



REVIEW OF THE *ABORIGINAL HERITAGE ACT 1972*

PROPOSALS FOR NEW LEGISLATION TO
RECOGNISE, PROTECT AND CELEBRATE
WESTERN AUSTRALIA'S ABORIGINAL HERITAGE

DISCUSSION PAPER

MARCH 2019

MINISTER'S FOREWORD



In March 2018, I launched a review of the *Aboriginal Heritage Act 1972* with the release of a Consultation Paper and a commitment to three phases of public consultation.

The Consultation Paper sought the views of Aboriginal people and communities, along with a broad range of other stakeholders, on the effectiveness of the current Act, the gaps in the legislation, and what improvements could be made.

I am delighted by the level of engagement across the State in the first phase of consultation on the Review of the Act. Aboriginal people have clearly voiced what is important to them and their expectations for a stronger say in what happens to their heritage. Other stakeholders have given useful insights into the inequities and inefficiencies in the current system. I would like to thank all those who took the time to share their views.

The feedback from this initial consultation has established that the current Act is no longer fit for purpose. We have heard that too much Aboriginal heritage has been damaged or destroyed; but we have also heard that dealing with the cumbersome, costly and uncertain processes to comply with the Act has economic consequences that should be addressed. I am therefore committed to ensuring we have modern legislation that effectively recognises, protects and celebrates the cultural heritage of Aboriginal Western Australians and operates transparently and efficiently.

Aboriginal cultural heritage is central to the health and vitality of the people and communities who continue to practice their

culture and pass on the knowledge to new generations. As the traditional custodians of the lands that make up Western Australia, Aboriginal peoples have deep spiritual connections to these lands, and cultural obligations to care for their country.

This Discussion Paper sets out proposals to recognise, protect, manage and celebrate the places and objects that are important to Aboriginal culture and to also provide a clear and efficient framework for other land users to engage with.

My goal is to promote respectful relationships where Aboriginal people and other land users can agree on how proposed land uses can proceed without causing the hurt and distress that damage to important cultural places or objects creates for Aboriginal people.

I am pleased to release this Discussion Paper, which marks the start of phase two of the Review of the Act and invite you to consider the proposals for new legislation it contains. Once again, I encourage everyone with an interest in Aboriginal heritage to engage in the coming opportunities to share their views on whether these proposals are the right ones for the effective protection of Aboriginal cultural heritage in Western Australia.

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

Ben Wyatt MLA
Minister for Aboriginal Affairs

INTRODUCTION

The Aboriginal peoples of Australia are proud that their cultural heritage can be traced back at least 60,000 years and is the oldest continuing culture in the world today. The fact that it is a living culture, practiced by people who have deep spiritual connections and obligations to their ancestors and ancestral lands makes it vitally important to protect, conserve and manage places and objects central to the cultural life of Aboriginal communities.

Although ground-breaking in its time, the *Aboriginal Heritage Act 1972* (the Act) has been described as ‘embarrassingly out of kilter’ with modern standards of heritage management, but also and more importantly, the rights and reasonable expectations of Aboriginal people. Many industry land users have expressed frustration with the uncertainty, delays and costs associated with trying to comply with the Act.

On 9 March 2018, the first of a three-phase public consultation process began with the release of a Consultation Paper, which sought the views of the people of Western Australia on how the Act should be improved. Over 550 people participated in workshops around the State and more than 130 written submissions were received by the close of Phase 1 on 1 June 2018. This feedback has been used to inform the proposals that follow.

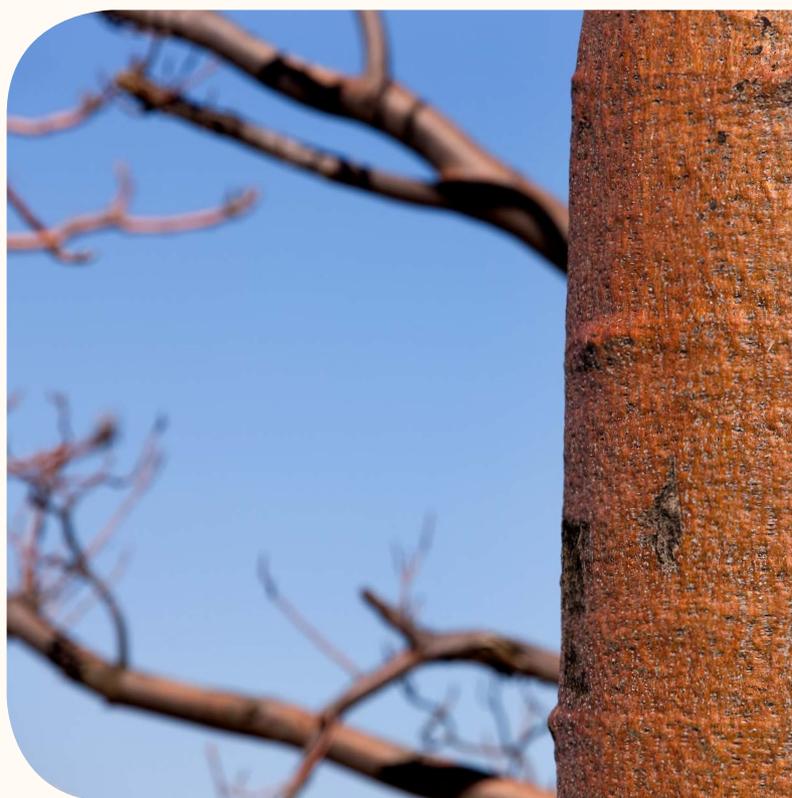
There have been previous reviews of the Act, none of which have resulted in significant amendment of the legislation. Within this context, this Discussion Paper sets out proposals that respond to stakeholders’ feedback on the current state and aspirations for modernised Aboriginal heritage legislation. They have been developed with a view to providing clarity and certainty for all stakeholders and to build the support necessary to deliver meaningful change. This will be essential to address the frustration being experienced by all stakeholders with the current legislative arrangements.

This review has also taken careful note of the clear trend towards embodying the intent of the *United Nations Declaration on the Rights of Indigenous Peoples* in legislation dealing with indigenous cultural heritage, as revealed by an analysis of equivalent legislation in other Australian states and territories, New Zealand and Canada. It is also evident that, irrespective of the outdated standards set by the current Act, there are a number of large industry organisations with operations in Western Australia that have voluntarily adopted international standards of best practice in relation to Aboriginal cultural heritage in this State. At the core of this best practice approach is a focus on achieving good heritage outcomes through the making of agreements founded on respectful and positive relationships between land users and Aboriginal people.

These proposals seek to give Aboriginal people in Western Australia a real role in decisions affecting their heritage. The emphasis is on establishing processes that focus on agreement-making that avoids or minimises impact on their cultural heritage. This is a fundamental shift away from the current emphasis on whether a place meets centrally-applied criteria to ‘qualify’ as an Aboriginal heritage site under the current Act. A modern system of indigenous heritage management is founded on local input from the owners of the heritage as to what is important to them, but it must also be unambiguous and transparent to enable industry and the community to engage with it, otherwise heritage can be lost through accidental or heedless destruction.

The proposals set out in this paper may be brought into effect by legislation, regulation and policy. This paper seeks to provide enough detail on each proposal to enable it to be critiqued by all stakeholders. As a result, there are likely to be questions as to how the proposals might operate in practice. Should the suite of proposals gain general acceptance, these questions will be addressed in the process of drafting the new legislation and become the focus of the third phase of consultation.

A range of supporting materials has been prepared to assist in the consideration of these proposals. These are available at <https://www.dplh.wa.gov.au/aha-review>



CONSULTATION PROCESS AND FEEDBACK

PHASE 1 – CONSULTATION PAPER

On 9 March 2018, the Minister for Aboriginal Affairs, the Hon Ben Wyatt MLA, launched a review of the *Aboriginal Heritage Act 1972* (the Act) with the release of a Consultation Paper. This marked the start of Phase 1 of a three-phase public consultation process.

Previous reviews have been criticised for failing to engage properly with Aboriginal people. A goal of this review was to be inclusive and transparent. To encourage participation by Aboriginal people, 31 culturally appropriate, four-hour workshops entitled, *My Heritage*, *My Voice*, were held around the State. In addition, 10 two-hour *Working with Our Aboriginal Heritage* workshops were held for other stakeholders.

