whether a proposal should be implemented, and if so on what conditions¹⁹. Where the decision-making authority is not another Minister, the Environment Minister can disagree with any such decision-making authority, but the Environment Minister must first obtain a report from an Appeals Committee (in practice the Appeals Convenor) as to the matters in dispute. Where the decisionmaking authority is another Minister, if the Environment Minister disagrees the matter must be referred to the Governor (effectively Cabinet) for final determination.

Minister can set conditions on proposal

If the Minister decides that a proposal can go ahead, the Minister can set a wide range of conditions on the implementation of the proposal (subject to agreement with other decision-making authorities). It is an offence, punishable by a fine of up to \$125,000 for an individual or \$250,000 for a corporation, to breach such a condition²⁰.

¹⁸ Section 40 *Environmental Protection Act 1986*

¹⁹ Section 45 *Environmental Protection Act 1986*

²⁰ Schedule 1 *Environmental Protection Act 1986*

What happens to other decisions during the EIA process?

Obtaining approval under the environmental impact assessment provisions of the *Environmental Protection Act* does not necessarily mean that a proposal may go ahead. The proposal must still obtain all other approvals which it would normally be required to obtain. For example, the *Aboriginal Heritage Act* continues to apply to proposals which are assessed by the EPA. Therefore proponents are still required to obtain a section 18 approval pursuant to the *Aboriginal Heritage Act* if they seek to interfere with Aboriginal heritage sites. Further, it will usually be the case that a proponent will need approval from a government decision-maker, such as a local government or Minister for Mines, before they can lawfully proceed with the development.

While the EPA is assessing a proposal, other decision-makers may not make a decision which will have the effect of allowing the proposal to be implemented²¹. For example, if while a proposal is being assessed by the EPA a developer also makes an application to interfere with an Aboriginal site to the Minister for Aboriginal Affairs under section 18 of the *Aboriginal Heritage Act 1972*, the Minister may not issue her consent to such interference while the EPA is undertaking an assessment of the proposal²².

Consideration of Aboriginal heritage in EIA process

Consideration of Aboriginal heritage during the environmental impact assessment process is more often the exception than the rule. Less than 50 of over 1050 proposals which the EPA has assessed have dealt with Aboriginal heritage²³. This is perhaps due to the fact that prior to 2001 the EPA did not usually consider Aboriginal heritage during its assessments, based on the presumption that the matter was adequately dealt with under the *Aboriginal Heritage Act*. However, the Draft "*Guidance for the Assessment of Environmental Factors on Assessment of Aboriginal Heritage*" (August 2001) (which was apparently developed after the EPA received legal advice about its lack of consideration of Aboriginal heritage) represents a change in the position of the EPA with respect to assessment of Aboriginal heritage, and it is likely that Aboriginal heritage issues will be assessed by the EPA more often in the future.

The consideration of Aboriginal heritage which is accorded in any environmental impact assessment will depend upon the specific proposal being assessed. At a minimum, however, the Draft "*Guidance for the Assessment of Environmental Factors on Assessment of Aboriginal Heritage*" (August 2001) provides that the EPA expects proponents to undertake a competent analysis of and report on the likelihood of the presence of matters of heritage significance to Aboriginal people, and report on whether the proposal will result in there being an impact on matters of heritage significance to

²¹ Section 41 *Environmental Protection Act 1986*

²² Also note that the *Environmental Protection Act Amendment Bill 2002* proposes to make it an offence for a proponent to commence works which would have the effect of implementing a proposal before the Minister for the Environment has made a decision.

²³ Source: Search of Department of Environmental Protection Library Database undertaken on 10 July 2002.

Aboriginal people. The assessment must identify relevant issues and consider how to minimise any adverse impacts on heritage values. Work may include consulting with Department of Aboriginal Affairs staff, undertaking an Aboriginal heritage survey, informing relevant Aboriginal people about the proposal, consulting with Aboriginal people, and demonstrating that Aboriginal people's concerns have been adequately considered.

The following are examples of proposals in which the EPA has considered issues of Aboriginal heritage:

Dampier to Bunbury Natural Gas Pipeline Land Corridor Expansion Project (July 2001)

This concerned a proposal to expand the land corridor to be used for the Dampier to Bullsbrook section of the Dampier to Bunbury pipeline. A total of 228 Aboriginal heritage sites were recorded along the land corridor or in the vicinity of it. The proponent requested approval to destroy 216 of those sites. None of the public submissions received about the proposal referred to Aboriginal heritage. The EPA recommended the proposal be implemented on the basis that an Aboriginal heritage management protocol be established to avoid all known Aboriginal heritage sites and to protect all sites discovered during construction. In addition, the EPA recommended that all known sites which were not to be destroyed should be flagged or fenced prior to construction to prevent accidental incursion, and that construction personnel should be briefed on Aboriginal heritage issues.

