Review of the *Aboriginal Heritage Act 1972*

Internal response by the Optimising Crown Land Administration (OCLA) project team, Department of Planning, Lands and Heritage, April 2018

The Optimising Crown Land Administration (OCLA) project is seeking to amend the *Land Administration Act* 1997 (LAA) following an extensive statutory review of that Act in the *Final Report of the Review of the Land Administration Act 1997*, which was tabled in Parliament. As the amendments are wide-ranging, the changes to the LAA are organised in six themes.

The Sundries Theme encompasses miscellaneous amendments to the LAA and other Acts to address issues which have arisen in respect of the LAA and interfacing Acts. The Sundries Theme and the Stage 2 Theme, which seeks to complete the process of establishing a single registration system for all land in Western Australia, each contain a number of proposals to amend the LAA and the *Aboriginal Heritage Act 1972* (AHA).

A summary of proposed changes to the AHA are as follows:

- To broaden the experience and knowledge available to support the Aboriginal Cultural Material Committee by removing the reference to an authorised land officer (being a licensed surveyor) and replacing it with a reference to a nominee or delegate (holding land tenure knowledge and experience) of the Minister responsible for the LAA, section 29(c) of the AHA.
- To enhance provisions relating to protected areas by providing for the registration against a title for the relevant land to alert a proponent that a protected area exists on the land. This will then require the proponent to then make appropriate enquiries.
- To amend the definition of 'owner' to provide for the correct identification of persons having powers, rights and obligations under the AHA.
- To provide for an order declaring a protected area to be an instrument subject to disallowance by Parliament, section 19 of the AHA.

Role of the Aboriginal Cultural Material Committee

Q4. Are the roles and functions assigned under the AHA sufficiently clear and comprehensive to fulfill the objectives of the legislation to preserve Aboriginal heritage places and objects? If not, what changes in roles and functions would you suggest?

Section 28 of the AHA establishes the Aboriginal Cultural Material Committee (the Committee), which consists of appointed members as well as three ex-officio members representing government agencies. While the roles and functions are clear, a change to the ex-officio membership is suggested to broaden the expertise and knowledge available to support the Committee.

Currently, an authorised land officer can be nominated as an ex-officio member under section 29 of the AHA. An authorised land officer is a licensed surveyor appointed under section 30 of the LAA to perform that function for the purposes of the LAA and other Acts.

Input by an ex-officio member involves consideration of the Committee's issues with experience and knowledge in matters relating to Aboriginal people. It is suggested for the purposes of the Aboriginal Cultural Material Committee, an authorised land officer does not necessarily need to be a licensed surveyor. Accordingly, under the AHA, it would be more

appropriate for the ex-officio member to be a nominee or a delegate of the Minister responsible for administering the LAA, even if that person is not a licensed surveyor.

It is suggested that section 29(c) of the AHA be amended by removing the reference to an authorised land officer and instead replacing it with a nominee or delegate (with land tenure knowledge and experience) of the Minister responsible for administering the LAA.

Protected areas

Q7. Is the declaration of a Protected Area under the AHA the best way to deal with Aboriginal sites of outstanding importance?

The declaration of a protected area under the AHA is supported as a way to deal with Aboriginal sites of outstanding importance. The Single Registration System Stage 2 theme under OCLA is relevant to declaration of protected areas under the AHA. Proposals to amend the AHA under this section regarding protected areas are dependent on proposed amendments to the LAA being passed in Parliament. A brief background to the Single Registration System Stage 2 is provided in Attachment 1.

When the LAA was introduced in 1997, the intention was that there would be a single source of truth for land in Western Australia. This single registration system would be held by Landgate. However, the establishment of the single registration system was deferred for reasons of time and the need for more consultation. The Department of Planning, Lands and Heritage is now working towards that through the OCLA project. Extensive consultation with relevant Government agencies has since been undertaken in relation to 34 affected Acts (including the AHA), and is ongoing.

These amendments will complete the process of making the LAA the State's code for Crown land dealings, enabling all dealings and interests in Crown land to be registered, and searchable, on Landgate's land register under the *Transfer of Land Act 1896* (TLA).

In respect of the AHA, the Department is keen to ensure that where a protected area on freehold land is identified by the Registrar, a memorial is lodged against the title of the relevant freehold land. Such a memorial would not prevent the registration of any subsequent dealing in relation to the land.

Should the Registrar identify a protected area on Crown land, the Department proposes that the Registrar record a memorial against the relevant Crown Land Title or request that the Minister for Lands create a reserve and grant a management order for the protected area.

OCLA is of the view that registration against a title for the relevant land will help avoid accidental desecration of Aboriginal heritage sites within protected areas, as it would alert a proponent of the existence of the protected area. Before undertaking work on a given parcel of land, a proponent would be required to ensure lawful access to the land, which requires searching the land register at Landgate, which would reveal that the protected area is held by the Minister for Aboriginal Affairs. A memorial on the land will alert the proponent that a protected area exists on the land. The proponent will then have to make appropriate enquiries of the Minister for Aboriginal Affairs.

Note that the memorial is proposed to be on the whole parcel of the land, without identifying the specific location of a site. It would simply note that the parcel is a protected area.

OCLA is aware that the boundaries of some protected areas are incorrect, largely due to improvements in spatial information over time. Resources may need to be applied to rectifying the boundaries under section 25 AHA over time.

