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Dear Dr Vogel,

### **Comments on revised draft Environmental Factor Guidance: Cultural and Heritage**

Thank you for the opportunity to comment on the revised draft *Environmental Factor Guidance: Culture and Heritage* as part of your targeted consultation with land councils and the Aboriginal Areas Protection Authority (AAPA). We understand that the purpose of the guidance is to support proponents and other stakeholders to understand when and how the Northern Territory Environment Protection Authority (NT EPA) considers cultural and heritage matters in an environmental impact assessment process under the *Environment Protection Act 2019* (EP Act).


We note that this guidance has been redrafted following strong feedback received when it was first issued in 2022, including from the Central Land Council (CLC) and Northern Land Council (NLC). The CLC and NLC's primary concerns were that the draft guidelines took a narrow view of cultural values as equivalent with sacred sites and didn't recognise the statutory consultative functions of the land councils. Unfortunately, while effort has been made to improve the guidance, it still has serious deficiencies and requires further redrafting.

This letter provides a short background on the Tiwi Land Council and the Tiwi Islands for context, before detailing our recommendations to strengthen the guidance, namely the need to:

1. Correct the false assumption that if other statutory processes are followed, then there is no additional role for the EP Act to play in relation to culture and heritage.
2. Make it clearer that land councils should be a primary source of information and advice.
3. Improve the clarity, consistency, relevance and accuracy of the guidance.

### **About the Tiwi Land Council**

TLC is a Corporate Commonwealth Entity established in 1978 under the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* (ALRA). The Tiwi Islands are entirely Aboriginal land, to which Tiwi hold inalienable freehold title under ALRA. The TLC is responsible for a number of key functions under ALRA, but most relevantly, to ensure that activities on the Tiwi Islands are undertaken only after proper consultation with the relevant Tiwi clan group(s) and with the consent of the traditional Aboriginal owners of that land.



TLC represents all Tiwi people in the protection of Country, while at the same time supporting sustainable economic development that improves Tiwi lives through income, employment and other opportunities to improve people's health and wellbeing. Consistent with our prescribed statutory functions, the TLC works to secure the effective management of Tiwi country and revitalisation of Tiwi culture for the benefit of future generations of Tiwi.

### **About the Tiwi Islands**

Tiwi people are proud saltwater people, with an unbroken history of occupation and ownership of their islands, and stewardship over land and surrounding waters. Their cultural values and ecological knowledge extend far out to sea. The Tiwi Islands group consists of two large, inhabited islands – Melville and Bathurst, originally called Ratuwati Yinjara (two islands) – and numerous smaller uninhabited islands. The islands and their surrounding waters are havens for a diverse range of species, including many not recorded anywhere else in the world.

In recognition of Tiwi stewardship of the islands and the importance of the islands for biodiversity conservation, the Tiwi Islands have recently been dedicated as an Indigenous Protected Area (IPA), adding 718,626 hectares to the Australian National Reserve System. The IPA Plan of Management makes clear Tiwi people's intimate understanding of their Country, the ecological significance of the islands and the environmental protection imperatives, and the inextricable link with Tiwi culture, the health of Tiwi Country and wellbeing of Tiwi people – all of which are indivisible. The next step for Tiwi people is to secure a marine IPA over Tiwi sea country, further validating their role as sea country managers.

### **The importance of strong environmental protections for Tiwi Country**

Tiwi people are entrepreneurial, and have pursued and continue to identify economic development opportunities on their islands. Tourism, Port Melville and forestry are all recent examples of this entrepreneurial endeavour.

At the same time, Tiwi people understand that development poses risks to the health of Country – and by extension, the wellbeing of Tiwi people and continuation of their culture. A robust environmental protection regime in the Territory should ensure that the impacts of development on Tiwi Country – whether Tiwi-led or otherwise – are understood by Tiwi people, that Tiwi people have the information they need to form informed views, and that their views are considered and acted upon.

#### **1. Correct the false assumption that if other statutory processes are followed, then there is no additional role for the EP Act to play in relation to culture and heritage.**


Our greatest concern with the draft guidance is the assumption that if other statutory processes are followed (for example, compliance with ALRA, the *Native Title Act 1993* (NTA) and/or the *NT Sacred Sites Act 1989* (NT SSA)) then there is no additional role for the NT EP Act to play in relation to cultural and heritage protection, and an Environmental Impact Assessment (EIA) would be unlikely to be required.