Prior to the workshops, and coinciding with the release of the consultation paper, support material was made available on the department's website. This included the PowerPoint presentations that would be used in the workshops to gain feedback in response to a number of specific questions. A support pack for the *My Heritage*, *My Voice* workshops was also provided, containing the questions with space for people to write down their thoughts in preparation for the workshops.

All the workshops were run by an independent facilitator who guided participants through the questions. The input of workshop participants was captured on butcher's paper that was photographed and published on the department's website. This level of transparency enabled people who participated to trust that

their thoughts had been captured and fed directly into the process without filter or editing. It also enabled others to see what had been said at the workshops.

More than 550 people attended the workshops around the State, with mixed levels of attendance, sometimes due to events in the community such as funerals, or other government business. Feedback from those who attended workshops, including members of the Aboriginal Cultural Material Committee (ACMC), the Western Australian Aboriginal Advisory Council (WAAAC) and other senior men and women from communities, was very positive about the process. There was some feedback that more notice and a longer time for the workshops for Aboriginal people will be needed for the next phase of consultation.

There remains a high degree of skepticism across communities and the consulting profession about the latest in a line of failed attempts to review the Act, however, those who have participated in the workshops are more positive and keen to engage in the next phase of consultation. The dates, times and locations of the workshops held during Phase 1 are available on the department's website at <https://www.dplh.wa.gov.au/aha-review>

An independently facilitated workshop was held for the ACMC to gain its input into the review. The department briefed the WAAAC, the Aboriginal Lands Trust (ALT), and a number of other stakeholder bodies. In addition, the department held three events seeking input from heritage professionals, industry representatives and other government departments.

All stakeholders had the opportunity to provide a written submission to the Consultation Paper via a dedicated online survey, email or post. Phase 1 of the public consultation process concluded on 1 June 2018 with over 130 submissions received.

The following is a high-level summary of the feedback from Phase 1 of the Consultation Process:

- There is no statutory requirement to involve Aboriginal people in decisions on Aboriginal heritage, which contravenes human rights under international law. Current consultation and decision-making processes do not always result in the ‘right people speaking for country.’ Land use projects can experience delays, additional costs and become unviable due to uncertainty about the consultation process.
- The Act does not adequately protect cultural landscapes and intangible heritage.
- The Act does not sufficiently encourage protection of Aboriginal heritage through co-existence with compatible land uses or modification of proposals to avoid impacts.
- The current system is adversarial and requires the Minister to adjudicate all land use decisions where Aboriginal heritage may be impacted. This is highly inefficient in a State the size of Western Australia, which is economically dependent on efficient access to land by the resources sector.
- The current system does not adequately facilitate risk-based decision-making and requires all proposals to follow the same approval pathway irrespective of the degree of actual or predicted heritage impact. The department, the APMC and the Minister are all involved in the review of the same information for every proposal, which compounds inefficiency.

- The current Act does not recognise the heritage outcomes resulting from agreements made under the *Native Title Act 1993* (Cth) between land use proponents and Native Title holders.
- The Register of Aboriginal Places and Objects is not a reliable source of information about the location of Aboriginal heritage. Some Aboriginal people refuse to have their most important places entered on the register for fear it will encourage unwanted visitors or facilitate destruction of heritage.
- The lack of understanding of Aboriginal heritage by the broader community leads to a lack of value, which can contribute to its destruction. Unlike historic heritage, there is no function in the *Aboriginal Heritage Act* to encourage public interest or understanding of Aboriginal heritage.
- Aboriginal people and land use proponents are vulnerable to some poor practices in the unregulated heritage consultation profession, particularly during periods of high demand associated with periods of high economic activity.
- The Act does not provide for any right of appeal by Aboriginal people in relation to decisions about their cultural heritage.
- Poor enforcement and low rates of prosecution for offences committed under the Act have been identified as problematic.
- The current Act is no longer fit for purpose and needs to be replaced with modern heritage legislation.

A more detailed summary of the feedback and analysis of the issues can be found on the department’s website at

<https://www.dplh.wa.gov.au/aha-review>

PHASE 2 – DISCUSSION PAPER

To maintain the goodwill and confidence achieved in Phase 1 of the consultation process, it is intended that the proposals contained in this Discussion Paper are properly explained and debated in communities and amongst other stakeholders. Timing these meetings so that people who work can attend, and that Law time/ cultural obligations are respected, will also be important considerations.

As with Phase 1, there will be several ways for stakeholders to make submissions on these proposals:

Online: www.dplh.wa.gov.au

Email: AHAreview@dplh.wa.gov.au

Post: Assistant Director General,
Heritage Services
Department of Planning,
Lands and Heritage
Locked bag 2506
Perth WA 6001

Phone for enquiries: (08) 6551 8002

As with Phase 1 of the consultation process, all feedback will be published on the department's website.

When providing your feedback, consideration should be given to whether these proposals meet the aim of providing modernised legislation that will recognise, protect and celebrate Western Australia's Aboriginal heritage. More specific questions regarding each of the proposals are contained in the Proposals for new Aboriginal Heritage Legislation Consultation Paper, which can be found on the department's website: <https://www.dplh.wa.gov.au/aha-review>

Your feedback must be received by close of business 31 May 2019. Please bear this in mind if posting your submission.

All feedback received during this phase of consultation will again be considered by the Government when drafting the new Aboriginal heritage legislation.

PHASE 3 – DRAFT EXPOSURE BILL

The third phase of public consultation will commence with the release of a Draft Exposure Bill (Green Bill) that will be developed in response to the feedback on this Discussion Paper. There will be more materials to explain the draft legislation and proposed regulations followed by further workshops and opportunities to critique the Bill before it is considered by Government for introduction into the Parliament.



REFORM PROPOSALS – OVERVIEW

These Reform Proposals aim to deliver more effective protection, conservation and management of Aboriginal cultural heritage in Western Australia than the current Act allows for, while providing a clear framework within which land use decisions can be made efficiently. In developing the new system for Western Australia, the systems of other jurisdictions in Australia, New Zealand and Canada have been studied (see xx for an overview of Inter-jurisdictional analysis). Where jurisdictions have recently updated their legislation, the systems show a clear shift towards empowering Aboriginal people and agreement making, but all retain a necessary element of permitting by government. The proposed new system in this paper is founded on those principles and is designed with the unique Native Title, geographic and economic circumstances of Western Australia in mind.

The proposals bring forward aspects of the current Act that have worked well and new approaches that aim to create a modern system that is culturally appropriate, reflective of developments in heritage management practice and is accessible for all types of land users. To underpin this modernisation, it is proposed that new Aboriginal heritage legislation will:

- Recognise the central role cultural heritage plays in the well-being of Aboriginal people and affirm the importance of its protection. (Proposal 1)
- Adopt a definition of ‘place’ that aligns with the internationally recognised ICOMOS Burra Charter definition: *“Place means a geographically defined area. It may include*

elements, objects, spaces and views. Place may have tangible and intangible dimensions.” (Proposal 2)

- Bring forward the presumption of protection afforded to Aboriginal heritage places under the current Act. (Proposal 4)
- Encourage and recognise agreement making between Aboriginal people and land users. (Proposal 6)
- Retain a mechanism for land use proponents to apply for consent to use land. (Proposal 5)
- Introduce a referral system to facilitate risk-based decision making and tiered assessments of land use proposals that take into account Aboriginal heritage and the impact of previous land uses. (Proposal 5)
- Give Aboriginal people a role in decisions affecting their heritage through appropriately constituted and accredited Aboriginal corporations designated as Local Aboriginal Heritage Services which will facilitate agreement making and ensure that the right people speak for country. (Proposal 3(A))
- Establish a skills based Aboriginal Heritage Council, chaired by an Aboriginal person that will have responsibility for:
 - administration of the Aboriginal Heritage Register
 - setting standards for identifying and recording Aboriginal heritage places
 - endorsing agreements for land use proposals between Aboriginal people and land users
 - assessing and advising on land use proposals that may affect Aboriginal heritage

- strategic oversight of the Aboriginal heritage protection system, including setting relevant policies and procedures
- advising the Minister on Aboriginal heritage issues generally
- promoting best practice in the management and maintenance of Aboriginal heritage places and objects
- facilitating and providing financial assistance to assist in the conservation of Aboriginal heritage places
- promoting Aboriginal heritage to the Western Australian community.