North West Shelf Gas Project – Woodside Energy (December 1999)

This proposal concerned Aboriginal rock art sites on the Burrup Peninsula. The Minister for Aboriginal Affairs had (arguably unlawfully)²⁴ given the proponent permission to destroy the sites before the matter was referred to the EPA. The EPA recommended the proposal be approved on the basis that the Minister for Aboriginal Affairs had already given consent to disturb the sites, that there was to be regular consultation with the Aboriginal community, and that a heritage management plan approved by the Minister for Aboriginal Affairs would be implemented.

Rezoning Land at Yanchep / Two Rocks (November 1999)

This proposal concerned an archaeological site 1 km north of Yanchep consisting of 40 artefacts. The site was considered important because it was one of the few sites recorded on the Quindalup Dune System. There was a high likelihood of other sites being found in the surrounding area during construction. The EPA recommended that the proposal be permitted on the basis that construction staff undergo a briefing on Aboriginal heritage issues to enable them to recognise

²⁴ See footnote 13.

potential artefacts, and that the on-site manager seek specialist advice to confirm the identification of futures sites.

Rezoning at Two Rocks (November 1999)

The proposal concerned a site that included a cave within which the crocodile slept overnight and was transformed into an emu. According to evidence given by Mr Ken Colbung, the knoll of the hill on the site concerned lies in a north-south direction and forms the contours of the emu's body. The northern section represents the head, the southerly section the tail and the cave symbolises the heart. The limestone capping represents the bones of the crocodile and the grass trees covering the knoll represent the emu's feathers. The EPA recommended that the proposal be approved on the basis that 3 hectares of the site be protected, fenced and signposted appropriately. In addition, the EPA noted that contractors would be briefed before carrying out excavation and would be supervised during excavation.

BHP Iron Ore Mine, 100km northwest of Newman (November 1998)

The proposal concerned a proposal by BHP Iron Ore Pty Ltd to develop 14 iron ore deposits in the Pilbara and provide associated infrastructure. The environmental impact assessment identified 15 sites which would be affected by the proposal. BHP undertook to flag, fence and/or signpost all of the sites, and also undertook to ensure all staff were inducted as to their responsibilities with respect to Aboriginal heritage sites. The EPA recommended the proposal be approved on the basis that:

“BHP has successfully consulted recognised Banjima and Nyiyarparli custodians and gained support for all currently proposed site disturbances.”

Cervantes – Jurien Coastal Road (February 1998)

This assessment concerned a proposal to build a road from Cervantes to Jurien. The environmental impact assessment documents supplied by the proponent relied upon a 1992 Aboriginal heritage report which the EPA found lacked detail, included a poor literature search and insufficiently consulted elders who specifically visited the area. Despite this, the EPA recommend the proposal be approved on the basis that Main Roads carry out further studies to the satisfaction of the Department of Aboriginal Affairs prior to commencing work.

I am not aware of any proposal which have been refused on the basis that the proposal would have an unacceptable impact upon matters of Aboriginal heritage.

As the above proposals indicate, the factors which will influence the EPA's decision whether to recommend that a proposal be implemented include:

- Do the Aboriginal people who have been consulted about the project agree the proposal should go ahead?
- Were any public submissions received about Aboriginal heritage?
- Will the proponent provide sufficient on-site management and education to protect sites?
- Can and/or will part of the site be preserved?
- Will Aboriginal people continue to be consulted about the project?
- What is the position of the Department of Aboriginal Affairs?

In addition, as discussed above, there is scope for the EPA to consider a much broader range of issues, including social, economic and cultural issues, as long as those issues are directly associated with a biological or physical interference in the specific area of a proposal.

Participation in the EIA process

As noted above, any person can refer a proposal which is likely to affect a matter of Aboriginal heritage to the EPA for assessment. Issues of Aboriginal heritage which may be affected include current social, economic and cultural issues which are directly affected by a particular proposal as well as consideration of particular sites and objects which are of significance to Aboriginal people because of some past event or association. (Note that there is not need to wait to refer a proposal until the proponent applies to the Minister under section 18 of the *Aboriginal Heritage Act* for consent to destroy particular sites.)

The main way to influence the environmental impact assessment of Aboriginal heritage issues, other than by referring a proposal for assessment in the first place, is to make a submission on the proponent's environmental review documents. The Department of Environmental Protection suggests that to make your submission effective, you should remember the following points while you are writing:

- ∄ State clearly your view and your reasons for it;
- ∄ State how your concerns might be addressed or give alternatives that might be considered;
- ∄ Provide references to any factual data such as scientific reports;
- ∄ Use photographs, maps or sketches if possible;
- ∄ Group your points under the relevant section or chapter of the proponent's review;
- ∄ If your submission is long, summarise the main points.

