EXTENT
HERITAGE ADVISORS
TO AUSTRALIA AND
THE ASIA PACIFIC

31 May 2019

Mr Vaughan Davies
Assistant Director General Heritage Services
Department of Planning Lands and Heritage
Locked Bag 2506
Perth WA 6001

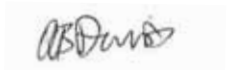
Dear Vaughan,

Submission on the Aboriginal Heritage Act 1972 Review Consultation Phase 2 (March 2019)

Please find attached a submission on behalf of Extent Heritage WA in relation to the *Aboriginal Heritage Act 1972* Review Consultation Phase 2 (March 2019). We welcome the opportunity to provide comment on the Phase 2 consultation with regards to the Aboriginal Heritage Act review.

Extent Heritage is a consulting firm that offers our clients a comprehensive range of heritage services drawing on our experience across all Australian jurisdictions, the Pacific and South East Asia. We have offices in Perth, Brisbane, Sydney and Melbourne and have a team of over 45 professional staff as well as a large pool of sub-contractors and casual employees. This team includes not only archaeologists but also anthropologists, GIS specialists, native title researchers, strategic & policy advisors, built and historic heritage specialists, project management, HR, HSEQ and finance professionals. Extent Heritage WA has a wealth of experience undertaking Aboriginal heritage surveys in Western Australia for a range of proponents including large mining companies, oil and gas developers, exploration companies, Aboriginal corporations, local councils and constructions projects. In addition, the Extent WA team have previously worked in a range of roles including in the Department of Indigenous Affairs (now DPLH), the mining industry and consulting. Given our breadth of experience and level of engagement in Aboriginal heritage management we trust the attached submission will provide some practical feedback in relation to the proposals.

Kind Regards



Annabelle Davis
Associate Director | Extent Heritage

Aboriginal Heritage Act 1972 – Phase 2 Consultation

General Comments

The desired outcome of the new legislation is that the legislation is "sensitive to the culture it is designed to protect and therefore more effective and trusted by Aboriginal people" (Consultation Paper: 4). In order to meet this desired outcome, the new legislation must account for and be inclusive of Aboriginal heritage beyond the narrow confines of native title. In Western Australia currently most of the consultation undertaken with the Aboriginal community in relation to heritage impacts is undertaken through recognised native title parties. However as native title requires that Aboriginal people demonstrate a continuous ancestral link not all Aboriginal people and groups are able to meet this and as such are not afforded native title rights and interests, however they still may have traditional rights and interests, particularly in relation to cultural heritage. Aboriginal people have fundamental Indigenous rights and interests that are protected nationally and internationally through instruments such as the United Nations Declaration on the Rights of Indigenous Peoples. As such it is essential that any new Aboriginal heritage legislation appropriately provides for the rights and interests of all Aboriginal people in relation to their heritage and is not exclusively related to native title.

The proposals outlined in the Phase 2 consultation paper intend to see a greater role for local Aboriginal heritage services in the Aboriginal heritage process, however the current proposals appear to limit this role as purely one of consultation for many Aboriginal people and in fact serve to dilute some of the autonomy Aboriginal people currently have in relation to managing their heritage and activities being conducted on their country.

The proposals will require considerable resourcing in both the development of guidelines, standards and procedures, in the administration of the new legislation and to provide Government with the appropriate capacity to act as local heritage services over some areas of the state if required. It is essential that these additional costs are identified and resourced prior to and during the implementation of the new legislation.

It is also essential that the guidelines and standards that are developed to support the proposed legislation are developed in consultation with Aboriginal people, heritage professionals, industry and other community stakeholders to ensure that they are robust, workable and effective.

