



Government of **Western Australia**  
Department of Jobs, Tourism, Science and Innovation

## JTSI RESPONSE TO THE REVIEW OF THE ABORIGINAL HERITAGE ACT 1972, SECOND CONSULTATION PAPER

**Will the proposal deliver the desired outcome? If no, why not and what changes would you suggest and why?**

**1) Repeal the Aboriginal Heritage Act 1972 and replace it with modern legislation, regulations and policies.**

JTSI agrees with this proposal. The current AHA is seen by industry, Aboriginal people and organisations as outdated and in need of a major overhaul. It needs not only to reflect modern day heritage management and practices, but also the impact the *Native Title Act 1993* (NTA) has had on heritage and Aboriginal land rights.

**2) Extend the scope of what is covered by new legislation to include ancestral remains, places that are cultural landscapes and place-based intangible heritage.**

JTSI advises caution if introducing and aligning the AHA's definition with the Burra Charter's definition of 'place'. For example, the Practice Note for the Burra Charter states "in some cases the find-spot of a single artefact may constitute a place."

There needs to be rigorous scrutiny applied to any evidence given regarding cultural landscapes and intangible heritage to promote consistency of its application and prevent its potential overuse and misuse. Something similar to the evidential requirements for Native Title determinations should be applied (or even borrowed) if it already exists to substantiate these 'places'.

JTSI supports protection for ancestral remains being incorporated into the new AHA. This will have to satisfy the requirements under the *Western Australian Coroners Act 1996* as well.

**3A) Provide for the appointment of Local Aboriginal Heritage Services to:**

- ensure the right people to speak for particular areas of country and related cultural heritage are identified;
- make agreements regarding Aboriginal heritage management and land use proposals in their geographic area of responsibility.

JTSI believes there needs to be proper integration with the Prescribed Body Corporates (PBC) established under the NTA as the majority of these PBCs already function as the first point of contact for proponents seeking heritage advice. Furthermore, PBCs must have 'right of first refusal' to be the Local Aboriginal Heritage Service (LAHS). Funding must be provided to the LAHS if the Traditional Owners, industry and the State want them to function efficiently.

When in place utilising PBC's ensures certainty for government and other parties by providing a legal entity through which they can conduct business with traditional owners.

Where a PBC chooses not to act as the LAHS, then the body that does must be approved by the PBC. This is to prevent the situation where a proponent would need to consult with two bodies in the same area regarding heritage ie. The PBC under the NTA; and the LAHS under the AHA. Additionally, LAHS appointed without the approval of the relevant PBC could enflame community tensions.

In situations where non-Traditional Owners have cultural knowledge for an area, approval should be sought from the PBC/LAHS for these people to be involved in heritage matters. This approval adds gravitas to the cultural knowledge these people hold.

The proposal states that a LAHS should be 100% Aboriginal owned. How will this be determined and does this apply solely to membership or extend to office bearers and administrative staff?

Further information is required about how future agreements made by LAHS will be integrated with existing agreements, specifically ILUAs. In areas where Native Title parties are absent, any future agreements made by the LAHS must make allowances for future Native Title determinations, specifically clauses that allow for the agreement to be amended or repealed upon a determination.

Critically, funding and training is vital for the successful establishment and ongoing successful operation of these LAHS. Most PBCs are under resourced and already swamped attempting to meet their current obligations.

Who will audit and evaluate LAHS to ensure they are maintaining “appropriate standards of good corporate governance”? The ORIC doesn’t have the staff or resources to do so.

**3B) a) Establish an Aboriginal Heritage Council (AHC) as the central body providing advice and strategic oversight of the Aboriginal heritage system.**

**b) Abolish the Aboriginal Cultural Material Committee.**

Aboriginal Heritage Council (AHC)

JTSI suggests the AHC members should be appointed solely on the basis of their technical skill and experience in Western Australian heritage.

The AHC shouldn’t set the standards for services provided by the LAHS, but approve standards that have been created through consultation with industry, heritage professionals and TOs and drafted by DPLH.

AHC members should be renumerated for their time beyond meetings. Proposals that are presented to the AHC would likely involve copious amounts of written background material that needs to be read and understood to allow an appropriate decision. For the AHC to function effectively, it needs to be resourced appropriately with perhaps an Office of the AHC created within DPLH.

There is a paucity of information in the consultation paper regarding the managing of potential ‘cultural’ conflicts of interest for Aboriginal members of the AHC. Alternatively, what are the cultural ramifications about Aboriginal people potentially making decisions about heritage outside of their own country?

Why would the AHC (or any nominated body) need to make decisions on projects deemed to have a neutral impact on heritage?

Finally, JTSI agrees that the AHC should be established to enable the abolishment of the ACMC.

**3C) The Minister retains overall accountability and decision-making powers for the Aboriginal heritage system in Western Australia, but may delegate certain decisions and functions to the Aboriginal Heritage Council.**

JTSI agrees with this proposal.

However, it is unclear who decides if a project requires the Minister's involvement.

1. Does the Minister review all potential proposals first to decide what may be delegated to the AHC?
2. Who determines what a low/medium/high impact is on Aboriginal heritage?
3. Who determines if a project is of State Significance? Is this Lead Agency projects?

