

24 January 2017

Committee Secretary
Senate Standing Committees on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

By email: ec.sen@aph.gov.au

Dear Sir/Madam

Submission on Protection of Aboriginal Rock Art of the Burrup Peninsula

1. This submission has been prepared by the Australian Environmental and Planning Law Committee of the Law Council's Legal Practice Section (**the Committee**).¹ The Committee welcomes the opportunity to provide comments on the Commonwealth's responsibility under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), to protect the globally significant and National Heritage listed Aboriginal rock art of the Burrup Peninsula in Western Australia (**WA**).

EPBC Act

2. The primary object of the EPBC Act is to provide for the protection of the environment, especially those aspects of the environment that are matters of 'national environmental significance'.² The Burrup Rock Art is a *National Heritage place* which has been included in the National Heritage List since 3 July 2007, on the basis that it is a place which has *National Heritage values*.³
3. It follows that the principles of ecologically sustainable development, as set out in s 3A of the EPBC Act, are obliged to be followed in relation to this place. These principles include the precautionary principle and the principle of inter-generational equity and are listed in s 3A of the EPBC Act as follows:
 - (a) *'decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;*

¹ The Law Council of Australia is a peak national representative body of the Australian legal profession. It represents the Australian legal profession on national and international issues, on federal law and the operation of federal courts and tribunals. The Law Council represents 60,000 Australian lawyers through state and territory bar associations and law societies, as well as Law Firms Australia.

² *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(1)(a) ('EPBC Act').

³ Ibid s 324C.

- (b) *if there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;*
 - (c) *the principle of intergenerational equity - that the present generation should ensure the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;*
 - (d) *the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making; and*
 - (e) *improved valuation, pricing and incentive mechanisms should be promoted!*
4. Under the EPBC Act, '[a] person must not, for the purpose of trade or commerce ... between Australia and another country ... take action that has, will have or is likely to have a significant impact on the National Heritage values of a national Heritage place' without the approval of the Australian Government Environment Minister,⁴ given pursuant to the approval provisions under the EPBC Act.⁵
 5. The Minister for the Environment, on behalf of the Commonwealth, under s 45 of the EPBC Act, has a bilateral agreement with State of Western Australia relating to accreditation of the State's environmental Impact Assessment procedures.

EPBC Act approval of facility

6. In 2001, a liquid ammonia facility proposed for the Burrup Peninsula was referred to the Commonwealth for a decision under the EPBC Act as to whether it required approval.⁶ On 2 April 2001, the Commonwealth Environment Minister decided that it was not a controlled action (that is, it was not likely to have a significant impact on matters of national environmental significance).⁷
7. This decision was made prior to the addition of national heritage as a matter of national environmental significance under the EPBC Act in 2003.⁸ The provisions of the EPBC Act relating to national heritage (such as sections 15B and 15C) were added in 2003 and the provisions did not commence until 1 January 2004. The Dampier Archipelago (including Burrup Peninsula)⁹ was not included in the National Heritage List until 3 July 2007 and the provisions of the EPBC Act and the listing do not operate retrospectively, so existing activities are permitted to continue unless there is a significant alteration to the nature of those activities.

⁴ Ibid s 15B(2)(a) and (8)(a).

⁵ Ibid pt 9.

⁶ Department of the Environment and Energy (Cth), *EPBC Notices*, Reference 2001/199, 6 March 2001 <http://epbcnotices.environment.gov.au/_portal/modal-form-template-path/a71d58ad-4cba-48b6-8dab-f3091fc31cd5?id=7fda6a1e-4c67-e511-b4b8-005056ba00ab&entityformid=c2c88dfd-64a4-49bf-84fb-9edb9186137&languagecode=1033>.

⁷ Department of the Environment and Energy (Cth), *EPBC Notices*, Reference 2001/199 - Decision whether action needs approval, 2 April 2001 <http://epbcnotices.environment.gov.au/_portal/modal-form-template-path/a71d58ad-4cba-48b6-8dab-f3091fc31cd5?id=7fda6a1e-4c67-e511-b4b8-005056ba00ab&entityformid=c2c88dfd-64a4-49bf-84fb-49edb9186137&languagecode=1033#>

⁸ *Environment and Heritage Legislation Amendment Act (No 1) 2003* (Cth).