In our view, the key issues in the success of the proposed amendment proposals are:

- Ensuring clear regulations, Aboriginal place criteria and practice standards are established right at the outset. This will ensure much needed clarity to all stakeholders and ensure best practice standards are maintained;

- Adequate resourcing and capacity building for the Local Aboriginal Heritage Services, and the Aboriginal Heritage Council. Without adequate support, the system will be destined for failure;

- Inclusion of a process for right people for country in non-native title areas, perhaps like the RAP appointment processes used in QLD and VIC;

- Careful integration of the new system with existing Native Title, ILUA and land use/access agreements to ensure continuity with settled agreements already in place;

- Clear archaeological and anthropological assessment practice standards are essential to ensure clarity of Aboriginal place definition and registration, and best practice archaeological and anthropological assessment, recording and research work is delivered under the new system. The scientific significance of places needs to play a role alongside the cultural/social significance to Aboriginal people; and

- WA should consider land area-based approaches to assessment and management, like those found in Cultural Heritage Management Plans in QLD and VIC. This approach to assessment of an area or an activity (rather than individual 'places' or 'sites' as currently occurs in WA) is current best practice and is much better at accommodating and managing broader cultural and intangible values across a landscape and delivering holistic heritage conservation and management outcomes.

Proposal 1 – Repeal the Aboriginal Heritage Act 1972 and deliver new Aboriginal heritage legislation

Proposal 1 aims to develop legislation that protects Aboriginal cultural heritage, reflects developments in best practice in heritage management and the rights of Aboriginal people under national and international law.

The proposal to draft new legislation is welcomed. Since the inception of the *Aboriginal Heritage Act 1972*, the social and legal landscape in Western Australia has considerably changed. In particular, the introduction of the *Native Title Act 1993* has considerably changed the way in which many Aboriginal people are consulted and engaged in relation to Aboriginal heritage and more broadly the potential impacts of development on their country. Native title rights and interests have now been recognised throughout much of Western Australia and native title claimants and holders have a far greater involvement in managing their heritage. The native title process has however also caused considerable irreparable social damage in many Aboriginal communities and in some severe cases has resulted in senior Aboriginal knowledge holders and lore holders being left out of the heritage and development consultation process. As such, it is essential that new legislation that recognises and respects the role of Aboriginal people in Western Australia in managing their own heritage and that the discrepancies between the native title and traditional Aboriginal heritage management processes are resolved in both a legal sense as well as a practical sense.

Proposal 1a aims to provide for the culturally appropriate identification and documentation of Aboriginal heritage places and objects including their tangible and intangible aspects, however the state of Western Australia is a large state with a range of different cultural practices that must be considered. It is essential that the new legislation and its associated administrative mechanisms consider how these cultural differences can be appropriately managed.

The objectives of the new legislation are to be applauded, however the detail in relation to how these objectives will be achieved is required. It is vital that Aboriginal people and heritage professionals continue to be consulted in relation to how the new legislation can be developed and drafted to ensure that its intended goals are met.

Proposal 2 – Update scope and definitions of new Aboriginal heritage legislation

Proposal 2 aims to develop legislation that protects Aboriginal heritage and is sensitive to the culture it is designed to protect.

It is pleasing to see that the proposed new legislation will continue to provide blanket protection for Aboriginal heritage places whether registered or not. This is an important inclusion as many Aboriginal communities do not want their sites registered with the Department for cultural reasons. We also support the proposal to ensure a greater range of intangible heritage is protected and managed under the new Aboriginal heritage legislation. However, as has been demonstrated by several of the recent successful legal challenges and appeals in relation to the Aboriginal Heritage Act it is essential that criteria, minimum information requirements and the assessment and recording practice standards for the types of heritage sites that are protected are clearly articulated and enshrined under the new legislation.

It is critically important the criteria, thresholds and practice standards are developed in close consultation with Aboriginal people and heritage professionals. The establishment of criteria and practice standards will ensure that there is consistency in relation to how Aboriginal heritage sites are recorded in the field as well as how they are managed during the approvals process. In this respect, we would recommend the approach that has been adopted in Victoria, where the Aboriginal Heritage Act 2006 is accompanied by a very clear set of regulations and practice standards that articulate what constitutes an Aboriginal place, what assessment standards and approvals need to apply for different types of impact and harm, and how Aboriginal places need to be managed. This approach provides clarity and certainty to all stakeholders, and ensures maintenance of best practice standards of assessment, recording, conservation and salvage. It also promotes significance-based approaches that incorporate cultural/social significance side by side with archaeological/scientific significance.

The recognition of cultural landscapes and the interconnectedness of Aboriginal cultural places is essential to ensure the alignment of the new legislation with Aboriginal cultural values. However, it is also important that the new legislation also consider how such cultural landscapes can be managed in the context of development and ensure that the cultural features and

components are managed in a culturally appropriate way. The proposal aims to achieve this, however further detailed consideration needs to be given to the cumulative and indirect impacts of development on cultural landscapes – it cannot simply be a site-based approach that only considers discrete dots on landscape.

