



REVIEW OF THE *ABORIGINAL HERITAGE ACT 1972* CONSULTATION PAPER

MARCH 2018

MINISTER'S FOREWORD



The *Aboriginal Heritage Act 1972* was the first legislation of its kind in Australia to protect Aboriginal places and objects. This is something we can be proud of. However, after 45 years in operation, with little change over that time, elements of the Act are no longer fit for purpose. It is time for the Act to be modernised in a way that is respectful of Aboriginal people and their heritage, and to ensure that our Aboriginal heritage is recognised, protected and celebrated by all Western Australians today and for generations to come.

I am pleased to release this Consultation Paper as phase one of a three-phase public consultation process that will ultimately lead to the introduction of new Aboriginal heritage legislation into the Western Australian Parliament.

Rather than propose a series of amendments to the Act, this Consultation Paper seeks community and stakeholder feedback on the effectiveness of the current legislation, to identify any gaps, and encourage ideas on how it can be improved.

This is the first opportunity for you to contribute to the review of the Act. Other opportunities for comment and input will be provided during phase two, which will see the release of a Discussion Paper later this year that will offer a series of proposals on what an amended Act should do.

More information on the consultation process and ways to get involved is contained in this paper.

The State Government is committed to identifying proposals that will provide effective solutions that recognise the needs of all stakeholders. In this regard, all feedback is valued and will be considered when developing proposals for amending the Act.

I encourage everyone with an interest in Aboriginal heritage to contribute their views and ideas.

A handwritten signature in blue ink, appearing to read 'Ben Wyatt'.

Ben Wyatt MLA
Minister for Aboriginal Affairs

INTRODUCTION

Aboriginal cultural heritage provides an important link for Aboriginal people to their past, present and future. It is therefore essential that State legislation provides adequate protection for Aboriginal cultural materials and sacred and significant sites to promote the passage of knowledge, arts, rituals and performances from one generation to another.

Aboriginal cultural heritage is also of great scientific, educational and historic interest and value to all Western Australians. Artefacts and places that are significant in terms of understanding how the first peoples of Western Australia lived on the land, and the Dreaming stories that enable today's Aboriginal people to stay connected to their culture, are an integral part of the history that makes our state unique.

Land use makes a significant contribution to the economic, social and environmental wellbeing of communities in Western Australia. It is therefore essential that heritage legislation operates in harmony with other relevant legislation in the interests of all stakeholders. It should also foster the efficient use of private and public resources through transparent processes that promote certainty.

The *Aboriginal Heritage Act 1972* (the Act) is the State's principal legislation enabling the preservation of Aboriginal cultural heritage places and objects. The Act is administered by the Minister for Aboriginal Affairs (the Minister), and sets out a framework that in general terms provides:

- Protection for Aboriginal places through the establishment of the Aboriginal Cultural Material Committee (the Committee) that:
 - Evaluates on behalf of the community the importance of places and objects associated with Aboriginal people;



- Recommends to the Minister places and objects which are of special significance and should be preserved, acquired or managed by the Minister;
 - Makes recommendations to the Minister with regard to applications to use land containing Aboriginal sites; and
 - Makes recommendations to the Registrar of Aboriginal Sites (the Registrar) regarding applications to undertake excavations or remove material from Aboriginal sites for research purposes;
- Protection for Aboriginal objects in consultation with the Trustees of the WA Museum;
 - Protection of Aboriginal heritage through the establishment and maintenance of the 'Register of Places and Objects' (the Register); and
 - Enforcement provisions, including penalties for offences.

HISTORY OF THE ABORIGINAL HERITAGE ACT 1972

After 45 years in operation, with little change over that time, it is widely accepted that the Act needs to be modernised in a way that is respectful of Aboriginal people and their cultural heritage.

Recognising there are many individuals and organisations that have an interest in Aboriginal heritage and the effect of the Act, a multi-stage consultative approach to develop contemporary legislation is proposed - starting with this Consultation Paper. Rather than propose amendments, this paper aims to engage stakeholders in an exploratory conversation on key aspects of the Act as it operates now.

Phase two will see the release of a Discussion Paper that will offer a series of proposals on what the amended Act should do following distillation of the feedback on the Consultation Paper. The Discussion Paper will take into consideration past experience and current practice, and a scan of approaches in other jurisdictions.

Following the second round of public consultation, State Government approval will be sought for the preparation of an Exposure Draft Bill (Green Bill). The Green Bill will be released for public comment. Feedback on the Green Bill will inform the preparation of a new Aboriginal Heritage Amendment Bill for consideration by State Parliament.