(Proposal 3(B))

- Retain the Minister for Aboriginal Affairs as a key decision-maker for land use proposals of State Significance or where significant impact to Aboriginal heritage is involved. (Proposal 3(C))
- Improve transparency through the publication of reasons for decisions, and ensure rights of review and appeal are equitable. (Proposal 7)
- Provide for Aboriginal remains to be dealt with appropriately. (Proposal 2)
- Provide new tools for the Minister to intervene quickly where Aboriginal heritage is at imminent risk of loss from unauthorised land use activities. (Proposal 3(C))
- Retain Protected Areas and provide new mechanisms to enable Aboriginal people to care for them. (Proposal 9)
- Bring the penalties for a breach of the Act into line with other heritage legislation (*Heritage Act 2018*). (Proposal 8)
- Improve enforcement by allowing sufficient time for breaches to be thoroughly investigated and prosecuted. (Proposal 8)

Other proposals include the establishment of a Directory of Heritage Professionals to aid in the selection of those with appropriate qualifications and improving standards.

These proposals and other complementary changes to Aboriginal heritage protection arrangements are set out in more detail in the following pages.



REFORM PROPOSALS – DETAIL

1. A NEW ABORIGINAL HERITAGE ACT

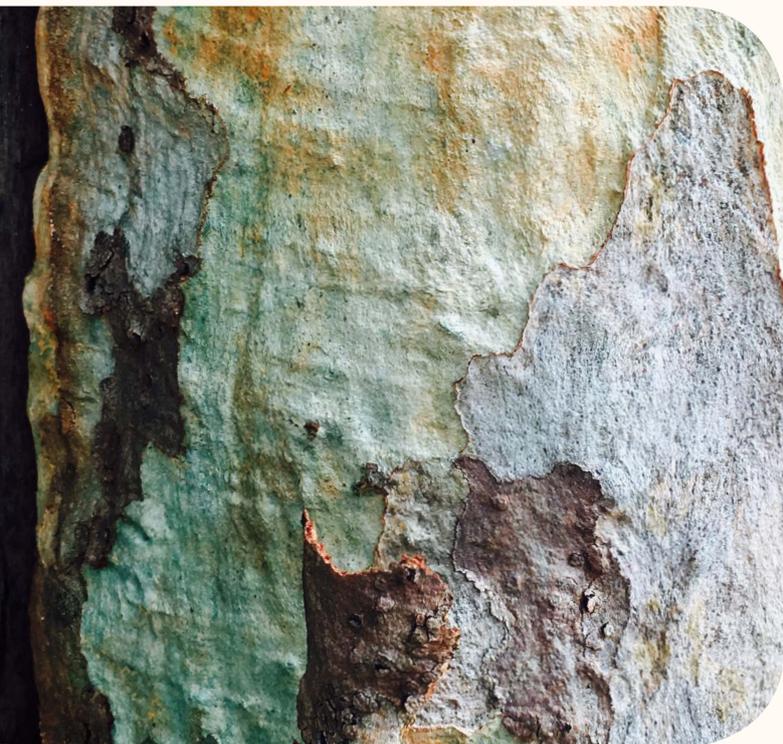
The overwhelming weight of stakeholder feedback is that the current *Aboriginal Heritage Act 1972* neither reflects the changed social and legal landscape that has led to the formal recognition of Aboriginal people's deep connections to the land and their culture, nor modern approaches to heritage management generally. Indeed, many of these concepts cannot be comfortably incorporated into the scheme of the current Act, which envisages only a limited formal role for Aboriginal people in its workings. Consequently, modernising the system of protection for Aboriginal heritage in Western Australia needs more than amendment to the existing Act: a new Act is required.

PROPOSAL 1:

Repeal the *Aboriginal Heritage Act 1972* and deliver new Aboriginal heritage legislation

It is proposed to repeal the *Aboriginal Heritage Act 1972* and replace it with new Aboriginal heritage legislation that recognises Aboriginal people's culture and embodies modern approaches to heritage management. The objects of new legislation will be to:

- a) Recognise the central role of Aboriginal cultural heritage to thriving Aboriginal communities, current and future.
- b) Provide for the culturally appropriate identification and documentation of Aboriginal heritage places and objects, including their tangible and intangible aspects.
- c) Provide a clear framework for the protection, conservation and management of Aboriginal cultural heritage, which informs land use and development decisions that respect Aboriginal heritage.
- d) Promote the appreciation of Western Australia's Aboriginal heritage so that the whole community values its preservation.



2. WHAT NEW LEGISLATION WILL COVER – ABORIGINAL HERITAGE PLACES, OBJECTS, ANCESTRAL REMAINS

The weight of the feedback supported including provision for groups of interconnected heritage places (for example, landscape features associated with the Dreaming, the songs and stories connecting such places, places of ceremonial importance, physical cultural remains, water sources and environmental values important to Aboriginal culture to be recorded as cultural landscapes). Recognising cultural landscapes reflects Aboriginal people's connection to country, the interconnectedness of Aboriginal heritage values and their setting, will encompass heritage values (such as song lines) that traverse considerable distances, and reflect best practice in heritage management. However, the protection of a cultural landscape would not preclude other land uses, or necessarily require that they be authorised in some way, within areas recorded as cultural landscapes. Rather, it would ensure that land use proposals, and their evaluation, are sensitive to the broadest range of Aboriginal heritage values. Compatible land uses will be able to occur or continue within cultural landscapes without the need for any statutory approval.

Intangible heritage values such as songs or stories that are tied to particular places will also be acknowledged by inclusion on the Aboriginal Heritage Register. As intellectual property is governed by Commonwealth legislation, which is currently under review, it is not proposed that new Aboriginal heritage legislation will cover intellectual property associated with stories, songs and bush medicine.

The omission in the current Act of specific reference to Aboriginal skeletal remains, in-situ and burials; those that have been disinterred and those re-buried, including remains that have been repatriated and await re-burial, was raised as an issue that should be addressed as a priority.

Lastly, administrative interpretations that attempted to narrow the scope of the current definition of Aboriginal heritage were successfully challenged by aggrieved Aboriginal people (see *Robinson v Fielding* [2015] WASC 108). Without amendment, the definition remains vulnerable to this type of administrative misstep and subsequent challenge,

To accommodate these changes and avoid future successful legal challenges, a new definition of what Aboriginal heritage legislation should cover will be required.

PROPOSAL 2: Update definitions and scope of new Aboriginal heritage legislation

It is proposed that new Aboriginal heritage legislation will:

- i) Adopt a new definition of 'place' that is aligned with the *Australia ICOMOS Burra Charter*¹ definition of place (and explanatory/and practice notes) that includes 'tangible and intangible dimensions':

"Place has a broad scope and includes natural and cultural features. Place can be large or small: for example, a memorial, a tree, an individual building or group of buildings, the location of an historical event, an urban area or town, a cultural landscape, a garden, an

¹ The *Australia ICOMOS Burra Charter* is widely accepted as the 'Australian Standard' for the identification, recognition and conservation of heritage places. It is used in all Australian jurisdictions to guide heritage policies and processes.

industrial plant, a shipwreck, a site with in situ remains, a stone arrangement, a road or travel route, a community meeting place, a site with spiritual or religious connections...

Places may have a range of values for different individuals or groups².”

- ii) Carry forward the protection of all Aboriginal cultural heritage places and objects whether registered or not, consistent with the current Act.
- iii) Continue to protect Aboriginal objects consistent with the current Act.
- iv) Include culturally appropriate procedures to deal with ancestral remains.