**3D) The Department of Planning, Lands and Heritage remains responsible for the day to day operation of the Act.**

JTSI agrees that DPLH continues to be the responsible agency for the daily operation of the Act. However, it is unsure if the current DPLH has an adequate number of staff with relevant skills and experience to undertake the following proposed functions:

1. Provide capacity building to Local Aboriginal Heritage Services.
2. Perform the role of a Local Aboriginal Heritage Service for areas where no suitable body exists or has been nominated to take on these functions.
3. Physically maintain the Aboriginal Heritage Register.
4. Support the Aboriginal Heritage Council in the development of policies and procedures to fulfil its responsibilities.
5. Provide or facilitate the provision of financial and technical assistance or other Aboriginal heritage management and conservation incentives.
6. Manage the Directory of Heritage Professionals.
7. Facilitate research and investigations relating to Western Australia's Aboriginal heritage.
8. Investigate alleged breaches of the Aboriginal Heritage Act (including of conditions attached to any permits issued in respect of land use proposals).
9. Assist in the prosecution of breaches where sufficient evidence has been collected.

**3E) Aid people needing to engage a Heritage Professional with appropriate qualifications and experience, and promote higher standards by publishing on the Department's website a public Directory of Heritage Professionals and the standards required for heritage investigations, community consultation and reporting of heritage information.**

JTSI supports the establishment of a Directory of Heritage Professionals and a minimum standard for heritage investigations, community consultations and heritage information.

DPLH should consult widely when drafting these standards and include the following:

1. Professional heritage bodies such as the Australian Association of Consulting Archaeologists Inc, Australian Archaeological Association and the Anthropological Society of WA.
2. Native Title Representative Bodies and Prescribed Body Corporates.
3. Established Resource Companies that have a dedicated heritage section such as RTIO, BHP, FMG, Roy Hill, Woodside etc.

DPLH will need to have staff qualified and experienced in heritage investigations and reporting to competently "advise what studies and standards are required" and to assess all materials received from external parties against these standards in a timely manner.

**4) a) 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.**

- b) The Aboriginal Heritage Council will set and regulate reporting standards and improve the accuracy and utility of the register as a mechanism for Aboriginal people to record their heritage and as a land use planning tool.**

JTSI agrees with the goal of improving the accuracy of records and information of the Register. However, the Register is viewed by industry, TOs and heritage professionals as outdated and significantly variable in its accuracy. There is also a substantial backlog of submitted heritage information waiting to be assessed.

For the Register to achieve a “level of confidence in accuracy of information” a serious investment of time and resources must be committed.

Will there be mandatory reporting of sites or at least enough information submitted to enable projects to avoid them in the future?

**5) a) Introduce a referral mechanism to facilitate tiered assessments of proposed land uses, with early advice (non-binding) provided by the department or Aboriginal Heritage Council on standards of consultation and/ or research necessary to support the approvals process for a development.**

**b) 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.**

**c) A ‘call in power’ will ensure that proposals that should have been referred, but have not been, can be assessed.**

JTSI supports the proposed tiered assessment model. The main concern is again having the appropriate numbers of staff within DPLH with the relevant experience and technical knowledge to operate the assessment structure efficiently.

How will this assessment structure interact with the EPA’s social surroundings guide and their assessment of this factor in proposals submitted to them?

**6) a) Encourage and recognise agreement making between Local Aboriginal Heritage Services or other relevant Aboriginal body and land use proponents.**

**b) The Aboriginal Heritage Council will consider and, if appropriate, ratify agreements where land users wish to rely on an agreement to expedite approvals under the new Act.**

JTSI supports the encouragement of agreement making between proponents and TOs. However, existing ILUAs need to be recognised where applicable.

Further clarification of the following statement in the consultation paper is needed

*“Since the Native Title Act 1993 came into operation there has been a growing number of Indigenous Land Use Agreements and other mechanisms by which heritage outcomes have been agreed between Aboriginal people and land users. Wherever possible these should be recognised, but not all will meet the standards required by the new Act and may not have been arrived at through an equitable negotiation process.”*

How will the DPLH determine an agreement was not arrived at through an equitable negotiation process? How does this interact with the ‘negotiate in good faith’ sections of the NTA?

Additional questions are:

1. What mechanisms are available to fast track proposals where both parties agree to the proposal?
2. What happens if one or both parties do not want their agreement ratified by the DPLH?

**7) a) Reasons for decisions are to be published.**

**b) Land users and Aboriginal people whose legal rights and interests are adversely affected by a decision will have the same rights of review and appeal.**

**c) Retain the State Administrative Tribunal as the primary review body.**

JTSI agrees that modern standards of procedural fairness be adopted in the new legislation.

The State Administrative Tribunal already has a significant case load. How will increasing its potential workload create an efficient review process without extra resources?

**8) a) Create a modern enforcement regime by ensuring offences and penalties are brought into line with the Heritage Act 2018 and other modern statutes.**

**b) The statutory limitation period is extended to 5 years.**

**c) Conducting compliance inspections and proceedings will be the responsibility of the Department of Planning, Lands and Heritage.**

JTSI supports modernising the enforcement regime under the new AHA and extending the statutory limitation to 5 years.

Sufficiently resourcing the compliance team within DPLH is necessary.

**9) a) It is proposed that the existing Protected Areas and the ability to declare new ones will carry forward into new legislation.**

**b) A new regulation will be created to authorise specific management activities by the relevant Aboriginal people.**

Supported.