Since 1972, numerous reviews have highlighted the need for legislative change to the Act. Few legislative amendments have been made, however, despite significant changes to the legal, economic and social environments surrounding the preservation and protection of Aboriginal cultural heritage. The Act has only been amended twice in 45 years of operation.

The first set of amendments in 1980 included the addition of the terms *'importance'* and *'significance'* in section 5. Parliamentary debates through Hansard show that the purpose of this addition was to *'tighten'* the definition of an Aboriginal site and ensure that only places *'worthy of preservation'* are subject to the protection of the Act. The second set of amendments, in 1995, transferred responsibilities for the administration of the Act from the Trustees of the WA Museum to the Minister and the then Aboriginal Affairs Department.

It is therefore time to ask:

- Is the Act meeting the expectations of stakeholders and the aspirations of the community for the way in which Western Australia's Aboriginal heritage is recognised, managed and protected?
- What changes are necessary to improve the effectiveness of the legislation?

HOW THIS CONSULTATION PAPER WORKS

This Consultation Paper poses a series of questions on how the Act currently operates to help determine its effectiveness, identify any gaps, and encourage ideas for improvements to the legislation. The Consultation Paper will also help identify what an amended Act should set out to do and how it should operate in the interests of all stakeholders.

The questions in this paper are provided to stimulate discussion and to assist interested parties who may wish to make a written submission. The paper is not intended to limit or restrict your responses in any way, and you are not required to respond to every question. You are encouraged to comment on any aspect of the Act of interest to you, including any part not outlined in this paper.

If you require further information on the review of the Act, please email the Heritage Services branch at the Department of Planning, Lands and Heritage (the Department) at AHAreview@dplh.wa.gov.au with your request.

This paper should be read in conjunction with the [Aboriginal Heritage Act 1972](#) and the [Aboriginal Heritage Regulations 1974](#), which can be accessed online through the State Law Publisher website (www.slp.wa.gov.au).

The Review of the Aboriginal Heritage Act page on the Department's website will also be updated to include fact sheets and other important information during the review process.



MAKING A SUBMISSION

Providing feedback on this Consultation Paper can be done in several ways:

Online

An online survey is available at www.daa.wa.gov.au.

Written submissions

Written submissions are encouraged and should be sent to AHAreview@dplh.wa.gov.au

Submissions can also be posted to:

Assistant Director General, Heritage Services
Department of Planning, Lands and Heritage
PO Box 7479
Cloisters Square PO WA 6850

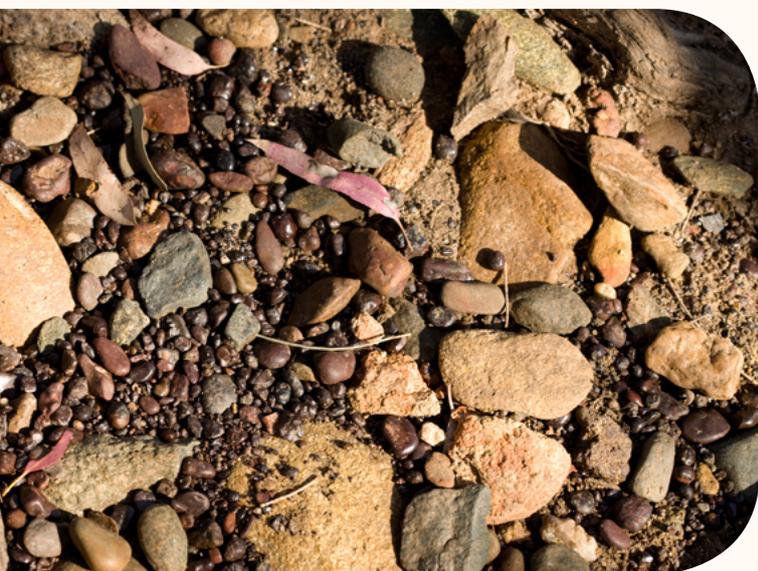
When providing your feedback, consideration should be given to what modernised legislation should set out to do and how it should operate in the interests of all stakeholders.

Your feedback must be received by close of business 1 June 2018. Please bear this in mind if posting your submission.

The Consultation Paper is the initial opportunity for you to contribute to the review of the Act. Other opportunities for input will be provided over the next six months.

This is an open process, therefore, all feedback received during the review of the Act will be made publicly available on the Department's website, including your name or the name of your organisation.

