



Department of Biodiversity,
Conservation and Attractions
Office of the Director General

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Ms Gail McGowan
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Dear Ms McGowan

Gail

REVIEW OF THE ABORIGINAL HERITAGE ACT 1972

Thank you for your letter dated 9 March 2018, and your invitation to provide a submission on the review of the *Aboriginal Heritage Act 1972*.

I trust the extensive engagement strategy that your department is undertaking through the *My Heritage, My Voice* and the *Working with Our Aboriginal Heritage* workshops is proceeding well. I have no doubt that the considered and inclusive consultation process that you are implementing will result in an outcome that delivers meaningful reforms.

Please find attached the Department of Biodiversity, Conservation and Attractions' submission on the *Review of the Aboriginal Heritage Act 1972 Consultation Paper*.

Should your staff wish to discuss this submission further, please contact Dr Simon Choo, Senior Policy and Planning Officer on 9219 9799 or simon.choo@dbca.wa.gov.au.

Yours sincerely

Mark Webb
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DIRECTOR GENERAL

28 May 2018

Att



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Department of Biodiversity, Conservation and Attractions (DBCAs)

Submission on Summary Consultation Paper

Amendments to *Aboriginal Heritage Act 1972*

May 2018

1. ***Is the long title an adequate description of what the amended Act should set out to do? If not, what changes should be made?***

The long title of the *Aboriginal Heritage Act 1972* (the Act) currently does not refer to the Aboriginal cultural heritage *significance* or *value* of places and things, but rather to the preservation of 'places and objects customarily used'. The long title would benefit from the inclusion of reference to Aboriginal cultural heritage significance and value.

2. ***What do you think are the best ways to ensure that appropriate people are consulted about what Aboriginal heritage places should be protected, and how a proposal may affect those places?***

The Act was developed prior to the recognition of native title under common law and the enactment of the *Native Title Act 1993* (Cth) (the NTA). The NTA sets out the statutory framework for identifying and engaging with Aboriginal people who have rights and interests possessed under traditional laws acknowledged and traditional customs observed by Aboriginal people for particular areas of land. Native title parties will generally have rights to care for and protect places of cultural or spiritual importance.

As a matter of practice, proponents and Government parties consult with native title parties in relation to protection of Aboriginal heritage under the Act. It would be beneficial for the Act to make explicit reference to the role of native title parties within the Act.

There are also places of significance to the Aboriginal community through historical or other associations, and accordingly, it would be beneficial if the amended Act provides a framework for how and when non-native title Aboriginal parties should be consulted and the interaction between these views and those of native title parties.

It would be of assistance if the amended Act provides a framework for consultation and/or consent by relevant Aboriginal people which takes account of the significance of the place, the nature of the proposed activity and the extent of potential impacts (see also the response to Question 9 below).

There are often significant demands on the Aboriginal community to deal with a range of heritage, native title and other socio-economic development matters, and meaningful engagement best takes place through face to face consultation. Some groups have regular meetings through which consultation can take place, whilst other groups may not already have the same administrative support and consultative mechanisms. The resourcing of Aboriginal groups to participate in such consultation should be considered in relation to amendments to, and implementation of, the Act.

3. ***To what extent has the provision to appoint honorary wardens been effective and how can it be improved?***

DBCA is not aware of any significant use of honorary wardens appointed under the Act. Given the extensive powers given to honorary wardens under Part VII of the Act, including the power to represent the Minister for Aboriginal Affairs 'in all respects as if he were the party concerned' (section 50 of the Act), this may act as a disincentive to appoint honorary wardens.

Amendments to the honorary wardens provisions that provide a clearer demarcation of functions, power and authority of honorary wardens may assist in increasing the use of these provisions under the amended Act.

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

The roles and functions of the Minister, the Aboriginal Cultural Materials Committee and the Registrar are clear. The roles and functions of Aboriginal persons, including which Aboriginal parties represent Aboriginal interests for an area or site, are not clear within the Act. As Aboriginal people are the holders of knowledge of the significance and value of Aboriginal places and values, Aboriginal people should play a critical role in advising on the values and potential impacts of activities on places and objects of significance. See also DBCA's response to Question 2 above in relation to greater explication of the role of native title parties within the Act.