Protection and enforcement

Q13. To what extent is the current section 18 application process effective and how can it be improved?

1. Definition of owner

The use of the term 'owner' in section 18 of the AHA has long been problematic from a Crown land administration perspective. This is mainly due to the absence of correct identification of the persons having powers, rights and obligations under the AHA in respect of any particular lot of Crown land. In addition, it means that the AHA definition of owner is limited and amendments are suggested to make this section more effective.

Section 18(2) of the AHA provides for the owner to apply to use the land for a purpose which would otherwise contravene section 18 of the AHA. In this context, the definition of 'owner' as it relates to Crown land is too limited, being only the Crown and a lessee from the Crown. A management body of a reserve or a lessee from that management body is not an owner for the purposes of that section. However, these entities are also likely to need approvals under section 18.

In section 19 of the AHA, notice of a recommendation to declare an Aboriginal site to be a protected area is to be given to the 'owners' set out in section 18(2). Because of the particular definition of owner, section 19 does not provide that notice be given to, for example, a management body who would be in actual control or management of the land and thereby affected by such a declaration.

'Owner' as it applies to Crown land requires a precise definition. Although the State is the legal owner of Crown land, for most practical purposes, the rights and responsibilities of an owner should be with the entity that has the effective care, control and management of that land. In many cases, this will be the management body of reserved land.

The Lands division of DPLH has analysed the various Crown land tenures and identified the most relevant and appropriate "owner" in each case, which requires amending the effective definition of 'owner' where that concept is used in the AHA.
For the purposes of section 18 (as well as the right to receive notices under section 19, discussed below), therefore, we would recommend that the definition of owner be broadened to include:

1. For freehold land – the registered proprietor or a mortgagee in possession.
2. For Crown land –
    a. In relation to a managed reserve – the management body of the reserve;
    b. In relation to a road – whichever of the following persons who, under a written law, has the care, control and management of the road –
        - the local government in whose district the road is situated;
        - the Commissioner of Main Roads; or
        - the Minister as defined in the Public Works Act 1902 section 2;
    c. In relation to any other Crown land the subject of a lease, other than land referred to in paragraph (a) or (b) – the lessee;
    d. In relation to any other Crown land – the Minister for Lands.

While all Crown land is owned by the Crown, the person with effective care, control and management of Crown land will vary depending on the particular tenure of that land. Crown land may be a road, a reserve (either with a management body or not), leased or simply unallocated. Where Crown land is leased, the lessor may be the Minister for Lands or another management body.

2. Parliamentary scrutiny

Currently, any order made by the Governor to vary or revoke a declaration of an Aboriginal site as a protected area is subject to Parliamentary scrutiny. This means that an order made by the Governor under section 25(2) of the AHA is a disallowable instrument that can be disallowed or amended by Parliament. However, the initial order made by the Governor under section 19 of the AHA to declare a protected area is not subject to disallowance.

It is suggested to amend the AHA to allow for Parliamentary scrutiny of the order made by the Governor to declare an Aboriginal site as a protected area and for consistency between sections 19 and 25(2) of the AHA.

Attachment 1

The objective of the Land Administration Act 1997 (LAA) Stage 2 amendments is to extend the scope of the single registration system set up under Stage 1 of the LAA to include Crown land currently vested, proclaimed or set aside under other Acts.

Due to complexities in drafting a *Land Administration Bill 1996* to repeal the *Land Act 1933* (the Repealed Act) within the allowable timeframe and the large number of other reforms required by the Cabinet decision, it was decided to undertake the project in two stages:

1. Stage 1 provided that the single registration system proposed in the *Land Administration Bill 1996* would be established for Crown land to be administered by the Minister for Lands under a new Land Administration Act;

2. Stage 2 proposed to extend the scope of the single registration system set up under Stage 1 of the *Land Administration Bill 1996* to include Crown land currently vested, proclaimed or set aside under other Acts e.g. the *Port Authorities Act 1999*, *Cemeteries Act 1986* and *Aboriginal Affairs Planning Authority Act 1971* to name a few.

Stage 1 of the single registration proposal was completed with the proclamation of the LAA in 1998 and the insertion of Part IIIB in the *Transfer of Land Act 1893* (TLA).

A major part of Stage 1 was the adoption of a Torrens land registration system for all Crown land with titles being created under the TLA. This enabled Crown land to be registered under the TLA. The Stage 1 amendments allowed for the creation of Certificates of Crown Land Title (CLTs) and the registration on those certificates of reservations and management orders made under section 41 and 46 of the LAA. Subsequent dealings on those CLTs under a management order such as leases and mortgages of leases would also be registered.

Currently, where Crown land was vested, proclaimed, or set aside under an Act other than the LAA, it is not required to register such vesting, proclamation or setting aside of land. In addition, there is no requirement for other agencies to have regard to other current and future uses of the land before arranging for the land to be vested, etc. There are established statutory and administrative mechanisms for that to occur before land is reserved and a management order is given under the LAA.

The (publicly searchable) registration system is therefore incomplete which leads to inconsistent dealings or uses of land. Under Stage 2, all Crown land will be brought under the LAA. This will streamline Crown land administration. This will also allow for proper consultation with other agencies, particularly in relation to the creation of reserves.

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