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Government of South Australia

Attorney-General's Department

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23 January 2023

Tyler Johns
Principal Advisor
Expert Panel for the Planning System Implementation Review
Email: [REDACTED]

Dear Ms Johns

Thank you for your email received on 7 December 2022 inviting the Commissioner for Aboriginal Engagement to provide a submission to the Expert Panel for the Planning System Implementation Review, due Monday 30 January 2023.

I refer to discussions with Joanne Fleer, Senior Project Officer, Aboriginal Heritage, on 19 December 2022 confirming that Aboriginal Affairs and Reconciliation (AAR) will provide comments to assist the Expert Panel, noting that the Commissioner for Aboriginal Engagement, Dr Roger Thomas, finished in his role on 31 December 2022.

As you may be aware the Australian Government and the First Nations Heritage Protection Alliance (FNHPA) are working under a Partnership Agreement to develop options to reform First Nations cultural heritage protections across Australia.

The need for legislation such as planning and environmental laws to coordinate with heritage protection laws across all Australian jurisdictions is identified as a key area of reform. The Directions Report prepared by the Australian Government and FNHPA Partnership states "cultural heritage approvals are (or are seen as) an afterthought in project development and planning. Informants emphasised the need to ensure that cultural heritage matters and discussion with Traditional Owners were considered early in the project development process"¹.

The extensive planning reforms undertaken in South Australia, including the introduction of the Planning and Design Code, have streamlined the approvals process required for developers, while retaining Aboriginal heritage matters clearly outside of the planning process. AAR recommends that this situation be reviewed.

In South Australia, other than where an Environmental Impact Statement (EIS) is required, as discussed below, there is no mechanism to trigger proponents to consider Aboriginal heritage and/or discuss this with Traditional Owners. Further, where the potential for damage or disturbance to Aboriginal heritage is identified, including where applications for authorisations

¹ Stage One Directions Report First Nations Cultural Heritage Reform, The Australian Government and the First Nations Heritage Protection Alliance, p.12, <https://culturalheritage.org.au/cultural-heritage-reform/>

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to damage, destroy or interfere with Aboriginal heritage are brought under the *Aboriginal Heritage Act 1988* (SA), there is no requirement that this be considered concurrently, coordinated, or integrated into the planning approvals process.

For example, it is not uncommon for AAR to receive applications under the *Aboriginal Heritage Act 1988* (SA) to damage, disturb or interfere with Aboriginal heritage after planning approval has been granted. When this occurs, proponents and supporters of development works may perceive that AAR, and any Aboriginal parties involved, are unnecessarily 'holding up' a project that has otherwise been considered and approved. When this occurs, the opportunity to modify the plans and conditions of the planning consents that have already been approved are limited. Incorporating an assessment of Aboriginal heritage early into the planning process, together with early engagement with Traditional Owners, will alleviate this perception, and ensure that final planning decisions are well-informed.

In South Australia, for Impact Assessed Projects where an EIS is required, Aboriginal heritage is identified through a process outlined in recent amendments to Practice Direction 17 that came into effect on 15 December 2022. AAR provided feedback to Planning and Land Use Services (PLUS) to support the changes and is pleased to see some of AAR's recommendations included in the Practice Direction and the associated EIS Assessment Requirements.

However, AAR notes that further improvements could still be made to require an offer for early engagement with relevant Traditional Owners, in addition to an assessment of the potential for unrecorded Aboriginal heritage to exist. Currently Practice Direction 17 requires proponents to undertake a search of AAR's central archives and potentially other archives held locally by Aboriginal people, as well as undertake a preliminary assessment of social and environmental issues (which may include Aboriginal heritage). AAR's central archives do not provide a complete record of Aboriginal heritage within the state. Such a requirement may yet be imposed upon the state through the current national Aboriginal heritage reform program.

AAR recommends that the EIS process in South Australia be further enhanced to clearly incorporate early engagement with Traditional Owners, including the development of Aboriginal Engagement Guidelines. AAR has offered to work with PLUS to support this work. Further, planning decisions should align and coordinate with the *Aboriginal Heritage Act 1988* (SA) authorisations process where damage, disturbance, or interference to Aboriginal heritage cannot be avoided as part of the project. Finally, and specific to the Expert Panel's explorations, AAR considers that Impact Assessed (Declared) Development decisions should be returned to a whole of Government process to ensure transparency and accountability, ensuring that the Minister for Aboriginal Affairs and AAR have oversight, if any issues are overlooked.

Victoria provides an example of a policy framework that seeks to better integrate planning and Aboriginal heritage. The Victorian Planning Provisions state that 'Planning must consider the *Aboriginal Heritage Act 2006* (Vic)', which further provides that no statutory project approvals can be granted before any necessary cultural heritage approval is granted. In Victoria 'areas of cultural heritage sensitivity' are represented spatially to assist developers to understand their legal obligations.

In addition to the recommendations outlined above specific to the existing EIS processes, AAR recommends a review of the *Planning, Development, and Infrastructure Act 2016* (SA) and Planning and Design Code to:

- enhance engagement with Aboriginal people
- better align planning processes with the *Aboriginal Heritage Act 1988* (SA)
- ensure cultural heritage is valued in planning

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- require early engagement with the relevant Traditional Owners in respect of planning decisions that affect them
- consider how best to ensure Aboriginal heritage is identified and considered early in the planning process
- explore the introduction of a Cultural Heritage Overlay in the Planning and Design Code

Consultation with Traditional Owners and stakeholders would be required as part of this review. This review aligns with the national reform agenda outlined at the commencement of this letter and will enhance the work that has already commenced by PLUS to improve its engagement with Aboriginal people in South Australia. AAR would be happy to support PLUS in this process.

Should you wish to discuss any of the above, please contact Ms Joanne Flear, Senior Project Officer (Heritage), on [REDACTED] or at [REDACTED].

Yours sincerely

[REDACTED]

Toby Forde
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