The proposal to adopt a broader definition of place is welcomed and the Burra Charter definition is a useful starting point; however, the proposal does not respond to one of the stated objectives of the legislative amendments - which is to reduce further legal challenges. Any proposed changes to the definition of a place under the new legislation must consider all types of Aboriginal cultural heritage including tangible and intangible heritage as well as potential sub-surface heritage and articulate how they can be clearly defined and assessed in a manner that provides clarity and certainty for government, development proponents and Aboriginal communities. Again, we would strongly recommend the Victorian model where the legislation is accompanied by detailed regulations and practice standards, is the best means of achieving this much needed clarity.

- Proposal 2(iii) to continue to protect Objects consistent with the current Act requires further consideration particularly in relation to the management of Objects. The role of the WA museum and the Minister as being ultimately responsible in this area are no longer appropriate and the role of Aboriginal people in managing objects that are salvaged from their country prior to development impacts as well as managing cultural material that is repatriated to them from Museums and private collections needs further consideration here.
- Proposal 2(iv) proposes that the new Act will include culturally appropriate procedures for the management of ancestral remains. Whilst the principles of this are commended the variability of Aboriginal cultural practice across the State needs to be considered. Such procedures also need to differentiate between the management of ancestral remains identified during a development versus the repatriation of ancestral remains.

Proposal 3A – Local Aboriginal Heritage Services

This proposal aims to ensure that Aboriginal people are incorporated in the decision-making process, provide mechanisms to ensure that the 'right people to speak for country' are involved in research and decision making, and empower people to economically benefit from their cultural heritage.

The proposal appears to expect that native title prescribed bodies corporate would fill the role of the local Aboriginal heritage services. In many circumstances however this situation will not be culturally appropriate and many of these organisations lack the funding or capacity to take on this additional role. Whilst in some regions local Aboriginal Corporations are effectively managing heritage, in other cases across Western Australia Aboriginal cultural knowledge holders do not trust these organisations to manage their heritage information in their best interests.

Native Title provides for common law recognition of traditional rights and interests of a group of people. Native Title does not remove or restrict traditional rights and interests of other Aboriginal people in an area. The rights of non-Native Title holders are also protected under International Covenant and need to be protected within the proposed legislation.

The consultation process in relation to proposed impacts to Aboriginal heritage places needs consideration. Whilst the proposal calls for a process that ensures that the right people that speak for country are consulted about impacts, this is not the current reality. There needs to be further guidance on how the right to speak for country is identified to ensure that it not only considers ancestry and connection to country but also cultural knowledge in relation to the area being impacted. It needs to ensure that the identification of parties to be consulted is done in line with traditional cultural practice within the region. The administration of the native title process and the implementation of native title agreements has meant that in many cases nominated representatives for consultation are identified through a Westminster style legal administrative and decision-making process rather than by one that is in line with traditional cultural rights and obligations.

It is essential that the development of guidance in relation to Aboriginal heritage services includes Aboriginal people and heritage professionals as well as native title and legal professionals.

Capacity and resourcing are key issues for many existing PBCs and native title representative bodies and the establishment of new Local Aboriginal Heritage Services (LAHS) needs to ensure that adequate consideration of the resourcing they may require is given. In order to effectively manage the role these organisations need to take on they will require support in the management of cultural information, heritage data, and heritage survey co-ordination.

Proposal 3A ii identifies the LAHS as playing a major role in the negotiation and implementation of heritage management and land use agreements. This process is currently driven by the Native Title Act and in many cases, agreement making results from the application of the future act process. It is essential that any processes set out under the new legislation are consistent with the native title legislation and that the new processes do not duplicate the types of heritage agreements that are already negotiated under this process.

Proposal 3B Aboriginal Heritage Council

The proposed Aboriginal Heritage Council aims to provide centralised oversight. The proposal to ensure that the Aboriginal Heritage Council comprises members who have knowledge, experience, skills and qualifications that are relevant to the functions of the legislation and the governance of a board is welcomed. However, it is also essential that Western Australian Aboriginal people are members of the AHC to ensure that strategy and decision making of the AHC is culturally appropriate and whilst there is recognition in the proposal that Aboriginal membership will be encouraged there is no requirement that these members will be Western Australian Aboriginal people.