⁹ Department of the Environment and Energy (Cth), *National Heritage Places - Dampier Archipelago (including Burrup Peninsula)* <<http://www.environment.gov.au/heritage/places/national/dampier-archipelago>>.

8. In October 2008, Burrup Nitrates Pty Ltd proposed to construct and operate a circa 350,000 tonnes per annum Technical Ammonium Nitrate Production Facility at a site within the King Bay/Hearson Cove Industrial Precinct on the Burrup Peninsula, adjacent to the existing Burrup Fertilisers Pty Ltd Ammonia plant for the purpose of manufacturing and Technical Ammonium Nitrate.
9. The Commonwealth Minister determined under the EPBC Act that the proposal was a controlled action under the EPBC Act. An action that a person proposes to take is a controlled action if the taking of the action by the person without approval under Part 9 for the purposes of a provision of Part 3 would be (or would, but for section 25AA or 28AB, be) prohibited by the provision. The proposal was referred for assessment under the EPBC Act and was assessed by the Environmental Protection Authority of Western Australia (**EPAWA**), pursuant to the bilateral agreement between the Commonwealth and the State of Western Australia.
10. EPAWA provided a report and recommendations *to the* Commonwealth Minister.¹⁰ The EPAWA Report took into account a CSIRO 2007 report of Field Studies on Rock Art Appearance and a CSIO 2008 Burrup Peninsula Air Pollution Study and EPAWA reports on advice it obtained from the Department of Environment and Conservation Air Quality Management Branch. The EPAWA expressed the opinion that the proposal could be managed to meet the EPA's environmental objectives and recommended conditions including what it described as "the adoption and implementation of best practice pollution control technology to minimise ammonia emissions and particulate emissions from the drilling plant 'common stack'".¹¹
11. The Commonwealth Minister approved the proposed action under Part 9, Division 1 of the EPBC Act, with conditions, on 14 September 2011. Those conditions included conditions related to the rock art sites, including air quality monitoring, colour contrast and spectral mineralogy monitoring for changes in patination and a management plan for mitigation of changes in patination. On 18 December 2013, the Minister varied the condition relating to the rock art monitoring programme.
12. Following that decision by the Commonwealth Minister, Yara Pilbara Fertilisers Pty Ltd has obtained a 'Licence to Operate' under Division 3 of Part V of the Environmental Protection Act 1986 (WA) (**EP Act**). The Chief Executive Officer of the Department of the Environment of the State of Western Australia has authority under s 57 of the EP Act to grant the licence. An application to amend the licence was advertised on 11 July 2016. The CEO has power under s 59 of the EP Act to amend a licence, including extending its duration.

Legal issues concerning administrative decisions

13. The legality of the administrative decisions of the Commonwealth Minister in approving the construction and operation of the Technical Ammonium Nitrate Production Facility and the Department of the Environment in granting a Licence to operate the Facility is to be judged by the usual administrative law criteria. The issue which is suggested by the Terms of Reference of this inquiry is whether the

¹⁰ Environmental Protection Authority of Western Australia, *Technical Ammonium Nitrate Production Facility, Burrup Peninsula*, Report 1379 (January 2011)
<http://www.epa.wa.gov.au/sites/default/files/EPA_Report/Final%20EPA%20Report%20050111-web_0.pdf>.

¹¹ Ibid 36.

decision makers failed to take into account relevant considerations which they were obliged to take into account.¹²

14. It is not clear whether the existing ammonia facility was considered when the technical ammonium nitrate plant was referred under the EPBC Act in 2008. The referral documentation provided to the Commonwealth by the proponent in 2008 states that the proposed Technical Ammonium Nitrate Production Facility (TANPF) is adjacent to the existing Burrup Fertilisers Pty Ltd (BFPL) Ammonia plant, and that:

*The TANPF will utilise existing infrastructure and utilities in the area to ensure it is commercially beneficial and provides the required availability to support the plant operations. The main raw material ammonia will be supplied by the BFPL plant via a connecting pipeline.*¹³