All feedback received during the consultation process is valued and will be considered by the Government when developing the proposals for amending the Act. The Government is committed to identifying proposals that will provide a balanced solution that meets the needs of all stakeholders.



PURPOSE OF THE ACT

The purpose of the Act is set out in the long title:

An Act to make provision for the preservation on behalf of the community of places and objects customarily used by or traditional to the original inhabitants of Australia or their descendants, or associated therewith, and for other purposes incidental thereto.

The long title sets out the general aims of the legislation to provide context for the detailed provisions of the legislation.

1. Is the long title an adequate description of what the amended Act should set out to do? If not, what changes should be made?

ROLES UNDER THE ACT

The Act sets out the roles and functions of the Minister, the Committee and the Registrar. The Department is responsible for administering the Act and works with all stakeholders to preserve and manage Aboriginal sites of importance and significance.

Role of Aboriginal people

While the Act does not explicitly require Aboriginal people to be consulted regarding Aboriginal cultural heritage, the general expectation is that where a proposal may breach the Act, Aboriginal people with knowledge of a particular area participate in heritage surveys associated with the proposal.

The Committee is obliged, as a matter of procedural fairness, to ensure that it has sufficient information from Aboriginal people who might be affected by a decision as to the existence, significance and importance of sites. While there is no explicit requirement for Aboriginal people to be consulted under the Act, it is acknowledged that information about the Aboriginal heritage for a particular area is best obtained through consultation with the relevant Aboriginal people.

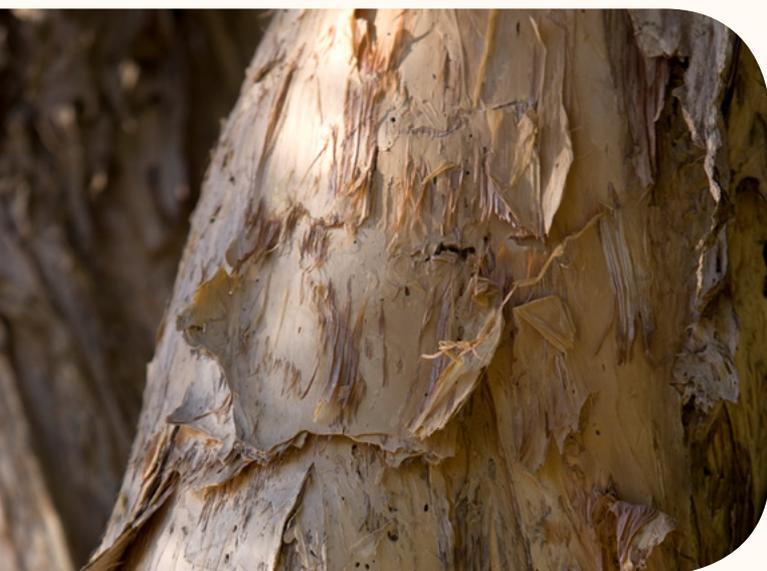
While there is no definitive list of Aboriginal people who should be consulted for an area, the Committee suggests that the following people at least should be consulted:

- (a) determined native title holders;
- (b) registered native title claimants;
- (c) persons named as informants on Aboriginal site recording forms held in the Register; and
- (d) any other Aboriginal people who can demonstrate relevant cultural knowledge in a particular area.

As part of the procedural fairness process, consultation with the relevant Aboriginal people is currently a pre-condition to the Committee's consideration of an application for consent or approval under the Act.

Under section 50 of the Act, the Minister may appoint honorary wardens for the purposes of the Act. Honorary wardens appointed by the Minister may exercise enforcement powers under Part VII of the Act. There is no requirement for honorary wardens to be of Aboriginal descent.

2. What do you think are the best ways to ensure the appropriate people are consulted about what Aboriginal heritage places should be protected, and how a proposal may impact those places?
3. To what extent has the provision to appoint honorary wardens been effective and how can it be improved?



