

*Aboriginal Heritage
Act 1972*

**2018 Review Submission
– Stage 1**

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1.0 Introduction

The *Aboriginal Heritage Act 1972* (AHA) was enacted to ensure that Aboriginal heritage, to which the Act applied, could be appropriately protected and preserved.

Provisions within the AHA impact Local Government in a number of ways including:

- As a landowner, Local Governments are required to consult with Aboriginal communities and conduct heritage surveys when proposing development, in compliance with the Act, and
- As a planning body, Local Governments are contacted by developers and owners for advice regarding the position of heritage sites.

The intent of the submission is to provide an open dialogue with the Department of Planning, Lands and Heritage, Aboriginal Affairs (the Department), on Aboriginal heritage reform in Western Australia (WA) taking into consideration the legal and cultural principles, from a local government perspective.

The Association acknowledges the timely review of the AHA and provides ongoing support to the Department for all further action toward achieving a deeper sense of local, state and national reconciliation.

2.0 Background

2012 Submission

In June 2012, the Association prepared a submission on behalf of members on the 'Seven proposals to regulate and amend the AHA, for improved clarity, compliance, effectiveness and certainty'.

1: Prescribe the manner and form of the Register	In-principle support
<ul style="list-style-type: none"> • DIA should be resourced to manage online register • Develop a GIS system, incorporated into LG systems, to ensure certainty around locality of registered Aboriginal heritage sites 	
2: Additional criteria pertaining to the Aboriginal sites of State importance	Partial support
<ul style="list-style-type: none"> • Broadening the criteria to ensure greater inclusion and protection of Aboriginal heritage sites • Clarification around the category to 'benefit current and future generations of WA' 	
3: Stronger compliance measures including civic penalties and remediation orders and adjustments to the onus of proof provisions	Partial support
<ul style="list-style-type: none"> • Increased penalties to match comparable legislation 	
4: Site impact avoidance certificates	Partial support – more information required
<ul style="list-style-type: none"> • Department to approve certain proposals to increase process efficiencies • Supports the establishment of an independent body to ensure due diligence is carried out 	

5: Enable the Department to levy fees and recovery costs for surveys and other services	In-principle support
<ul style="list-style-type: none"> Levy fees and recover costs through an independent body 	
6: Remove risk that section 18 consents may be technically invalid because of the definition of 'the owner of any land'	Partial support – more information required
<ul style="list-style-type: none"> Supported amendments to the definition 'the owner of any land' for the purpose of increasing clarity Any changes to S18 will include an amendment to allow Aboriginal people with an interest in the land to appeal Minister's/Department decisions. 	
7: Investigate options to amend the Aboriginal Heritage Act 1972 and the Environmental Protection Act 1986 to streamline decisions about Aboriginal heritage	Did not support
<ul style="list-style-type: none"> The statement 'properly addressed in another process of Government' other than the <i>Environmental Protection Act 1986</i> is misleading The purpose of each legislation is different The EP Act contains provision for right of appeal. S18 of the AH Act confines appeal rights to land owners only The environmental impact assessment (EIA) process undertaken by EP Act is open and transparent and the review document is made publically available. This process ensures Aboriginal sites are appropriately identified and ultimately protected. 	

2014 Submission

Many of the issues raised by Local Governments were addressed in the Aboriginal Heritage Amendment Bill 2014 (the Bill). At this time the endorsed position of the Association supported the following changes:

- The introduction of increased penalties
- Greater transparency through the introduction of the Register of Declarations and Permits (DP Register)
- Increased support for the operation of Register of Aboriginal Sites and Objects (the Register)
- Better coordination of the approvals process

3.0 Discussion

Aboriginal people are still to be enshrined in the *Commonwealth of Australia Constitution Act 1900* (the Constitution) as the traditional custodians of their heritage. The Constitution is the supreme law under which the Commonwealth Government operates, including its relationship to the State of Western Australia. It is properly described as the 'birth certificate of the nation'.

Western Australia has the opportunity through the review of the AHA to lead the way in constitutional recognition. From this all state based legislation and localised policy and procedures can align.