3. KEY ROLES IN ABORIGINAL HERITAGE – PROPOSED LOCAL AND CENTRAL BODIES – FUNCTIONS AND SELECTION

A substantial weight of stakeholder feedback stressed the need to:

- i) Ensure that any new legislation incorporates Aboriginal people in decision-making related to their heritage.
- ii) Provide mechanisms to ensure that the ‘right people to speak for Country’ are involved in research and decision-making related to their heritage.
- iii) Recognise the intersection with the *Native Title Act 1993* (Cth) that arises particularly through the right to “maintain places of importance and areas of significance to the native title holders under their traditional laws and customs and protect those places” included in most native title claims and awarded at determination.
- iv) Empower Western Australia’s Aboriginal peoples to benefit economically from their cultural heritage (should they choose and feel it appropriate to do so).
- v) Actively assist proponents’ consideration of Aboriginal heritage in development planning and provide timely advice on emerging issues.
- vi) Provide for strategic system oversight, standard setting and heritage promotion activities.

This, coupled with the proposed scope of new Aboriginal heritage legislation, will require a new system of administration that decentralises a number of functions to appropriately constituted

² Explanatory Note to Definition of Place, Burra Charter 2013

and accredited local Aboriginal bodies. However, there was a substantial weight of feedback also stressing the benefits of more centralised decision-making for consistency, land use proponent certainty and system oversight.

Consequently, functions under new Aboriginal heritage legislation should be divided into those that are appropriately undertaken at a local level and those that should remain centralised. In order to accommodate this, a system to enable local Aboriginal bodies to opt in to providing heritage services (proposed Local Aboriginal Heritage Services) will be required to facilitate local input, in addition to a centralised body (proposed Aboriginal Heritage Council) that is responsible for some decision-making, coordination and strategy. The Minister, however, will retain a significant decision-making and oversight role.

PROPOSAL 3(A): Local Aboriginal Heritage Services

The requirement under the *Native Title Act 1993* (Cth) for native title holders to have some corporate structure to manage their recognised rights after a successful determination of native title has resulted in an increasing number of locally constituted Aboriginal bodies with the representation, skills and, potentially, desire to take on a role in Western Australia's Aboriginal heritage management system. Where they are ready, willing and (constitutions permitting) able, these native title bodies corporate could be appropriate to fulfil the role of Local Aboriginal Heritage Services under new Aboriginal heritage legislation.

Not all areas can or will have native title bodies corporate, and some such bodies may not choose to take on a role beyond that prescribed by the *Native Title Act 1993* (Cth). In other areas, a more regional approach may be

culturally appropriate, with the result that other bodies encompassing the areas covered by a number of native title bodies corporate may be preferable.

It is clear from the consultation that 'one size will not fit all'. Therefore, a process of nomination and selection (according to clear, published criteria) will be required before any local body is accorded the status of Local Aboriginal Heritage Service. An outline of the proposed selection process is provided later in this paper.

Functions of a Local Aboriginal Heritage Service

Once selected it is proposed that a range of functions under the new legislation will be devolved to those bodies:

- i) Ensure the right people to speak for Country and the relevant cultural heritage are consulted in their geographic area of responsibility.
- ii) Make agreements regarding Aboriginal heritage management and land use proposals in their geographic area of responsibility.
- iii) Provide evidence of the importance of the heritage to the relevant Aboriginal people and advice to the Aboriginal Heritage Council on Heritage Agreements being put forward for ratification and the acceptability of land use proposals that may impact on Aboriginal heritage in their geographic area of responsibility, if requested.
- iv) Assist in improving the accuracy of the Aboriginal Heritage Register by providing evidence and data to the required standards for Aboriginal heritage in their geographic areas of responsibility.

- v) Consult with other Local Aboriginal Heritage Services where tangible or intangible heritage values extend beyond individual Services' areas of responsibility.
- vi) Undertake directly, or coordinate others to perform, on-ground identification, maintenance and conservation of Aboriginal heritage in their geographic area of responsibility.

Where approached for input or advice, Local Aboriginal Heritage Services will have certain timeframes within which they must respond and will be entitled to charge a fee for that service.

Appointment of a Local Aboriginal Heritage Service

To be considered for recognition as a Local Aboriginal Heritage Service, an organisation must:

- i) Be 100 per cent Aboriginal owned.
- ii) Have genuine connection with the area it proposes to represent (including through member and Board composition).
- iii) Have demonstrable support from a broad constituency of the Aboriginal people within, and 'cultural authority' over, the area it proposes to represent.
- iv) Be incorporated under either the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* or Corporations Law.
- v) Have Rules that are consistent with the requirements imposed on Prescribed Bodies Corporate, especially in terms of obligations to consult on certain decisions.
- vi) Have demonstrable capacity to undertake the functions required of it and maintain appropriate standards of good corporate governance.

As noted previously, it is likely that Prescribed Bodies Corporate will most readily meet these requirements. However, this will not preclude other bodies from being considered for the role.

Prospective Local Aboriginal Heritage Services will be selected through an expression of interest process.

PROPOSAL 3(B): The Aboriginal Heritage Council

To provide centralised oversight it is proposed that a new expert body, called the Aboriginal Heritage Council will, be established.

The Aboriginal Heritage Council will be comprised of members who have knowledge, experience, skills and qualifications that are relevant to the functions of the legislation and governance of a Board, and will be appointed by the Minister after a formal expression of interest process. It will serve as the standard setter, peak body for the provision of strategic advice on Aboriginal heritage matters and ensure Local Aboriginal Heritage Services perform their functions appropriately. In circumstances where a Local Aboriginal Heritage Service does not perform its functions, or where there is no such body recognised, the department will perform these functions.

In addition, the Aboriginal Heritage Council may assist with resolving disputes between Local Aboriginal Heritage Services, their members and/or proponents where external intervention appears warranted and the parties agree or do not have other formal dispute resolution procedures in place. This dispute resolution function will not extend to disputes between heritage professionals and their clients, which will remain a matter for the contractual arrangements between the parties.

As the Local Aboriginal Heritage Services will ensure that the right people speak for Country, the Aboriginal Heritage Council members will not need to be appointed on the basis of representation of a particular geographic area or region. Rather, it is proposed that the Minister, assisted by the department, will be responsible for the selection and appointment of nine

members with skills and experience in relevant disciplines, such as heritage management, conservation and interpretation, anthropology, archaeology, land use planning and development, board governance, administrative decision-making, and history. The selection process will be designed to ensure that suitably qualified Aboriginal people are appointed as a priority and that gender balance is promoted. The legislation will provide that the Aboriginal Heritage Council must be chaired by an Aboriginal person and will have the power to establish sub-committees and co-opt professional advisers to assist with its functions.

Functions of the Aboriginal Heritage Council

- i) Promote the conservation of Aboriginal cultural heritage by setting standards and providing guidance on best practice for the identification, conservation and management of Aboriginal heritage places.
- ii) Set standards for services provided by heritage professionals and accredited Local Aboriginal Heritage Services providers.
- iii) Administer the Aboriginal Heritage Register.
- iv) Provide advice to the Minister on Aboriginal heritage matters.
- v) Provide strategic direction for the Western Australian Aboriginal heritage system.
- vi) Manage the appointment and performance of Local Aboriginal Heritage Services.
- vii) Ensure the relevant Local Aboriginal Heritage Services have been consulted prior to the submission for approval of land use proposals that may impact on Aboriginal heritage.
- viii) Where land use proposals are proceeding according to agreements made with relevant Local Aboriginal Heritage

Service(s), ensure that the agreement-making process has been conducted in good faith and these agreements meet certain minimum requirements (i.e. they do not attempt to 'contract out of' the new legislative requirements).

- ix) Assess land use proposals (and agreed outcomes relating to them) that may impact on Aboriginal heritage values and make decisions on their acceptability (under authority delegated by the Minister) where such proposals:
 - a. demonstrate a neutral or positive impact on Aboriginal heritage, or
 - b. demonstrate a low impact on heritage or where mitigation actions will result in a low impact on heritage, or
 - c. are acceptable to the relevant Aboriginal people, and
 - d. do not involve projects deemed to be of State Significance.