Proposal 3B i and ii also aims to have the Aboriginal heritage council set the standards for and provide guidance for best practice in the identification, conservation and management of Aboriginal heritage places as well as setting the standards for services provided by heritage professionals and LAHS providers. The development of these standards is welcomed; however, it is essential that such standards are also subject to review and input by the professional peak bodies and key stakeholders to ensure they are aligned with best practice and current methodological approaches in the identification, conservation and management of Aboriginal heritage.

Proposal 3B iii proposes that the Aboriginal Heritage Council will have a role in administering the Aboriginal Heritage Register, however it is unclear as to what this role will actually be, including what will constitute a site under the Act and of the criteria for registering places onto the Aboriginal Heritage Register. The administrative processes applied by the Registrar of Aboriginal Sites and the Departments of Indigenous Affairs, Aboriginal Affairs and Planning, Lands and Heritage (DPLH) over time for the assessment of sites under the Act has been subject to a number of inconsistencies in the way in which sites are managed on the Register.

Proposal 3B iv – No concerns this is consistent with the current Act.

Proposal 3B v – Conceptually this appears to be ok however it is unclear what is meant by strategic direction and how this role will integrate with the administrative role of the department

Proposal 3B vi – It is unclear what criteria will be used to manage the appointment and performance of local Aboriginal heritage services. It is essential that the capacity of local Aboriginal heritage services is considered as part of the assessment process. In addition, it is essential that the Department is sufficiently resourced to ensure that LAHS are provided with the level of support they will require.

Proposal 3B vii – Further clarity is required in relation to how this would operate. The capacity of LAHS to respond to ongoing and regular requests for information also needs to be considered.

Proposal 3B viii – It is unclear as to how this proposal will be implemented and what the exact role of the AHC will be in this process. It is also unclear as to how this proposal will apply to areas that already have agreements in place. There are numerous existing heritage and native title agreements in Western Australia under which good faith negotiations have been conducted.

Proposal 3B ix – agreed in principle.

Proposal 3B x – agreed in principle

Proposal 3B xi – agreed

Proposal 3B xii – agreed in principle however there needs to be a better alignment of the various legislation and approvals processes to ensure that where Aboriginal heritage matters relate to other approvals such as environmental approvals that there is due process so as to adequately consider heritage risks but not delay other approvals timelines.

Proposal 3B xiii, xiv, xv, xvi, xvii, xviii and xix – it is welcomed that these important roles will be taken on by the AHC. However, it is important that all regions of the State are adequately represented, and enough department capacity and resourcing is dedicated to achieving these outcomes.

Proposal 3C – The Minister's Role

The proposal to delegate decision making on land use proposals and projects that are not of State Significance to the AHC is welcomed however further clarity on the administrative process and transparency of information related to the AHC recommendations to the Minister on State significant projects is required. The requirement to publish reasons for decisions is welcomed as this will enable all stakeholders to have greater transparency over the decision-making process.

The introduction of stop work orders by the Minister is welcomed however further development of guidelines and standards as to how these would operate is required including what information would be required prior to the issuing of a stop work order.

Proposal 3D – The role of the DPLH

The proposals outlined in relation to the role of the DPLH are consistent with many of the current functions of the Department. However, in order to fulfil these functions, it is essential that the DPLH maintain enough resources and competent experienced staff.

Proposal 3E – Heritage Professionals – improving qualifications and experience

There has been considerable variation in professional standards applied to the recording and assessment of Aboriginal heritage in Western Australia over past decades. This has caused many issues with effective heritage management and led to a problematic Register of Aboriginal Sites and Places. This proposal is welcomed and should lead to an increased confidence in the quality of much of the information provided to a new Register.

Proposal 4 – Heritage Information – The Aboriginal Heritage Register

Proposal 4 indicates that an Aboriginal heritage place will be included on Heritage Register if a place is identified as culturally important to Aboriginal people, assuming through a LAHS. It is unclear if Aboriginal people in an area that aren't represented through a LAHS can also nominate heritage places without the knowledge/support of the LAHS. There have been past occasions where PBCs have directly objected to nominations by traditional Aboriginal custodians to place heritage places on the Register as Aboriginal Sites. This proposal has potential to encourage gatekeeping in relation to Aboriginal heritage protection which has been a criticism of some RNTBCs on occasions in the past. For many Aboriginal people this is unacceptable.