Recommendations

1. Recognition in AHA of Aboriginal people as the traditional custodians of their heritage.
2. The Department considers developing a working party or Yarn Group to guide the remainder of the AHA review to ensure recommendations are appropriately discussed and weaved into the review process.

There are some current assumptions that require addressing as a vital in moving forward collaboratively in this space.

Stronger compliance and enforcement

The concept that all Traditional Owners will be supportive of all sites being publically registered, needs to be acknowledged as mythical and in some instances unachievable. Efforts spent to address this will be beneficial to a more successful implementation of the AHA.

Register of Sites and Objects

There is concern regarding the conflict between using the Register to justify approval permits with the rights of Aboriginal peoples access in privacy to their cultural sites. Supporting the rights of Aboriginal people to control, maintain and protect their cultural heritage is fundamental. The incongruences in the AHA need to address this. Furthermore, the AHA suggests that all Aboriginal culture is a fragment of the past.

Recommendations

3. Acknowledgement in section 5 by inclusive definition, the living and dynamic nature of Aboriginal culture as not limited to place and object to ensure Aboriginal cultural heritage values are considered earlier in application processes.
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Expedited Approvals by the Chief Executive Officer (CEO)

In the Associations 2012 submission, there was support allowing DAA to expedite certain approvals, support is contingent on the expectation that adequate consultation is carried out with relevant stakeholders before approval is given. Increased resources will be required for culturally appropriate consultation to occur.

The Bill included a new Section 18 process, a newly created position of CEO who could issue a permit where they were satisfied that the activity would not destroy or damage an Aboriginal site, of that there is no significant risk that the act would adversely affect the important and significant of the site without reference to the ACMC. The power and position of the CEO with

no rights of review to Aboriginal people the Government Gazette as the only mechanisms for awareness of like situations is in need of review.

Culturally appropriate consultation

The purpose of the AHA is to provide ‘the preservation on behalf of the community of places and objects customarily used by or traditional to the original inhabitants of Australia of their descendants’ (long title). Amendments to the title to acknowledge the Aboriginal community, not the general non Aboriginal community would reflect a significant change to the intent of the legislation. This purpose would then need to be carried out through the entire AHA. The appointment of an Aboriginal member at all stages of the process of reviewing and implementing the AHA is required if culturally appropriate consultation is to occur. Specifically the ACMC, which guides the AHA.

Consultation must meaningfully involve Aboriginal and non-Aboriginal people, be culturally appropriate, involve adequate timeframes and be conducted by appropriate processes. Engaging in face to face discussions to reach consensus as part of a two tiered consultation process will be a significant innovation for the AHA.

Recommendations

4. Amend section 28(3) stating the ACMC have a member specialised in anthropology relating to “the Aboriginal inhabitants of Australia” be amended to include the ‘appointment of Aboriginal members’
5. Localised decision made possible through the development of local Committees with members who have the authority to speak for Country.
6. Include stronger signals on Aboriginal community representatives being decision makers and having accountability in applications.

Section 18 Assessments

There are currently approximately 15,800 lodged heritage places that need assessment. The Aboriginal Cultural Material Committee (ACMC) is unable to manage this workload.

There is an improvement opportunity within this process. Amendments to the AHA could be amended to provide for alternative situation where consent is obtained from the relevant Aboriginal parties, via a ‘Consent or Works’, potentially significantly reducing the number of Section 18 applications. Ultimately ACMC would only need to assess applications where consent cannot be obtained.

The AHA should also have provision for circumstances where the proponent has made reasonable endeavour to undertake Aboriginal heritage survey but the relevant parties have been unable to come to a consensus. This could be addressed through the AHA by the inclusion of the requirement for the proponent to serve notice of ‘request for survey’ and the obligation for the Aboriginal group to undertake the requested survey within a specified timeframe.

Local Governments are of the opinion that the Section 18 process should be more transparent, providing clarity to parties, with timeframes for each approval and recommendation being trackable via the Register.

Recommendations

7. Streamline Section 18 with greater potential for inclusion of 'Consent for Works' projects
8. Acknowledge reasonable endeavours to undertake Aboriginal heritage surveys
9. Include a 'Request for Survey' notice process included as an option under Section 18
10. Develop a transparent online function to the Register to monitor the progress of Section 18 applications

Environmental conservation

There is the possibility through the AHA to recognise all resources, particularly water, which will further accomplish social, cultural and economic benefits of cultural heritage. Native vegetation and biodiversity are intricately linked.