- x) Provide advice to the Minister where a land use proposal will have a significant negative impact on Aboriginal heritage or involve a project of State Significance. The scope of the advice to be limited to:
 - a. assessment of the evidence of importance of the heritage to the relevant Aboriginal people, or its potential scientific value, and
 - b. level of satisfaction that all reasonable attempts have been made to mitigate damage to Aboriginal heritage.
- xi) Refer land use proposals to the Minister for a decision where there are disputes that cannot be resolved by the parties and/or are contentious.
- xii) Provide advice to other decision-making authorities to ensure that development approvals under their ambit appropriately consider Aboriginal heritage.
- xiii) Promote public awareness and knowledge of issues relevant to the conservation of Western Australia's Aboriginal heritage.
- xiv) Promote and assist in the proper management and maintenance of Western Australia's Aboriginal heritage.
- xv) Provide financial (e.g. grants) and other assistance to promote the conservation of Aboriginal heritage.
- xvi) Promote education and training in relation to Aboriginal cultural heritage.
- xvii) Arrange or conduct research and investigations in relation to Aboriginal cultural heritage.
- xviii) Develop and implement policies to give effect to its functions.
- xix) Anything else that it is required or authorised to do under the Act or any other written law.

The Aboriginal Heritage Council may delegate any of its powers to the department, other than the power to delegate.

Local Aboriginal Heritage Services (and the department) will ensure that the importance of heritage to local Aboriginal people is properly evidenced to facilitate accurate recording on the Aboriginal Heritage Register and in making land use decisions. Consequently, the evaluation of heritage places and objects by the Aboriginal Cultural Material Committee will no longer be required. Similarly, as the Aboriginal Heritage Council will be responsible for the proper functioning of the Aboriginal Heritage Register, the statutory function of Registrar of Aboriginal Sites will not carry forward into the new legislation.

PROPOSAL 3(C):

The Minister's role

Ministerial referral is reserved as a further level of oversight and approval for land use proposals that involve major impacts to Aboriginal heritage, or projects that are of State Significance (i.e. those that meet criteria relating to the project's level of complexity, significance to the State and impact on the environment and infrastructure published by the Department of Jobs, Tourism, Science and Innovation).

Functions of the Minister

- i) The Minister may delegate decision-making to the Aboriginal Heritage Council in respect of land use proposals that may impact on Aboriginal heritage values where such proposals:
 - a. demonstrate a neutral or positive impact on Aboriginal heritage, or
 - b. demonstrate a low impact on heritage or where mitigation actions will result in a low impact on heritage, or
 - c. are acceptable to the relevant Local Aboriginal Heritage Service, and
 - d. do not involve projects deemed to be of State Significance.

- ii) Receive advice from the Aboriginal Heritage Council on land use proposals that may have significant impact on Aboriginal heritage values or involve projects deemed to be of State Significance (irrespective of whether the heritage impacts are likely to be significant or not).
- iii) Make decisions on land use proposals (and agreed outcomes relating to them) that may have significant impact on Aboriginal heritage values or involve projects deemed to be of State Significance.
- iv) Have due regard to the social and cultural effects of the land use proposal and the views of the relevant Aboriginal people and the public interest as part of the decision-making process.
- v) Publish reasons for decisions.
- vi) Support the Aboriginal Heritage Council's Aboriginal heritage promotion activities as appropriate.
- vii) Issue a stop work order in cases where Aboriginal cultural heritage is threatened by unauthorised land use activities.
- iii) Provide advice to land use proponents on processes and minimum standards that must be met where land use proposals have the potential to cause negative impacts on Aboriginal heritage places.
- iv) Receive reports of Aboriginal heritage places and objects for inclusion on the Aboriginal Heritage Register.
- v) Maintain the Aboriginal Heritage Register.
- vi) Provide, or facilitate the provision of, financial and technical assistance or other Aboriginal heritage management and conservation incentives.
- vii) Manage the Directory of Heritage Professionals.
- viii) Provide capacity building to Local Aboriginal Heritage Services.
- ix) Develop and deliver education and training.
- x) Develop and deliver promotion programs.
- xi) Perform the role of Local Aboriginal Heritage Service for areas where no suitable body exists or has been nominated to take on these functions.
- xii) Facilitate research and investigations relating to Western Australia's Aboriginal heritage.
- xiii) Investigate alleged breaches of the Aboriginal Heritage Act, including of conditions attached to any permits issued in respect of land use proposals.
- xiv) Assist in the prosecution of breaches where sufficient evidence has been collected.

PROPOSAL 3(D):

The role of the Department of Planning, Lands and Heritage

An organisation is needed to ensure the day-to-day operation of any new Act, and it is proposed that this function will remain with the Department of Planning, Lands and Heritage.

Functions of the department

- i) Provide secretariat and other support to the Aboriginal Heritage Council.
- ii) Provide operational advice to the Minister responsible for any new Aboriginal Heritage Act.

PROPOSAL 3(E): Heritage professionals – aiding selection of those with appropriate qualifications and experience and improving standards

Feedback from both the workshops and stand-alone submissions pointed out that there is currently no minimum standard (either qualifications or experience) governing the work of Aboriginal heritage professionals in Western Australia. This, it was asserted, has led to variable quality in the research and consultation being undertaken to support the assessment of land use proposals, resulting in uncertainty, increased costs across the entire heritage management system and unsatisfactory heritage outcomes.

A significant number of submissions called for improvement in the standards of professionals involved in the Aboriginal heritage management system. Suggestions on how this might be achieved ranged from full regulation of the profession through some compulsory registration scheme with minimum qualifications and fee-setting powers, mandated methodologies and standards for all materials generated by heritage professionals to the provision of information and training sessions.

Heritage professionals are, and will remain, a critical part of Western Australia's Aboriginal heritage protection system. They provide advice to proponent and Aboriginal parties, on-ground technical expertise and much of the data the system requires to function. As the submissions point out though, the highly variable quality of these inputs has a negative impact on the efficiency and reliability of the heritage management system. It is also clear that to ensure the system best supports Local Aboriginal Heritage Services, heritage professionals must

be subject to greater rigour. An efficient and cost-effective system also requires professional practice to shift from a process to an outcomes focus.

A system that regulates heritage professionals' work in a highly prescriptive manner would risk increasing regulatory burdens and costs on all parties. Further, limiting the range and value of allowable fees are not features of any other system regulating professional services in Western Australia. Rather it is proposed to promote more downward pressure on costs associated with heritage studies and consultations by setting clear minimum documentary standards through regulations that seek to do no more than is necessary to identify and record places and assess a land use proposal.

Directory of Heritage Professionals

- i) Establish a public Directory of Heritage Professionals. Listing on this Directory will be open to those with appropriate qualifications and experience.
- ii) Applicants will be expected to formally attest to the accuracy of all information and claims in their application and professional referees will be required to support claims to particular areas of practice or expertise.
- iii) Information supplied in applications will be made public (but not including any information obtained from referees).
- iv) The department will reserve the right to omit claimed practice areas where, in its opinion, the claims made do not accurately reflect the applicant's expertise.
- v) Entries will be removed if the applicant advises the department that they have ceased to practice or are found to have promoted their listing as being an endorsement, approval or recommendation from the department.

- vi) Proponents and Local Aboriginal Heritage Professionals will be encouraged, but will not be required, to source advice from heritage professionals whose details are entered on the Directory and who have expertise appropriate to the land use under consideration.

Improving Professional Standards

- i) Standards and guidelines will be developed and made publicly available detailing the requirements for particular types of heritage investigation, community consultation, reporting heritage places, and the provision of spatial data.
- ii) In response to a land use referral, the department will advise what studies are necessary and what standards are to be met by heritage professionals. Land use proponents and Local Aboriginal Heritage Services will be encouraged, but not obligated, to incorporate these requirements into their contractual arrangements with heritage professionals.
- iii) Any materials lodged that do not meet the required standard or conform to published guidelines will not be accepted. Timelines for approvals processes dependent upon these materials will be suspended until the required standard is met.
- iv) The department will engage with the peak bodies for heritage professionals when developing standards and guidelines, which will ultimately be endorsed and published by the Aboriginal Heritage Council.

4. HOW HERITAGE INFORMATION WILL BE MANAGED – THE ABORIGINAL HERITAGE REGISTER

Submissions were clear on the need to maintain a central register of Aboriginal heritage places to enable Aboriginal people to record their heritage and facilitate the planning process of land use projects to avoid or minimise impacts on that heritage. However, there was considerable feedback on the fact that the current register of places and objects is inaccurate, which means it is of limited value as either a record of heritage or a planning tool. There was also commentary that the practice of having the Aboriginal Cultural Material Committee assess places against the criteria in section 5 of the current Act had created a confusing impression that protection of Aboriginal heritage is only achieved by registration, as is the case with State heritage in Western Australia. This was highlighted as unnecessary and a contributory factor to the significant backlog of places that had been lodged, but not yet ‘registered’.