Role of the Aboriginal Cultural Material Committee

The Committee is established as an advisory body under section 28. The role of the Committee is to evaluate, on behalf of the community, the importance or significance of Aboriginal places and objects and recommends places and objects to the Minister, which are or have been of special significance to Aboriginal people. The Committee's advice may include recommendations about the preservation or management of Aboriginal sites and objects, and applications for land development. The functions of the Committee, listed in section 39(1), are:

- *to evaluate on behalf of the community the importance of places and objects alleged to be associated with Aboriginal persons;*
- *where appropriate, to record and preserve the traditional Aboriginal lore related to such places and objects;*
- *to recommend to the Minister places and objects which, in the opinion of the Committee, are, or have been, of special significance to persons of Aboriginal descent and should be preserved, acquired and managed by the Minister;*
- *to advise the Minister on any question referred to the Committee, and generally on any matter related to the objects and purposes of this Act;*
- *to perform the functions allocated to the Committee by this Act; and*
- *to advise the Minister when requested to do so as to the apportionment and application of moneys available for the administration of this Act.*

Committee members are drawn from various parts of Western Australia and are people who, in the opinion of the Minister, have special knowledge, experience or responsibility that will assist the Committee in the recognition and

evaluation of the cultural significance of matters coming before the Committee. The Minister appoints a chairperson of the Committee from the appointed members.

Of the appointed members, one shall be a person with specialised experience in anthropology, and there are three ex-officio members representing government agencies, including Landgate, the WA Museum and the Department of Planning, Lands and Heritage.

Role of the Minister for Aboriginal Affairs

Responsibility for the administration of the Act is vested in the Minister under Part III. The Minister is required to have regard to the recommendations of the Registrar and the Committee but is not bound by these recommendations.

Under section 10 of the Act, the Minister's role is to ensure that, so far as is reasonably practicable, all places in Western Australia that are of traditional or current sacred, ritual or ceremonial significance to Aboriginal people should be recorded on behalf of the community, and their relative importance is evaluated so that resources can be made available for the preservation of such places.

The Minister can delegate all or any of his or her powers under the Act, except for the power of delegation, to an officer of the Department. Additionally the Minister's powers under Part VI of the Act can be delegated to the Trustees under the *Museum Act 1969*.

Role of the Registrar of Aboriginal Sites

The Registrar is appointed to undertake various statutory responsibilities under the Act, including maintaining the Register and granting permits to undertake certain activities on Aboriginal sites. The Registrar, subject to the approval of the Director General of the Department, can delegate any of his or her powers or duties under the Act, except for the power of delegation, to another officer of the Department.

4. Are the roles and functions assigned under the Act sufficiently clear and comprehensive to fulfil the objectives of the legislation to preserve Aboriginal heritage places and objects? If not, what changes in roles and functions would you suggest?



WHAT IS PROTECTED?

ABORIGINAL SITES

An Aboriginal Site means any place to which section 5 of the Act applies:

5(a) any place of importance and significance where persons of Aboriginal descent have, or appear to have, left any object, natural or artificial, used for, or made or adapted for use for, any purpose connected with the traditional cultural life of the Aboriginal people, past or present;

5(b) any sacred, ritual or ceremonial site, which is of importance and special significance to persons of Aboriginal descent;

5(c) any place which, in the opinion of the Committee, is or was associated with the Aboriginal people and which is of historical, anthropological, archaeological or ethnographical interest and should be preserved because of its importance and significance to the cultural heritage of the State;

5(d) any place where objects to which this Act applies are traditionally stored, or to which, under the provisions of this Act, such objects have been taken or removed.

5. Does section 5 adequately describe the sorts of places or sites that should be protected under the amended Act? If not, how can it be improved?

ABORIGINAL OBJECTS

In relation to Aboriginal objects, section 6 states:

'... [the] Act applies to all objects, whether natural or artificial and irrespective of where found or situated in the State, which are or have been of sacred, ritual or ceremonial significance to persons of Aboriginal descent, or which are or were used for, or made or adapted for use for, any purpose connected with the traditional cultural life of the Aboriginal people past or present.'

This includes objects so nearly resembling an object of sacred significance to persons of Aboriginal descent as to be likely to deceive or be capable of being mistaken for such an object (section 6(2)).

This does not include collections held by the Museum, which is under the management and control of the Trustees, under section 9 of the *Museum Act 1969*, or objects made for the purpose of sale.

Part VI of the Act deals with the protection of Aboriginal objects. Under this Part, the Act enables the governor, on the recommendation of the Committee, to declare objects that are: of sacred, ritual or ceremonial importance; of anthropological, archaeological, ethnographical or other special national or local interest; or of outstanding aesthetic value to be classified as Aboriginal cultural material.

The Minister shall from time to time consult with the Trustees of the WA Museum appointed under the *Museum Act 1969* relating to the protection of objects.

In certain circumstances, the Minister may retain, purchase, and compulsorily acquire objects to which the Act applies. Objects of sacred, ritual or ceremonial significance in the possession of the Minister shall not be displayed in a manner not sanctioned by the relevant Aboriginal custom.

