

## **Aboriginal Heritage Act Review 2018**

### **Phase 1 Consultation Paper**

#### **Banjima Native Title Aboriginal Corporation Submission**

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Banjima Native Title Aboriginal Corporation (**BNTAC**) is the Prescribed Body Corporate that holds native title on trust for the Banjima People. BNTAC deals with all matters relating to the Banjima Native Title Determination WAD6096/1998 (**Banjima Determination**).

BNTAC acknowledge the comprehensive consultation process that is currently being undertaking in reviewing the *Aboriginal Heritage Act 1972* (WA) (**AHA**) and the unique and important opportunity that this provides for Indigenous stakeholders such as the Banjima People to directly engage in this process of review.

BNTAC provides this submission by way of general comment and addresses broad principles in relation to the current workability of the AHA. We make this submission, broadly addressing the areas and questions outlined in the Consultation Paper.

#### Introduction

The AHA can be seen as a largely reactive and ineffectual piece of legislation that gives primacy to non-indigenous, non-culturally centred decision making. It is ineffective in its broad purpose of protecting Aboriginal heritage as in practice it is administered around a land use approvals regime. Under the Act, Aboriginal landowners lack any control in the protection of their own cultural assets. This lack of control is a key underlying pressure and concern for Aboriginal people generally and underscores two themes that pervade heritage protection in Western Australia. Aboriginal people have no effective role in relation to the protection of their country and cultural imperatives are not recognised in the framing of heritage protection regimes.

#### Purpose of the Act

The Act's broad objective is to preserve Aboriginal heritage on behalf of the community. This aim in itself provides an ultimate dichotomy in the AHA that pervades many of the current issues that arise around the workability of the Act. There is an immediate disjuncture in the Act's purpose in that unavoidably the conflicting perspectives of land use that derive from the administration of the Act entail a consideration of the community's interests above that of Aboriginal interests in making decisions around consenting to use land for certain purposes under Section 18 of the Act.

Given this, the objectives and purpose of the act should clearly state the primary intention of the Act as being to protect Aboriginal heritage in accordance with the traditional decision-making processes and cultural imperatives of the relevant Aboriginal landowners. To achieve this, the following core principles should be specifically outlined as objectives of the Act:

1. Aboriginal cultural imperatives have primacy over economic and public interest considerations in the framing, evaluation and decision-making around heritage processes;
2. Aboriginal landowners must have a central role in decision-making processes related to heritage protection; and
3. In making any decisions around land use conflicts Aboriginal landowners must be able to give free, prior and informed consent in accordance with their relevant traditional decision-making processes around the management of their cultural heritage values.

These objectives should be a substantive outcome of decision-making under the Act so that they are a benchmark for all processes and decision-making.

#### Roles under the Act

To ensure the appropriate people are consulted and in ensuring that substantive roles and functions under the AHA can fulfil the Acts objectives, Native Title Holders and their decision-making requirements under traditional law and custom need to be substantially enshrined within the AHA. In its current form the AHA does not formally recognise Native Title Holders, nor does it compel direct consultation or decision-making with or by them. Instead non-Aboriginal people and other Aboriginal people ultimately make decisions about country. Despite having legally recognisable rights at law, Native Title Holders currently have no formal enforceable rights under the Act, nor the capacity to seek review of decisions through the State Administrative Tribunal.

The decision-making requirements of Native Title Holders under traditional law and custom require culturally relevant frameworks to be recognised that give primacy to cultural imperatives. Achieving this requires proactive and holistic management of heritage with clear objectives for protection, control and primacy of Native Title Holders in defining their heritage, identifying, evaluating and managing sites and playing a central role in decision-making around land use conflicts.

This sort of holistic and proactive management can be achieved through the development of Heritage Management Plans with Native Title Holders that can be utilised as a key decision-making point for all stakeholders in assessing land use applications under the AHA. Heritage Management Plans are an important tool in being able to articulate key principles for decision-making that accord with the objectives of the Act and can articulate what the relevant decision-making requirements and processes are for individual Native Title Holder groups. They can include formal provisions that will empower relevant Native Title Holders to negotiate and enter into formal agreements with land use developers that are enforceable and can be internally monitored. Access to sites and site complexes can also be controlled through the HMP, allowing Native Title Holders to continue to access and use sites and country and maintain culture, including importantly the continued dissemination of culture and knowledge.

The Banjima People in the protection of their Native Title Rights and interests are already engaging in comprehensive planning processes around cultural and heritage management through their Banjima Healthy Country Plan as well as exclusion area planning undertaken as part of comprehensive mining agreements. These endeavours and processes need to be accounted for and recognised through the AHA with areas that are deemed to be significant under Banjima Traditional Law and Culture being substantially protected through Statutory mechanisms within the Act.

### Assessment, Protection and Enforcement of the Act

Definitions of sites within the Act must also reflect and recognise holistic notions of cultural landscapes that include both tangible and intangible aspects of contemporary cultural practice. The narrow site-specific approach to the protection of heritage that assesses the significance of discrete areas of country is disconnected from the complexity of the interconnectedness between the physical and spiritual aspects of land and the frameworks that provide for Indigenous kinships systems, social connectedness and general physical and social well-being.

Native Title Holders should be given primacy in the assessment of significance of places and objects under the AHA. The assessment of whether places or objects are considered important or significant have to date been at the discretion of non-indigenous and non-cultural decision-making processes. Registration of sites as a benchmark for whether a place or object is considered significant or afforded protection is often in direct conflict with traditional law and custom.

Traditional law and custom should also be a fundamental criteria for protection and enforcement under the AHA. The authorisation, assessment and evaluation of land use activities needs to be made within the broader cultural landscape perspective of Native Title Holders and undertaken in a proactive manner that allows cumulative cultural and social impacts to be assessed and managed.

Ultimately the AHA to date has not been effective as a means of protecting Aboriginal heritage in Western Australia as it is generally recognised that there has been a lack of enforcement of the AHA, including a lack of resourcing directed towards active monitoring of compliance under the Act and very few prosecutions for breaches of the Act. (See Productivity Commission Inquiry Report Mineral and Energy Resource Exploration September 2013; Australia State of the Environment: State of Indigenous Cultural Heritage December 2011 and Auditor General Report Ensuring Compliance with Conditions on Mining September 2001). In remote areas there is a real opportunity for Native Title Holders to undertake real time on the ground monitoring to ensure the protection and enforcement of the Act. Fee for service arrangements with Native Title Holders should be considered as part of any review of the Act.