Some submissions also pointed out that the information entered into any register must have a high degree of reliability if there was to be a shift from the current presumption of protection model to one of protection only through registration. Such a shift would have significant consequences for Western Australia’s Aboriginal heritage system as:

- i) The State would move out of step with current trends in Indigenous heritage management, which are attuned to maintaining culture rather than fossilising tradition.
- ii) Protection would be lost for heritage places we do not yet know about and which, because of Western Australia’s size, it would be uneconomic to proactively identify.

- iii) The register would lose its usefulness as a tool supporting risk-based decision making based on predicted Aboriginal heritage in areas where little or no information is currently formally recorded.
- iv) A significant legacy issue would arise in transitioning the current register to a 'protection via registration' system, given its current variable data quality.

There was some commentary in the feedback that proposals put forward in 2014 that would have seen entry on the register as the sole means of protection would not be supported.

PROPOSAL 4: Retain the current form and function of the register of Aboriginal Places and Objects but rename it the Aboriginal Heritage Register

It is not proposed that the Aboriginal Heritage Register (the register) will function like other registers and lists that comprise only protected heritage. Rather, it will continue in its current form, which will become an increasingly valuable planning tool as its accuracy improves. The register will:

- i) Retain the current presumption of protection for Western Australia's Aboriginal Heritage places and objects, whether currently known or not. Accordingly, the primary role of the register will remain as an information repository.
- ii) Rename the register of Aboriginal Places and Objects to the Aboriginal Heritage Register to reflect the proposed shift of emphasis from 'sites' to the revised scope of the legislation.

- iii) The Aboriginal Heritage Council will set and regulate reporting standards and improve the accuracy and usefulness of the register as a means for Aboriginal people to record their heritage and as a land use planning tool:
 - a. heritage professionals will be required to provide reports that meet the reporting standards, and
 - b. reports from non-heritage professionals that identify and locate heritage places or objects and their associated stories may be entered onto the register, provided that the minimum information standards are met.
- iv) Provide a transparent system to indicate the level of reliability attached to the information in the register.



- v) The department will support the Aboriginal Heritage Council in the maintenance of the register by:
 - a. checking place reports to ensure adequate evidence of the nature of the heritage and its cultural significance to the relevant Aboriginal people and/or the scientific community has been provided.
 - b. capturing evidence in the register in a culturally appropriate manner.
 - c. the evidence will be considered by the Aboriginal Heritage Council in preparing its advice to the Minister on the potential impact of a land use proposal on the relevant Aboriginal people or the scientific importance and significance of the place.
 - d. where a report of Aboriginal heritage has been submitted that does not meet the standards of evidence set by the Aboriginal Heritage Council, the place will be shown on the register as a potential Aboriginal heritage place, which may require further investigation. This will aid risk-based decision-making as to the options of avoidance or consultation/investigation.
- vi) Encourage Local Aboriginal Heritage Services to refine legacy information on Aboriginal heritage places in their areas of responsibility.
- vii) Provide a means to update information included on the register, particularly where it increases the accuracy of the registered heritage and has the support of the relevant Local Aboriginal Heritage Service(s).
- viii) Improve the usefulness of the register as an information and planning tool by standardising how various heritage values are referred to and depicted spatially.

- ix) Include spatial information highlighting areas of likely Aboriginal heritage sensitivity, based on sound predictive modelling, to assist land users to undertake effective risk assessments and act as a trigger for formal assessment processes.

It is not proposed to carry forward the statutory role of Registrar of Aboriginal Sites into the new legislation, but a senior officer of the department will support the Aboriginal Heritage Council in the day-to-day management of the register.



5. MANAGING LAND USE PROPOSALS THAT MAY IMPACT ON ABORIGINAL HERITAGE

Consultation with stakeholders noted that, to be consistent with modern regulatory standards and current best practice, new legislation should focus on assessing activity and aiming to reduce its impact on Aboriginal heritage rather than trying to assess how a place fits with criteria that are seen as inconsistent with living Aboriginal culture. Decisions should be based on a sound assessment of the risks associated with the proposed activities, rather than the application of template and risk-averse decision-making criteria that are not focussed on good quality outcomes.

Many submissions expressed the desirability for those considering activities that might impact on Aboriginal heritage, of considering these issues early in the development process. The need for land users to have a means of obtaining advice on what may be required to facilitate the proposed development was also highlighted. Submissions also suggested that the standards required for investigations and the conduct of professionals undertaking studies to facilitate development approvals processes should be explicit.

Whilst some submitters took the view that new Aboriginal heritage legislation should never authorise impacts on Aboriginal heritage, most recognised that this would not be a practical outcome. A mechanism will always be required to oversee and make decisions where land use conflicts occur. However, any system should prioritise outcomes that facilitate both heritage protection and other desired land uses.

PROPOSAL 5:

Introduce a referral mechanism to facilitate tiered assessments and approvals of proposed land uses

As outlined above, it is proposed that the department and the Aboriginal Heritage Council will have a central role in providing early advice on land use proposals to proponents and setting standards for any consultation and/or research necessary to support development approvals processes. Local Aboriginal Heritage Services will also require an understanding of land uses that are proposed in their geographic area of responsibility in order to proactively manage heritage processes and apply their resources efficiently. These bodies, too, will benefit from early notice of proposed land use activities. A referral process analogous to that provided in the *Environmental Protection Act 1986* is a means to accomplish this. Indeed, it may be possible (even preferable) to use the same referral document to reduce duplication.

A referral process will also support risk-based tiered assessment of land use proposals whilst encouraging agreed outcomes between land user proponents and the relevant Local Aboriginal Heritage Service. This will reduce regulatory burdens. Lastly, it will ensure that potential heritage values are identified early in land use planning, thereby ensuring Aboriginal heritage protection is incorporated to the greatest extent possible and investment is not delayed by the late identification of potential constraints.

An effective land use proposals approvals system should:

- i) Provide a formal referral mechanism to both government and Local Aboriginal Heritage Services for land use proposals for advice on the Aboriginal heritage implications of the proposal and appropriate level of assessment.

- ii) Provide for a tiered assessment of land use proposals that is dependent upon known or predicted Aboriginal heritage and the nature of the proposed land use (for example, the degree of impact to the land that the proposal is likely to cause).
- iii) Provide that a land user may voluntarily adopt the highest tier of assessment, particularly where this reflects agreements made with the relevant Local Aboriginal Heritage Service or other relevant Aboriginal parties.
- iv) Provide a 'call in' power for proposals that ought to have been referred but were not.
- v) Set the standards for research, consultation and reporting to be undertaken for each level of assessment.
- vi) Provide that reasons for decisions on the acceptability of land use proposals are given publicly by the relevant decision maker.
- vii) Provide that all parties to a decision regarding the acceptability of land use proposals that impact on Aboriginal heritage have the right to appeal.

It is proposed that the tiered assessment system will reflect the following factors:

- a) any known Aboriginal heritage.
- b) any predicted Aboriginal heritage, where information is incomplete or indicates that a place is highly sensitive but not necessarily visible, such as burials or sub-surface archaeological remains.
- c) the extent to which prior land uses have already impacted upon known or predicted Aboriginal heritage.

Permits or authorisations of varying types will still be required to authorise various activities, particularly where the land use proposal attracts the highest tier of assessment. Depending on the tier of assessment, the land use permit or authorisation will be issued by the department, the Aboriginal Heritage Council or the Minister.

The proposed system will encourage outcomes that result in land use proposals being designed to co-exist with Aboriginal heritage places, however this may not be possible in all cases. It will therefore be necessary to have processes by which land uses that impact on that area's Aboriginal heritage are authorised.

Proponents will be required to take steps to identify whether their land use proposals will negatively impact on Aboriginal heritage. This risk assessment can either be based on information contained in the Aboriginal Heritage Register, additional information the proponent has collected through previous studies they have undertaken or through processes embodied in an Aboriginal Heritage agreement, which may set out a range of agreed activities.