5. ***Does section 5 adequately describe the sorts of places or sites that should be protected under the amended Act? If not, how can it be improved?***

Section 5 could be strengthened by providing a definition of 'significance', which will assist in assessing whether places fall within the scope of section 5. See for example, section 3 of the *Heritage of Western Australia Act 1990*, which defines 'cultural heritage significance'.

6. ***Do section 6 and Part VI adequately describe the sorts of objects that should be protected under the amended Act? If not, how can they be improved?***

Nil comment.

7. ***Is the declaration of a Protected Area under the Act the best way to deal with Aboriginal sites of outstanding importance?***

The effect of a Protected Area is that the 'exclusive right to the occupation and use of every place that is declared to be a protected area is vested in the Minister' [for Aboriginal Affairs] (section 22 of the Act). This will generally not be consistent with the aspirations of the Aboriginal traditional owners of the area to use, manage and protect the values of the area, and may in fact be inconsistent with native title rights and interests for an area. The Protected Area provisions may also adversely affect the ability of other management tools such as those available under the *Conservation and Land Management Act 1984* (CALM Act) to apply to an area to conserve and protect its heritage values.

The operation of the Protected Area provisions of the Act should be reviewed.

8. *Should the Act provide for the management of Aboriginal Ancestral (Skeletal) Remains? If so, what needs to be considered?*

Traditional burial practises continue to be used in a contemporary setting in parts of the State. The views of the Aboriginal community should inform whether Aboriginal Ancestral (Skeletal) Remains are managed under the Act. From DBCA's experience in engagement with Aboriginal people across the State, places where Aboriginal Ancestral (Skeletal) Remains are located are of high significance. These places would benefit from protection under the Act, and provisions dealing with the discovery and management of Aboriginal Ancestral (Skeletal) Remains would be beneficial. Should the management of Aboriginal Ancestral (Skeletal) Remains be included within the amended Act consideration should be given to how contemporary and recent historical burials are treated.

9. *What sort of activities that may affect an Aboriginal heritage site should require consent or authorisation?*

There is a wide range of different activities that may potentially affect sites, which in turn will have a range of different levels of significance.

The current wording of section 17 of the Act provides that it is an offence for a person who 'conceals, or in any way alters' a site. This could be construed to also include alterations or impacts on a site that have a beneficial impact upon a site, or alternatively, management actions which conceal a site to protect the site from public access or potential damage. It would be useful for offence provisions of the amended Act to focus on detrimental effects to a site.

The consent or authorisation requirements under the amended Act should take into consideration:

- the nature and extent of the proposed activity (e.g. ranging from low to high disturbance)
- the nature and extent of the significance of the site, area or values
- the extent of previous impacts on the values of the site, area or values
- the level of risk by the proposed activity to the heritage values of the site, area or values
- the potential adverse impact of the proposed activity on the site, area or values.

Consideration should be given to delegations of approvals within the Act for different activities/risks/impacts.

Undertaking on-ground fire mitigation activities are a necessary and common activity undertaken by DBCA to protect life, property and biodiversity values by assisting in reducing fire intensity, time taken to control and potential damage to values during bushfire events. As a land management agency, it is important that DBCA can undertake its core business where there are *low risks* to heritage without onerous or costly administrative processes. DBCA is also involved in emergency bushfire response, during which time critical decisions are required to be made in order to protect life and property and ordinary due diligence processes that would apply without these constraints are not available.

10. *What should be the criteria against which to evaluate an activity that may affect a site (e.g. a proposal to use or develop land)?*

The following area criteria which could assist in evaluating whether an activity could impact upon a site:

- the long-term intent of a project (e.g. residential development vs environmental remediation or protection)
- scale (e.g. size, extent, duration) of the project
- level of ground disturbance activity
- extent of previous disturbance
- nature of the values associated with the site
- level of significance of a site
- whether proposed activity enhances or protects the values of the site.

11. *How can 'impact' arising from proposals for land use on sacred sites that do not have physical cultural heritage elements be assessed?*

The impact arising from proposals should be assessed in light of the nature of the values that may be adversely affected, and the nature of the activity proposed. The views of Aboriginal people will be critical in understanding impacts arising from proposals for land use on sacred sites that do not have physical cultural heritage elements.