15. The TAN plant referral also notes the previous referral under the EPBC Act for the ammonia plant.¹⁴
16. As such, it appears that the Commonwealth was or should have been aware that the TANPF proposal was related to the liquid ammonia facility. As the reasons for the approval decision have not been published, the extent to which the Commonwealth considered the cumulative impacts of the TANPF combined with the existing ammonia facility is unclear. However, the legal requirement to consider cumulative impacts under the EPBC Act is limited. The approval conditions relating to the TAN plant refer to an air quality monitoring program which must be undertaken for at least 24 months before construction to establish 'baseline data', which would include the emissions from the existing ammonia plant.
17. An issue to be considered is whether the existing ammonia facility should have been considered as a component of the TAN plant. The Commonwealth Environment Minister has the discretion under s 74A of the EPBC Act to decide not to accept a referral if the Minister is satisfied that the action is a component of a larger action (this section is designed to deter proponents from making 'split referrals' in order to circumvent the requirements of the EPBC Act). However, the fact that the previous facility had been referred under the EPBC Act and constructed many years earlier indicates that these were two separate actions, rather than components of one larger, single 'action'.¹⁵

Variation of conditions of approval

18. The Yara Australia (**Yara**) Compliance report of October 2016 (which relates to the TANPF) states that Yara will be seeking a further variation regarding assessment of

¹² *Minister for Aboriginal Affairs v Peko- Wallsend Ltd* (1986) 162 CLR 24 at 39; *Lu v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 141 FCR 346 at 357-8.

¹³ Burrup Nitrates Pty Ltd, *Referral of proposed action* (October 2008) <http://epbcnotices.environment.gov.au/_entity/annotation/15080544-8e69-e511-a947-005056ba00a8/a71d58ad-4cba-48b6-8dab-f3091fc31cd5?t=1480457932352> 6.

¹⁴ Ibid 43.

¹⁵ See further Department of Sustainability, Environment, Water, Population and Communities (Cth), *Environment Protection and Biodiversity Conservation Act 1999 (Cth) Policy Statement: Staged Developments-Split referrals: Section 74A of the EPBC Act* <<https://www.environment.gov.au/system/files/resources/9af4f5a0-6a4b-4322-9dd1-dbb9710d682/files/epbc-act-policy-staged-developments.pdf>> 2-4.

rock art.¹⁶ The process for varying the conditions of approval is set out in s 143 of the EPBC Act. The variation notice must generally be published in the Commonwealth Gazette and on the internet.¹⁷ In practice; most variations of conditions are published on the EPBC Act public notices database. Under s 78A of the EPBC Act, any person may (at any time) request the Commonwealth Minister to reconsider a decision as to whether an action was a controlled action in certain circumstances. These circumstances are listed in subsection 78(1), for example, if there has been a substantial change in circumstances or substantial new information is available about the impacts of the action. The request must be in writing and must set out the grounds on which the person thinks the decision should be reconsidered (see also EPBC Regulation 4AA.01 for the requirements relating to the request).

19. In terms of the ability to appeal a decision by the Commonwealth Environment Minister to vary approval conditions, it is possible for certain individuals and organisations¹⁸ to seek reasons for that decision and, if necessary, judicial review of the decision under the *Administrative Decision (Judicial Review) Act 1977* (Cth). However, judicial review is limited to looking at the lawfulness of the decision-making process, rather than the merits of the decision itself. Further, if the decision is found by the court to be wrongly made, the remedy or Court order is generally to ask the decision-maker to go back and remake the decision.

Conclusion

20. The Committee provides this summary of the legal position in order to assist the Senate Committee in its deliberations upon the specific matters raised by the Terms of Reference of the inquiry, which focus upon the administrative decisions made and the appropriateness of the scientific information taken into account in arriving at those decisions.
21. The Committee would welcome the opportunity to discuss the submission further. Please contact Adjunct Professor Greg McIntyre SC, Chair, Australian Environmental and Planning Law Committee at gmcintyre@johntoohey Chambers.net.au in the first instance.

Yours sincerely



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¹⁶ Yara Australia, *Compliance Assessment Report 2016* (October 2016) <http://www.yara.com.au/images/500-200-CAR-YPN-0036%20TAN%20Plant%20MS870%20Compliance%20Assessment%20Report%202016_tcm583-240532.pdf>.

¹⁷ EPBC Regulation 16.02 and subsection 143(5) of the EPBC Act: the instrument must be published in accordance with the EPBC Regulations except if the instrument is exempt under section 47 or 47G of the FOI Act or the Minister believes it is in the national interest not to publish it (EPBC Act, subsection 143(6)).

¹⁸ That is, an Australian citizen, organisation or association that has, in the 2 years before the decision, engaged in a series of activities in Australia for the protection or conservation of, or research into, the environment: see *EPBC Act*, section 487.