Creating maps and plans to help development proponents to plan for and avoid impacts and conserve strategic landscapes and areas containing high Aboriginal cultural value is an important motion forward. It is recognised and supported that the Department be appropriately resourced to develop and provide available and accessible maps via the Register that are accurately maintained.

It is recognised that there will be some challenges, outside of being appropriately resourced such as the relationship between the Register and the maps, acknowledging the oral histories, recorded sites, and the intricacies surrounding waterways. However the Association acknowledges that data needs to be managed with accuracy in order to support Local Governments in planning and modelling.

11. Consider the potential to pilot a conservation mapping process in a specific region to support Aboriginal views and knowledge on Country to share knowledge and improve conservation potential.
12. The Department be appropriately resourced to develop, in partnership with the local communities of the trail site, to provide an available and accessible cultural conservation mapping system via the Register that is accurately maintained.
13. Include definitions in the AHA to better consider and refer to waterways.

Land Use Planning

It is not in scope of a submission at this time to discuss Native Title Settlement, particularly the South West Native Title settlement together with progress being made towards a Local Government specific Noongar Standard Heritage Agreement.

However, in the broadest sense, recognition of native title following the High Court of Australia's Mabo judgement of 1992, has clarified and helped to set parameters about land use planning and management under a native title regime.

14. The Department continues to prioritise discussions and preparations of the South West Native Title Settlement and Local Government specific Noongar Standard Heritage Agreement with relevant stakeholders.

Broad discussions

The broader concerns of Local Governments continue to relate to:

- State based Native Title Agreements
- Local Government specific Noongar Standard Heritage Agreement template
- Engagement with Reconciliation Australia
- Procurement policies of Local Government with respect to Aboriginal businesses in line with recently adopted State procurement policy
- Aboriginal Constitutional Recognition

4.0 Recommendations

1. Recognition in AHA of Aboriginal people as the traditional custodians of their heritage.
2. The Department considers developing a working party or Yarn Group to guide the remainder of the AHA review to ensure recommendations are appropriately discussed and weaved into the review process.
3. Amend section 28(3) stating the ACMC have a member specialised in anthropology relating to “the Aboriginal inhabitants of Australia” be amended to include the ‘appointment of Aboriginal members’.
4. Localised decision made possible through the development of local Committees with members who have the authority to speak for Country.
5. Include stronger signals on Aboriginal community representatives being decision makers and having accountability in applications.
6. Acknowledgement in section 5 by inclusive definition, the living and dynamic nature of Aboriginal culture as not limited to place and object to ensure Aboriginal cultural heritage values are considered earlier in application processes.
7. Streamline Section 18 with greater potential for inclusion of ‘Consent for Works’ projects.
8. Acknowledge reasonable endeavours to undertake Aboriginal heritage surveys.
9. Include a ‘Request for Survey’ notice process included as an option under Section 18.
10. Develop a transparent online function to the Register to monitor the progress of Section 18 applications.
11. Consider the potential to pilot a conservation mapping process in a specific region to support Aboriginal views and knowledge on Country to share knowledge and improve conservation potential.
12. The Department be appropriately resourced to develop, in partnership with the local communities of the trail site, to provide an available and accessible cultural conservation mapping system via the Register that is accurately maintained.
13. Include definitions in the AHA to better consider and refer to waterways.
14. The Department continues to prioritise discussions and preparations of the South West Native Title Settlement and Local Government specific Noongar Standard Heritage Agreement with relevant stakeholders.

5.0 Conclusion

Aboriginal knowledge, underpinned by an ancestral responsibility, holds an intrinsic obligation for Aboriginal peoples care for Country. A review of the AHA is an opportunity to amend legislation and lead the way in cultural heritage planning and protection. The equitable role involvement of Local Government to address outcomes for community capacity building and wider health and wellbeing can also be achieved through this process. The Association recognises the Departments proposal to reform current legislation as a mechanism in achieving this. The Association also supports continuing the conversation with the Department and other key stakeholders into the future to contribute towards local, state and national reconciliation.

6.0 References

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