If the risk assessment indicates that Aboriginal heritage is, or may be, present that is likely to be affected, at that stage the proponent may:

- 1) modify their proposed land use to avoid those impacts, or
- 2) undertake further investigations, including consulting with the Local Aboriginal Heritage Service, to determine the nature and extent of any Aboriginal heritage places.

If there is insufficient information available or the proponent is not confident in making a risk assessment, the proponent may seek early advice or formally refer the land use proposal to the department for assessment. Any advice given by the department before a land use proposal is formally referred will not be binding. Therefore, it may still be necessary for a proposal to be referred even if that advice has been taken into consideration by the proponent.

The department will assess any formal referral and determine what, if any, studies must be completed prior to that land use proposal being assessed and approved should Aboriginal heritage impacts prove unavoidable. Non-compliance with standards of consultation or documentation will result in the application

not being accepted and the clock will stop on any agreed timeline until correct documents are submitted.

The proponent may amend their proposal to eliminate or reduce potential impacts on Aboriginal heritage in response to the department's advice or proposal assessment.

Where a proponent has a ratified heritage agreement covering the area of a land use proposal, the heritage processes contained within it may be completed prior to a land use proposal being referred. The results can be tendered with any referral to expedite approvals processes. In particular, where these agreed standards/processes are the same or higher than those that would have been imposed through the department's assessment of the proposal, proponents will not be required to undertake any further investigations. The land use proposal will then be referred directly to the relevant decision-maker should it involve unavoidable Aboriginal heritage impacts.

Consents to undertake an activity or range of activities will run with the land, so that proponents acquiring rights and interests in land can pursue activities that have already been consented to without further approvals being sought under the new legislation. However, where a new proponent significantly modifies the activities or proposes entirely different land uses, fresh approvals will be required.

If a proponent does not refer a land use proposal that the department/Aboriginal Heritage Council considers should have been referred, a 'call-in' power (similar to that afforded the Environmental Protection Authority) will be available. That is, the department/Aboriginal Heritage Council may require the land use proponent or decision-making authority to refer the proposal to the Aboriginal Heritage Council. Local Aboriginal Heritage Services may request that the department uses this call-in power if, in their opinion, there is a land use proposal within their geographic area of responsibility they believe ought to be formally assessed.



6. AGREEMENTS BETWEEN ABORIGINAL PEOPLE AND LAND USERS

Since the *Native Title Act 1993* (Cth) was enacted, agreement-making, including dealing with heritage matters, has become an increasingly accepted means of reconciling the interests of Aboriginal people and land users/land use proponents. The practice can have the benefit of providing social, economic and best practice heritage outcomes for Aboriginal people, whilst increasing certainty for proponents regarding development risks and approvals processes. The most robust of such agreements provide for high standards of heritage research, guaranteed mechanisms for involving the relevant Aboriginal people in project planning and land use decision-making, frameworks for reaching specific agreements about heritage outcomes, ongoing community involvement in heritage performance monitoring and effective dispute resolution processes. Any new Aboriginal heritage system must respect the considerable investment that has been made in reaching and implementing such agreements. It should also encourage the further development of strong relationships between Aboriginal people and land users as a foundation for early engagement and the adoption of best practice heritage management into the future.

Unfortunately, not all agreements currently on foot embody either current best practice or the flexibility to respond to future advances in heritage management techniques. The parties may not, for example, have had the background or advice necessary to include such provisions, or their bargaining positions may have resulted in lesser terms being negotiated. The system must also give an incentive for parties to reach good (rather than expedient) agreements in the future and to ensure that there are no attempts to contract out of obligations under the new Act. For these reasons, there must be a degree

of oversight over heritage management terms to ensure that standards are not eroded and appropriate administrative decisions can be based upon agreed outcomes.

PROPOSAL 6: Encourage and recognise agreement making

When assessing the acceptability of land use proposals and issuing any required permits, it is proposed that both the Aboriginal Heritage Council and Minister will have regard to heritage outcomes agreed between land users/land use proponents and the relevant Local Aboriginal Heritage Service(s) or other relevant Aboriginal body.

Many of these agreements are likely to have been negotiated as part of compliance with *Native Title Act 1993* requirements and will not have been tailored to suit the proposed new system. In addition, the processes and standards some of these agreements contemplate may not be sufficient to meet the Aboriginal Heritage Council's requirements. Consequently, where land use proponents wish to rely on an existing agreement and agreed heritage outcomes arising from it to expedite approvals under new Aboriginal heritage legislation, they must submit the agreement for formal ratification by the Aboriginal Heritage Council. This will require a degree of disclosure as to the terms, particularly who is involved in heritage management decision-making, how those decisions are actually made and, if necessary, 'authorised' by the relevant Aboriginal group, what rights to express dissent are preserved and how disputes are managed. However, precisely how heritage management decisions are made will remain a matter for the parties to decide.

To be ratified, an existing agreement must not authorise the destruction of Aboriginal heritage without the need for formal approvals under the

Aboriginal Heritage Act or seek to circumvent any other part of its operation. That is, parties will not be able to entirely contract out of the new Aboriginal heritage legislation.

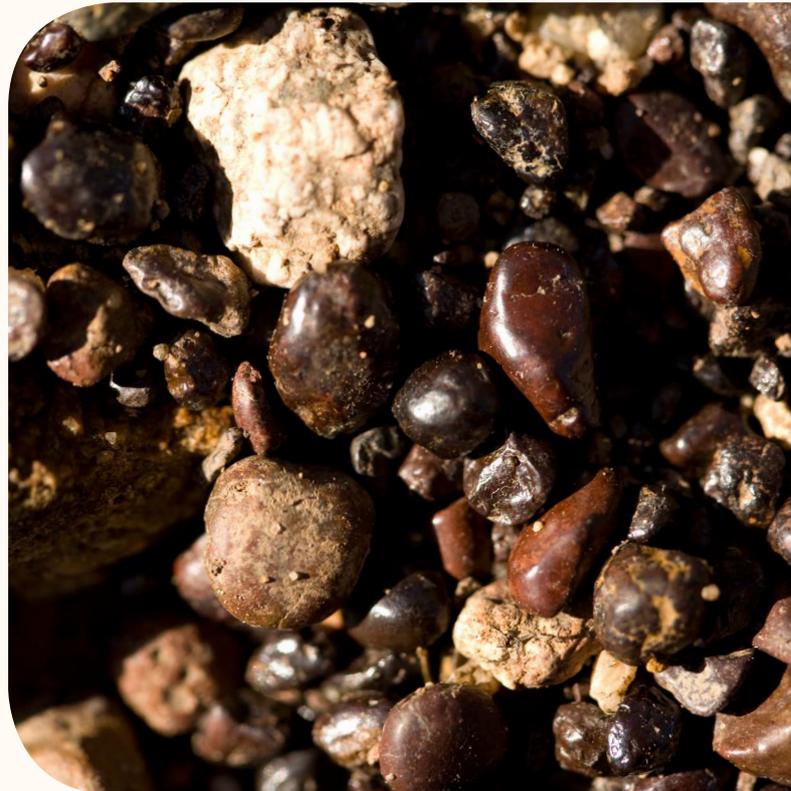
If a proponent presents an agreement for ratification that pre-dates the establishment of the relevant Local Aboriginal Heritage Service(s), the Aboriginal Heritage Council may seek advice from any Local Aboriginal Heritage Service(s) covering the agreement area as to its current suitability. The Aboriginal Heritage Council will also be empowered to determine what information it requires regarding the contents of an agreement, and the form this must be presented in, when proponents are seeking ratification.

Proponents will also be able to make agreements with Local Aboriginal Heritage Services regarding various matters under the new Act (costs, timeframes, etc.) but only to the extent that they are consistent with it and, again, do not attempt to contract out of its operation. Such agreements may, of course, do more but that will be a matter for the parties to agree upon.

The Aboriginal Heritage Council will not be empowered to inquire into, or impose its view on, any commercial terms of agreements negotiated in good faith by the respective parties.

When presenting an agreed heritage outcome to the Aboriginal Heritage Council for authorisation or recommendation to the Minister, proponents will need to provide sufficient information regarding the outcome itself and how it will be implemented, the agreement it was made under, the processes followed and to disclose any dispute regarding it. The Aboriginal Heritage Council will be empowered to set the standard of information required and the form it must be supplied in. The Aboriginal Heritage Council will be empowered to seek additional information, including from any relevant Local Aboriginal Heritage Service(s), to ensure that a proper administrative decision is made.