Proposal 5 – Managing Land use Proposals

Proposal 5 will introduce a tiered land use model that will provide a formal referral process to Local Aboriginal heritage services and the State with regards to how different types of activities may impact Aboriginal heritage and enable a risk-based approach to heritage management. In principle this proposal will serve to manage Aboriginal heritage sites in accordance with the level of risk. It is unclear however as to how the proposed tiered model will operate and whether impacts from all types of activity will be considered. The introduction of additional permits and approvals for these activities may also add to the already existing regulatory burden of DPLH and will require additional staffing and resources to manage. Should additional permits be introduced, it is recommended that for low impact activities these are issued by LAHS. The proposal also appears to limit the level of involvement of the LAHS in the assessment of which tier would apply to a project. In current practice in many areas across the State native title parties have already negotiated tiered assessment land use models as part of their native title or land access agreements. It is important that the proposal also considers how these existing forms of assessment may operate in the future.

Proposal 6 – Encourage and Recognise Agreement Making

Proposal 6 requires all heritage agreements regardless of when they were negotiated to require formal ratification by the Aboriginal Heritage Council. Most heritage agreements in Western Australia have been triggered during the Right to Negotiate process under the Native Title Act. As such many heritage agreements form subsets of the wider native title or land access agreements under which they were negotiated. In some cases, in Western Australia the terms under which these agreements have been reached have taken 10-20 years to negotiate, are hundreds of pages (e.g. Pilbara) and include complex conditions and commitments that interlink heritage approvals to other benefits. In these cases, it is unlikely that the parties will want to have the insecurity of the agreements being found to not comply with the Aboriginal Heritage Councils requirements. In other regions of WA heritage agreements relate to land access and include very simple consultation and engagement commitments. Whilst the intent of the proposal is positive, it is essential that the ratification process does not devolve the many positive heritage agreements that are in place across Western Australia. Furthermore, any guidelines developed for the ratification process of such agreements must consider the complex

relationship between the Native Title Act and the Aboriginal Heritage Act. In order to ensure that the ratification process considers these complexities it is strongly recommended that the Aboriginal Heritage Council include members with professional experience working in native title and Aboriginal heritage.

Proposal 7 – Transparency and Appeals

Proposal 7 aims to increase the transparency in the decision-making process which is positive. Currently, the State Administrative Appeals process is only available to proponents for appeals and an equal right of appeal that includes Aboriginal people is widely sought. However, it is unclear whether the equal footing would only be afforded to Aboriginal people in a community who are represented or involved in a LAHS.

It is essential that the guidelines and standards used to guide the decision-making process are also made available.

Proposal 8 – Enforcement

The proposed amendments to enforcements are welcomed. In addition to these penalties, it is recommended that due consideration also be given to applying stop work orders here also.

Compensation (or a proportion of a fine) for wrongful impact to a heritage place should be, at least in part, directed to the community or group of individuals who suffer as a result of the loss. There becomes an issue here if those groups or individuals are not represented or included in a LAHS and so the Heritage Council may need to be involved at least on such occasions.

It is widely recognised that a longer period of statutory limitation has been sorely lacking in the AHA. A five-year period should be adequate, however the threshold for proving guilt and intent remains substantial and is likely to maintain the low number of successful prosecutions under the AHA.

The proposed changes should also include requirements to provide public, transparent and more accountable reasons for decisions and decision-making on not following through with seeking prosecution (like Proposal 7), along with a process to allow third party comment on the decision/natural justice before final decision.

Proposal 9– Protected Areas

Protected Areas are currently the highest level of protection afforded under the AHA, but significant limitations occur in relation to Native Title implications. It is unclear what would occur if a group other than a Native Title group request that an area be made a Protected Area and subsequently the Native Titleholding group object; or if a Native Titleholding group request that an area be made a Protected Area and another group object. In addition, the state has a legacy of approving developments within Protected Areas by varying the area. If Protected Areas are to be continued in the new legislation it is essential that they are protected to the level that is intended and only agreed activities can occur.