Appeal against EPA decisions

Another way to participate in the environmental impact assessment process is to lodge an appeal against the EPA's decisions. There are also several opportunities to appeal the EPA's decisions and recommendations during the environmental impact assessment process. For example, any person may appeal to the Minister for the Environment against:

- € a refusal by the EPA to assess a proposal;
- € the level of formal assessment which the EPA sets for a particular proposal; and
- € the EPA's report and recommendations to the Minister²⁵.

The appeal can simply be in the form of a letter to the Minister setting out the grounds of the appeal. The appeal must be lodged within 14 days of the EPA's decision being placed on its public record.

Enforcement of conditions of approval

It is the Department of Environmental Protection ("DEP")'s role to monitor the implementation of proposals and compliance with the conditions of an approval under the *Environmental Protection Act*. If a condition has been breached, the offender may be prosecuted. Prosecutions for breaches of conditions can only be brought by the Chief Executive Officer of the DEP, acting with the consent of the Minister for the Environment²⁶. If any person believes that the DEP has not properly dealt with a complaint, that person can take the matter up with the Minister for the Environment or the State Ombudsman.

In extreme cases, where there is an impending breach of an condition and the DEP refuses to take action, a person may wish to consider seeking an injunction in the Supreme Court to prevent the breach of the condition from occurring.

Problems with environmental impact assessment of Aboriginal heritage

While the environmental impact assessment process offers opportunities for the assessment of the impact of particular proposals on Aboriginal heritage, and therefore for the recognition and protection of Aboriginal heritage, it is not a complete answer to the question of how to best recognise and protect Aboriginal heritage. Some of the problems associated with environmental impact assessment of Aboriginal heritage are:

- € The EPA formally assesses very few proposals. Its assessment is restricted to major proposals only. For example, in the 2000- 2001 financial year, 555 proposals were referred to the EPA, but the EPA decided to formally assess only 35 of those

²⁵ Section 100 *Environmental Protection Act 1986*

²⁶ Section 114 *Environmental Protection Act 1986*

proposals²⁷. Environmental impact assessment can therefore not provide comprehensive recognition and protection of Aboriginal heritage.

- ∄ There is no ability to appeal from the decision of the Minister for the Environment to grant approval for a particular project. The proponent has a right to appeal against the conditions which are imposed upon any approval, but members of the public or even people who are affected by the Minister's decision do not have a corresponding right.
- ∄ If the Minister decides that a proposal cannot be implemented and the Minister for Aboriginal Affairs does not agree, the matter is referred to the Governor (effectively Cabinet) for decision. This necessarily politicises the decisionmaking process.
- ∄ The environmental impact assessment process is not designed to deal with sensitive issues associated with Aboriginal heritage such as secret business. Indeed, given that the assessment process relies upon the publication of information, it may be inherently unsuitable to deal with some Aboriginal heritage issues.
- ∄ Despite the publication of the draft *Guidance for the Assessment of Environmental Factors on Assessment of Aboriginal Heritage* in August 2001, it will in all likelihood be some time before the EPA assesses, or obtains the necessary expertise to appropriately assess, all issues of Aboriginal heritage.
- ∄ The EPA can only assess issues which are directly affected by a physical disturbance of land the subject of a proposal. Therefore some issues of concern will not be able to be dealt with by way of environmental impact assessment.

Conclusion

The environmental impact assessment process under the *Environmental Protection Act* provides opportunities for the consideration of, and therefore some recognition and protection of, Aboriginal heritage. Elements of the environmental impact assessment process include:

- ∄ It is not constrained by the limited conception of Aboriginal heritage which the *Aboriginal Heritage Act* is, and can include consideration of any economic, cultural and social issues associated with a person's physical or biological surroundings which will be directly affected by a particular proposal;
- ∄ Any person can refer a proposal to the EPA for assessment at any time – there is no need for a developer to apply for approval to interfere with an Aboriginal site before the *Environmental Protection Act* is triggered;
- ∄ Once the EPA has decided to formally assess a proposal, no approvals can be granted, and therefore the proposal can't go ahead, until the EPA has completed its assessment and the Minister for the Environment has made her decision about the proposal; and

²⁷ EPA Annual Report 2000 – 2001 at page 11.

€ The EPA assessment process includes several avenues for public comment and appeals by members of the public.

While there are some limitations upon the environmental impact assessment process, to recognise and protect Aboriginal heritage, there are many as yet unexplored opportunities for consideration of Aboriginal heritage issues, including any economic, cultural and social issues, which will be affected by a development proposals in WA.