Once an agreement is ratified and the relevant information tendered in the correct form, the Aboriginal Heritage Council and Minister will be required to have regard to agreed heritage management outcomes when making decisions on land use proposals. In this way, administrative processes are made more efficient, proponents are given more certainty and, crucially, the input of the relevant Aboriginal people is formally taken into account.



7. TRANSPARENCY OF DECISION-MAKING

There was a very strong response in feedback to the effect that decisions in the current system lack transparency, which compounds the inequity of Aboriginal people not having rights of appeal against decisions that affect their heritage. There is no comparable modern legislation that excludes Aboriginal people in this way, which the feedback highlights as a significant failing of the current Act.

In making decisions about land use applications that impact Aboriginal heritage, the Minister is required to have regard to the general interest of the community, but is not required to publish reasons for a decision. Concerns are held by Aboriginal people that a failure to publish reasons for decisions and a lack of a right of appeal gives rise to a perception that Ministerial decisions favour the economic interests of the general community over the protection of Aboriginal heritage.

It is critical for confidence in any regulatory system that the highest standards of administrative decision-making are met and are open to public scrutiny. Currently, no decision-maker is required to publish reasons for their decisions, which limits the ability for anyone with a sufficient interest who is aggrieved to challenge the outcome.

Modern standards of procedural fairness must be reflected in new Aboriginal heritage legislation. This requires the incorporation of an effective and efficient system for decisions to be challenged by those affected. The proposed Local Aboriginal Heritage Services will be responsible for identifying the right Aboriginal people to provide input into decisions and receive notice of those decisions, creating a clear pathway for efficient and time-bound review processes.

PROPOSAL 7: Transparency and appeals

In order to promote a more transparent and equitable system, it is proposed to:

- i) Publish reasons for decisions by the relevant decision-maker at key decision-making stages (referral/standards setting and land use proposal assessment), enabling affected parties to seek review of these decisions.
- ii) Give Aboriginal people and land users whose legal rights and interests are affected by the decision-maker's actions the same rights of review and appeal if they are aggrieved by a decision on proposed land use and other administrative decisions.
- iii) Make review mechanisms subject to statutory timeframes and available to those who are the acknowledged knowledge holders, native title holders or claimants, or have any other legal interest in the relevant land.
- iv) Notify participants in the consultation process on a land use proposal of the recommendations to be considered by the AHC and may lodge a written objection to the recommendation within 21 days of the receiving notice of the recommendation. The department will be required to ensure procedural fairness is afforded to all parties and provide details of objections to the AHC, which must be considered by the AHC before making a recommendation to the Minister on a land use proposal. The Minister will be provided with details of stakeholder consultation processes and copies of submissions but will not hear appeals directly.
- v) Retain the State Administrative Tribunal as the primary review body for any person whose legal rights and interests are negatively affected by a decision by the Minister.

8. ENFORCEMENT – OFFENCES AND PENALTIES

There was little stakeholder feedback on the precise nature of the offences that any new Aboriginal heritage legislation should provide for, but there was overwhelming feedback that the current penalties are inadequate. They are seen as neither a punishment nor deterrent; they do not reflect the serious impact that damage to Aboriginal heritage has on the custodians of that heritage and they do not send an appropriate signal regarding the importance Western Australian society places on protecting and maintaining Aboriginal heritage. There was also considerable feedback that the current period within which a prosecution must be commenced (12 months) was inadequate given the remoteness and inaccessibility of Aboriginal heritage places that may be illegally damaged or destroyed. There was also comment from a number of workshops and submissions that the ignorance defence afforded in section 62 of the current Act should no longer apply.

Stakeholder feedback on the use of Honorary Wardens in the enforcement regime was mixed; some wanted the use of Honorary Wardens to be revitalised, but for others there was either a negative association with the term ‘Warden’, or no perceived value. The power of the Minister to appoint them has fallen into disuse due to low demand and the difficulties of empowering individuals with functions of the Minister. At the same time, Aboriginal Ranger programs have become an established means through which Aboriginal people care for country, including their heritage places. The broad remit and flexibility of locally-based Rangers has the potential to deliver positive Aboriginal heritage outcomes, including promoting holistic management of heritage places and their entire context.

Some who wanted the function of Honorary Warden to be revitalised suggested that they be given a new power to issue stop work orders. Recognising the need for a legal mechanism to prevent the imminent damage to heritage, it is proposed to give the Minister the power to issue stop work orders. (See Proposal 3(A))

PROPOSAL 8: A modernised enforcement regime

Modern regulatory regimes recognise that it is more effective to encourage good behaviour than to punish non-compliance. To do this, there must be a balance between incentives (including efficient approvals processes) and penalties. This must all be backed by the tools and resources to prosecute breaches when they are discovered. It is proposed to:

- i) Maintain the current range of offences.
- ii) Limit the current ‘ignorance’ defence to circumstances in which the land use proponent has done everything ‘reasonably practicable’ to make themselves informed.
- iii) Increase the limitation period within which a prosecution must commence to five years from the time of the offence.
- iv) Reinforce (for the avoidance of doubt) that a place need not be on the Aboriginal Heritage Register for the offences to apply.
- v) Increase penalties to match those provided for in the *Heritage Act 2018*, which empower a court to:
 - a. impose a fine of up to \$1 million, with a daily penalty of \$50,000, on a person found guilty of an offence.

- b. impose a fine of up to \$1 million and imprisonment for one year, with a daily penalty of \$50,000, on a person found guilty of contravening a stop work order made by the Minister for Aboriginal Affairs.
 - c. order a person to take specific measures to restore a place, or any specified land, feature, building or structure, or to return anything to the place so that the place is restored to the state in which it was before the offence occurred.
 - d. order compensation for the damage or loss, of heritage, wholly or in part.
- vi) If a person is convicted of an offence the Governor may order that, during a period of not more than 10 years, the subject land must not be developed or used, or may be used only for the purposes specified in the order.
- vii) Not carry forward Honorary Wardens in the new legislation.



9. PROTECTING PLACES OF OUTSTANDING IMPORTANCE

Section 19 of the Act provides for the declaration of Aboriginal sites that are of outstanding importance to be Protected Areas, and vests exclusive use of the land in the Minister for Aboriginal Affairs. Section 20 of the Act also makes provision for the temporary declaration of a Protected Area for up to six months. There are currently 80 Protected Areas in Western Australia.

Although the feedback acknowledged that Protected Areas are the ‘gold standard’ under the Act, the fact that seemingly incompatible land uses could be authorised with apparent ease, while heritage or land management activities were constrained by Protected Area status was seen as a particular weakness. It was also highlighted that, as no new declarations of Protected Areas had been made since the early 1990s, the mechanism was under-used and places some considered worthy of this level of protection were not receiving it.

Conferring Protected Area status on an area is a ‘future act’ under the *Native Title Act 1993*, as it can impair any native title rights and interests. Even where the relevant native titleholders or claimants are supportive, the formal processes of the *Native Title Act 1993* must be complied with before a declaration can be made. As the future act process can be costly, time-consuming, and worsen any internal community issues, Protected Area declarations are now rarely pursued.

Further, the limits that Protected Areas impose on activities within their designated boundary make it extremely difficult to actively manage and conserve these places. As a perverse outcome, this can mean that Protected Areas receive less positive attention than heritage places without this level of formal protection.

PROPOSAL 9: Protected Areas

To ensure that their outstanding importance continues to be recognised, it is proposed that existing Protected Areas will carry forward into new Aboriginal heritage legislation along with the process for declaring new ones.

In recognition of the problems identified with managing Protected Areas, a process for authorising specific management activities by the relevant Aboriginal group(s) is needed. It is envisaged that this will be via amended Regulations, similar to the authorisation currently available under Regulation 10 of the *Aboriginal Heritage Regulations 1974*. To ensure that no new Protected Area is created without provision for active management, where possible this authorisation should occur simultaneously with its creation.





The Department of Planning, Lands and Heritage acknowledges the traditional owners and custodians of this land. We pay our respect to Elders past and present, their descendants who are with us today, and those who will follow in their footsteps.

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