This assumption is posited in the final paragraph of under *3.2 Regulatory framework – other legislation* (p.7) and in *4.5 When the NT EPA may not require assessment of the culture and heritage factor* (p.14) and needs to be corrected.

In relation to ALRA, while genuine engagement and compliance with the Act *may* reduce the likelihood of significant or unacceptable impact on cultural and heritage values<sup>1</sup>, an agreement under ALRA **is not a substitute for an EIA**. The EIA brings to light critical information about the environmental and cultural impacts of a project – information that is often not known at the time consents under ALRA are given.

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<sup>1</sup> As suggested in section 3.2 on p.7 of the draft guidance.



The EIA process is essential to inform traditional owners, facilitate their input and determine any necessary protections for cultural values once that information is known. In relation to Authority Certificates issued by AAPA, these do not constitute consent by traditional owners to an action, or protection of cultural values (as they are limited to sacred sites only).

**Recommendation 1:** The fact that a proponent has obtained an agreement in accordance with the *Aboriginal Land Rights Act 1976*, an Indigenous Land Use Agreement (ILUA) or an Authority Certificate is not sufficient reason for the NT EPA to determine whether there is potential for significant impact on culture and heritage. This needs to be clear in the guidance, which requires revisions to the draft at sections 3.2 (p.7) and 4.5 (p.14).

## **2. Make it clearer that land councils should be a primary source of information and advice.**

Guidance to proponents about obtaining information and advice about culture and heritage at section 3.3. *Obtaining information on Culture and Heritage* (p.7) needs to more clearly specify the requirements to consult with land councils.

Given ALRA coverage across the islands and reflecting our statutory functions, the guidance needs to clearly specify a requirement to consult with the TLC in the first instance, with the TLC coordinating any further consultations, in relation to any action on the Tiwi Islands.

Additionally, given the crucial importance of sea country to Tiwi people and culture, their strong aspirations to have legal rights to sea country recognised and the TLC's experience in facilitating affected groups' voice to development proposals, the requirement to consult with the TLC should extend to actions proposed in the seas surrounding the islands.

A map of land council boundaries and tenure across the NT may be a helpful addition to the guidance.

**Recommendation 2:** Clearly specify as a requirement of a referral that proponents consult with the Tiwi Land Council for any action on the Tiwi Islands and in the seas surrounding the islands.

## **3. Improve the clarity, consistency, relevance and accuracy of the guidance.**

Overall, the guidance lacks clarity and consistency. As currently written, we envisage that proponents will find it difficult to determine their obligations and how to go about meeting them. The guidance would benefit from a rethink of the structure and sequencing of the information, and substantial editing.

The guidance needs to more clearly and accurately describe the relevant legislative regimes and statutory bodies (especially at Appendices 2 and 3). There are some misstatements of law<sup>2</sup> and inaccuracies in the descriptions of the land councils' roles and statutory functions<sup>3</sup>. The TLC is happy to work with the NT EPA to improve the description of our roles and functions. We also recommend that the NT EPA seek independent legal advice to review the draft guidance and ensure its accuracy.

Importantly, these sections need to do more than describe the law and relevant organisations' roles and functions: they need to provide succinct analysis that helps proponents navigate the system.

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<sup>2</sup> For example, as noted above, an 'Authority Certificate' is not an approval (as stated on p.22). Under the NT Aboriginal Sacred Sites Act, AAPA does not have the power to approve works: an AAPA certificate only describes how the work can be done without damaging sacred sites.

<sup>3</sup> For example, that land councils are required to maintain a register of traditional owners (p.23).



**Recommendation 3:** Review the guidance to improve clarity, consistency, relevance and accuracy of all information, including seeking independent legal advice to review the draft guidance and ensure its accuracy.

We are aware that other land councils are also providing you with feedback. While there is substantial work still to be done to improve the guidance, we appreciate the work undertaken by the agency to date and the opportunity to provide input – the protection of culture and heritage is vital, and it is important that we get this right. The TLC would be happy to make time to meet with NT EPA staff and the other land councils to discuss our feedback and how the guidance can be further improved.

Thank you again for the opportunity to provide input.

Yours sincerely,



Brendan Ferguson  
**CEO**  
**Tiwi Land Council**