It should be noted that section 9 of the *Museum Act 1969* requires the WA Museum to *'make and preserve ... collections representative of the Aborigines of the State'*.

6. Do section 6 and Part VI adequately describe the sorts of objects that should be protected under the amended Act? If not, how can they be improved?

PROTECTED AREAS

Section 19 of the Act makes provision for the declaration of Aboriginal sites that are of outstanding importance to be Protected Areas. Protected Areas are gazetted areas of land having defined boundaries. Some Protected Areas contain a number of sites or are specific to one site only. Section 20 of the Act also makes provision for the temporary (up to 6 months) declaration of a Protected Area.

There are currently 80 Protected Areas in Western Australia. There are no examples of Protected Areas being declared since the 1980s.

7. Is the declaration of a Protected Area under the Act the best way to deal with Aboriginal sites of outstanding importance?

ABORIGINAL ANCESTRAL (SKELETAL) REMAINS

The proper acknowledgement and care of deceased ancestors and Aboriginal Ancestral (Skeletal) Remains is an important part of Aboriginal culture. Other than the requirement to report the location of burial grounds under section 15, the Act does not include specific provisions that cover the discovery and management of Aboriginal Ancestral (Skeletal) Remains. Separate provisions relating to Aboriginal remains are included in the:

- *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Commonwealth) – Part II Division 3;
- *Aboriginal Heritage Act 2006* (VIC) – Part 2 Division 2;
- *Aboriginal Heritage Act 1988* (SA) – various sections in Part 3; and
- *Aboriginal Cultural Heritage Act 2003* (QLD) – Part 2 Division 2.

8. Should the Act provide for the management of Aboriginal Ancestral (Skeletal) Remains? If so, what needs to be considered?



PROTECTION AND ENFORCEMENT

The Act protects all Aboriginal sites in Western Australia, whether they are registered or not, provided that the site can be determined to meet the definitions under section 5. Consent is required from the Minister for any activity that may affect Aboriginal sites.

Under section 17 of the Act, a person who excavates, destroys, damages, conceals or in any way alters an Aboriginal site commits an offence, unless he or she acts with the authorisation or consent of the Registrar or the Minister. Consent or authorisation is usually given in one of three ways:

- **Section 16** authorisation. Section 16 of the Act provides that the Registrar may, on the advice of the Committee, authorise the entry upon and excavation of an Aboriginal site, and the examination and removal of anything on or under the site in such manner and subject to such conditions as the Committee may advise.
- **Section 18** consent. Section 18 of the Act provides that, in order to avoid committing an offence under section 17, a land owner may give notice to the Committee that he or she requires to use the land for a purpose that might impact on a heritage site unless consent is given by the Minister. The Committee considers the notice and makes a recommendation to the Minister. The Minister then makes a decision whether or not to consent to the use of the land. If consent is granted, the Minister can also impose conditions.

- **Regulation 10** authorisation. Regulation 10 of the *Aboriginal Heritage Regulations 1974* details particular activities that require written authorisation from either the Registrar or the Minister before any such activities can occur on land and/or property to which these Regulations apply.

For section 18 applications, a land owner typically commissions a heritage survey where an activity will likely affect a site. As part of the heritage survey Traditional Owners or knowledge holders are engaged to identify cultural heritage places and strategies to manage the identified Aboriginal cultural heritage places.

There is also a covenants provision under the Act that has not been used. In recent years, agreements by land users to protect cultural heritage have emerged under other legislation such as the *Native Title Act 1993*, the *Heritage of Western Australia Act 1990* and processes such as the Noongar Standard Heritage Agreement under the South West Native Title Settlement. These have become a more common means for setting out requirements for the long-term, site-specific conservation of heritage places, irrespective of changes in ownership, where it is desirable to establish clear guidelines and enforcement.

9. What sort of activities that may affect an Aboriginal site should require consent or authorisation?
10. What should be the criteria against which to evaluate an activity that may affect a site (e.g. a proposal to use or develop land)?

11. How can 'impact' arising from proposals for land use on sacred sites that do not have physical cultural heritage elements be assessed?
12. Who should provide consent or authorisation for proposals that will affect Aboriginal sites?
13. To what extent is the current section 18 application process effective and how can it be improved?
14. What provisions could be included in an amended Act to ensure the long-term protection of Aboriginal sites where alternative statutory arrangements do not apply?