12. *Who should provide consent or authorisation for proposals that will affect Aboriginal sites?*

It may be appropriate to have different levels/delegations of consent/authorisation depending on the nature of the site, levels of significance, risks to heritage or nature of activity.

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

A section 18 application can only be lodged by 'the owner of land'. Given the diversity of land use arrangements applied across the State, it will often be the case that the proponent of a project or activity that may require a section 18 approval is not the 'owner of the land'. The section 18 application process could be improved if the application can be lodged by a party who has authority to conduct the works that are of potential impact.

The section 18 process can be lengthy, and consideration should be given to alternative authorisation processes particularly where the effect of the proposed activity is not to destroy a site or to have a significant adverse impact on it.

14. *What provisions could be included in an amended Act to ensure the long-term protection of Aboriginal sites where alternative statutory arrangements do not apply?*

The CALM Act provides a range of mechanisms that provide for the proactive preservation, conservation and protection of Aboriginal cultural heritage values by Aboriginal people themselves as well as DBCA, these include:

- enabling Aboriginal customary activities on CALM Act land, which facilitates Aboriginal access to places of significance to facilitate their care and protection, and to continue cultural practices, lived traditions and transfer this knowledge to younger generations;
- providing a management objective for CALM Act lands to conserve and protect the value of the land to the culture and heritage of Aboriginal persons; and
- enabling the joint management and joint vesting of CALM Act land to give Aboriginal people a direct say on the management of the conservation estate and the sites and values contained therein.

Consideration should be given to the inclusion of proactive measures to identify, conserve and protect Aboriginal heritage places and values and provide for long-term protection of Aboriginal sites and values. An example of such measures are the 'Conservation Incentives' provided under Division 2 of the *Heritage of Western Australia Act 1990*.

- 15. *Are the enforcement provisions under the Act adequate to protect sites? If not, how can they be improved?***

Ambiguity in the construction and interpretation of provisions under the Act appear to have constrained the ability to rely on the enforcement provisions under the Act. Improved drafting of the Act would assist in enabling greater reliance on the enforcement provisions of the Act.

- 16. *Are the current penalties under the Act adequate? If not, how can they be improved?***

Nil comment.

- 17. *Should a defence continue to be provided where the disclosure of information (section 15) is against customary laws/protocols?***

The provisions of section 7 of the Act which do not require Aboriginal people to disclose information contrary to customary law or tradition are appropriate.

Consideration needs to be given to the impact of this upon the certainty and comprehensiveness of the Register of Aboriginal Sites, and there may be ways in which non-sensitive levels of information (not contrary to customary law or tradition) are disclosed and such information protected so that areas can be identified for protection from inadvertent damage.

- 18. *Are the criteria for assessing the significance of sites under section 39(2) and (3) adequate to evaluate whether a site should be added to the Register? If not, what should the criteria be to assess the significance of a site?***

The criteria provide a broad range of factors to assist the Committee in determining significance.

- 19. *What should be the steps to report, nominate, assess, enter, amend or remove an entry from the Register?***

Issues of procedural fairness should be considered in relation to the removal of an entry from the Register.

- 20. *What do you think is missing from the Act?***

As noted in DBCA's response to Question 9, a framework for the consideration of variable levels of impacts on the diverse range of sites and significance, that takes into account: the nature and extent of the proposed activity; the nature and extent of the significance of the site; the extent of previous impacts on the site; the levels of risk associated with the activity; and the potential adverse impacts of the activity would be beneficial.

Consideration should be given to whether a 'scale of costs' should be included within the Act or subsidiary legislation, so that parties have a guide on what costs for different types of consultations, surveys and engagements are required to meet obligations under the Act. This could be in similar terms to the Schedule of Costs currently attached to the Government Standard Heritage Agreement. This would assist in project planning for Aboriginal heritage matters.

21. *What sections, if any, do you think should be removed from the amended Act, and why?*

The sections that should be removed from the amended Act will be dependent on the form, function and structure of the proposed amended Act.