PENALTIES

The penalties for destroying, damaging, concealing or altering Aboriginal sites or objects as a breach of sections 17 and 43 of the Act are outlined under section 57:

- \$20,000 and 9 months' imprisonment for an individual who commits their first offence; and \$40,000 and 2 years' imprisonment for subsequent offences.
- \$50,000 for a Body Corporate for a first offence; and \$100,000 for subsequent offences.

Other offences under the Act include disclosing confidential information, interfering with markings of Protected Areas, contravening regulations relating to Protected Areas, failing to comply with terms of a notice vesting the property in and right to possession of an object in the Minister, and contravening an order under section 49.

As the Act does not stipulate a limitation period for when a prosecution for an offence under the Act must commence, section 21 of the *Criminal Procedure Act 2004* applies. This means a prosecution of a person for an offence under the Act must commence within 12 months after the date on which the offence was allegedly committed.

In proceedings for an offence under the Act, section 62 provides a 'special defence of lack of knowledge'. Section 62 states '*It is a defence for the person charged to prove that he did not know and could not reasonably be expected to have known, that the place or object to which the charge relates was a place or object to which [the Act] applies.*'

15. Are the enforcement provisions under the Act adequate to protect sites? If not, how can they be improved?
16. Are the current penalties under the Act adequate? If not, how can they be improved?



SITE ASSESSMENT AND REGISTRATION

ASSESSMENT

Section 15 of the Act provides that any person who has knowledge of any thing or place to which the Act applies or might reasonably be suspected to apply has an obligation to report it to the Registrar. However, under section 7(1)(b), Aboriginal people are not compelled to disclose information or otherwise act contrary to any prohibition of the relevant Aboriginal customary tradition.

When the Registrar receives notification of a heritage place that may be a site under the Act, the assessment process commences. This includes the heritage place being listed as 'lodged' on the Department's database, and a preliminary assessment is prepared for consideration by the Committee to decide whether the heritage place meets the criteria under section 5.

Should the Committee form the view the heritage place meets the criteria under section 5 of the Act, it will then be considered an Aboriginal site and placed on the Register.

In evaluating the importance of places and objects, sections 39(2) and (3) of the Act provide that the Committee shall have regard to:

- 39(2) (a) *any existing use or significance attributed under relevant Aboriginal custom;*
- (b) *any former or reputed use or significance which may be attributed upon the basis of tradition, historical association, or Aboriginal sentiment;*

(c) *any potential anthropological, archaeological or ethnographic interest; and*

(d) *aesthetic values.*

39(3) *Associated sacred beliefs, and ritual or ceremonial usage, in so far as such matters can be ascertained, shall be regarded as the primary considerations to be taken into account in the evaluation of any place or object for the purposes of this Act.*

The majority of assessments undertaken relate to land use applications under section 18 of the Act. As a result there is a significant backlog of sites yet to be assessed.

The process for assessing whether or not an object is an Aboriginal object to which the Act applies is outlined in section 41 under Part VI of the Act. This process includes the Minister (or delegate) inspecting the object. If it is decided the Act applies to the object, the Minister is responsible for photographing, copying, or otherwise obtaining a record of the object and investigating the extent or nature of any interest the object may have. This process may include consulting the WA Museum. It should be noted that currently there are no objects listed on the Register.

17. Should a defence continue to be provided where the disclosure of information (section 15) is against customary laws/protocols?
18. Are the criteria for assessing the significance of sites under section 39 (2) and (3) adequate to evaluate whether a site should be added to the Register? If not, what should the criteria be to assess the significance of a site?

THE REGISTER

The Act specifies that a Register must be maintained. Under current arrangements the Register is held and maintained by the Registrar, currently an officer of the Department. The Register is intended to, so far as is practicable, list all Protected Areas, all Aboriginal cultural material, and all other places and objects to which the Act applies. The manner and form of the Register is determined by the Minister.

The Register is an essential reference tool to assist land users in identifying locations where Aboriginal heritage is present, and is available to members of the public for searching online via the Aboriginal Heritage Inquiry System. However, searches are subject to exclusions where information is of a culturally sensitive, confidential or restricted nature. As a general rule, confidential and restricted information held or managed by the Department can only be accessed with the permission of relevant Aboriginal informants, or their descendants.

19. What should be the steps to report, nominate, assess, enter, amend or remove an entry from the Register?

OTHER PARTS OF THE ACT

Comments on any other aspect of the Act are welcome. Please include your ideas and suggestions in your submission.

20. What do you think is missing from the Act?
21. What sections, if any, do you think should be removed from the amended Act, and why?





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