



Government of **Western Australia**  
Department of **Jobs, Tourism, Science and Innovation**



**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 existing title reflects the period in which it was drafted and warrants modernisation. A new title should emphasise the role of the Aboriginal Heritage Act in identifying, protecting, and recognising Aboriginal heritage both at an instrumental administrative level, and at a more general public level.

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

Since the introduction of the *Aboriginal Heritage Act 1972*, native title has become recognised at common law and in the *Native Title Act 1993*. At an administrative and policy level, native title is fully enmeshed with governmental and commercial processes. Around 86% of land in Western Australia is subject to native title rights and interests, and these rights and interests invariably encompass the protection of Aboriginal heritage.

Therefore, Native Title Parties (NTP) – this means either registered Native Title claimants or determined Native Title Holders; should be the primary point of contact for Aboriginal heritage places within their claim's boundaries.

If there are non-NTP persons that state having cultural knowledge about a place within a Native Title claim, they should be authorised by the relevant NTP before being involved in site recording.

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

Given the scale of activity that is conducted under the AHA, the small number of honorary wardens and the limited knowledge of their activities, it can be concluded that their role is largely ineffective.

The importance of ensuring compliance with the AHA, and investigating possible breaches of the AHA, is a very important role.

The revised AHA and its associated administrative arrangements should monitor and enforce protection of:

- Aboriginal heritage surveys
- Aboriginal Heritage Management Plans
- Practice to monitor and enforce compliance with the AHA

The heavy dependence of Western Australia's economy on activities that occur on lands and waters that are subject to native title demands this process to be transparent and timely.

**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?**

*ACMC*

Given the volume of applications that come before the ACMC, its role should be one of review, rather than of deliberation over the specific detail of each application. The ACMC has the capacity to solicit specific research in aid of consideration of an application and underutilises this power. The DAA is understaffed with qualified heritage professionals that can assist the ACMC's workload.

The membership criteria of the ACMC is outdated. When the AHA was established, ACMC members were drawn from different geographic regions to supply specialist knowledge to the deliberation of the ACMC. However, the native title sector through PBCs, NTRBs, native title holders and claimants, now have this regional knowledge. Membership should be drawn from these entities.

Finally, the number of heritage specialists on the ACMC needs to expand from a sole anthropologist to two anthropologists and two archaeologists. This will allow the ACMC to have a range of professional opinions on information presented, which in turn gives the Minister greater confidence when delegating authority to the ACMC.

More specifically, the Director of the WA Museum role on the ACMC is redundant.

ACMC meetings should be open to parties that are potentially affected by its recommendations on a proposal. Minutes of ACMC deliberations should also be available to these parties as soon as practicable.

*Role of Minister*

The Minister's role should be take such measures as are practicable to ensure the protection, conservation and recognition of places of cultural significance to Aboriginal people on behalf of the community.

The Minister should be the only person who can:

- Provide consent for any proposal that may affect a State significant site;
- Declare a Protected Area;
- Appoint and remove ACMC's members.
- Issue 'stop-work' orders.

Any other powers the Minister may have could be delegated to the appropriate person/body if required.

## *Registrar*

The Registrar's role should primarily be to maintain the Register.

The Register should be updated and managed according to principles and standards of:

- Best practice ICT
- Modern-day needs of parties who rely on the Register.
- Best practice measures and strategies to ensure the promotion and protection of areas of Aboriginal heritage significance.

Given the important role of the native title sector (NTRBs, PBCs, native title holders and claimants, consultants) the Registrar should have as a priority strong relationships with this sector.

### **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?**

Sub-section 5a can be interpreted very broadly. It needs to be redefined to cover archaeological sites - any object made or modified by Indigenous Australians such as artefact scatters, rock art, scarred trees, middens etc.

Sub-section 5b describes ethnographic/anthropological sites. The key terms used within this sub-section (sacred, ritual and ceremonial) are not defined within the AHA and this needs to be addressed. This should be done in consultation with NTRBs; NT parties and key heritage professionals.

Sub-section 5c can be streamlined to apply to the preservation of sites because of their importance and significance to WA's cultural heritage, such as the Burrup Peninsula.

Sub-section 5d has become outdated and was originally intended to protect objects of special significance such as sacred boards, and other ritual paraphernalia. One possibility is to rewrite this sub-section to apply to Aboriginal skeletal remains.

### **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?**

This section was created to prohibit the taking of sacred Aboriginal artefacts and also creating reproductions of these artefacts. This protection is still needed but in relation to reproductions, maybe better achieved in other legislation such as Intellectual Property law.

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

It can be an important step in the process but needs to be done in conjunction with creating or changing the land tenure that lies underneath the Protected Area and the mechanisms available in the NTA such as ILUAs.

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

Yes. There needs to be integration with other legislation in WA eg. Coroners Act 1996. The Act or the DPLH also needs something implemented regarding the repatriation of remains to appropriate NTPs.

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

This has been fairly standardised by the mining, oil and gas industries in their various heritage agreements and ILUAs and adopted by the DPLH's Due Diligence Guidelines (DDG).

Importantly, it needs to be considered with the level of existing ground disturbance where the proposed activity is to occur.

The DDG outlines types of activities such as negligible and minimal that would unlikely require interaction with the AHA. However, the moderate, significant and major activities would likely need consent.

The issue of consent to activities needs to work with the NTA's future act process.

**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 DPLH's DDG successfully outlines this criteria as the:

- Current level of existing ground disturbance;
- Type of natural landforms present; and
- Type of activity.

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

The Victorian State government has a system to record 'Aboriginal intangible heritage' which includes sacred sites. Boundaries around these types of sites can be established and subsequently potential impacts can be assessed.

If a sacred site is identified that is not associated with an easily definable landform, then the boundary of the site should be defined as the extent:

- to which the uninitiated may approach the site without either incurring spiritual danger and/or causing offence to the NTP in accordance with custom and tradition and/or;
- which defines the area that requires protection from damage.

This is why Anthropologists working closely with the NTP are engaged to assess such sites/areas.

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

The Minister for Aboriginal Affairs must provide consent for any proposal that may affect a State significant site.

Ministerial consent could be delegated for non-State-significant sites but the person delegated this responsibility needs to have suitable tertiary qualifications and extensive experience in Aboriginal heritage.

More importantly, there has to be an unbiased, clear and timely avenue established for affected parties to appeal a decision made by the Minister or their delegated person besides the State Administrative Tribunal.

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

It is ineffective primarily due to a lack of administrative procedures underpinning it and inadequate resourcing within DPLH.

DPLH need to create standardised administrative procedures for the heritage sector to adopt and have these procedures clearly available to everybody on their webpage. This includes creating:

- A register of qualified heritage consultants. Consultants need qualifications and/or extensive experience in Aboriginal Cultural Heritage to be allowed to work in WA.
- Standardised recording forms and tools for all types of Aboriginal ethnographic and archaeological heritage sites.
- Standardised template for Cultural Heritage Management Plans.
- Standardised schedule of fees for NTPs and heritage consultants assisting in heritage surveys, management plans and monitoring.

All s16 and s18 applications should attract an administrative fee. This can be scaled depending on if the applicant is a Government department or private industry; sole-operator or company; the size of the s16/s18 application area (under/over a particular size).

The Aboriginal Heritage Inquiry System needs a major overhaul with buffer zones around sites abolished and sites classified as Stored Data removed or placed on another mapping system.

Finally, s18 applications should be transferrable between proponents if the nature and size of the proposed activity within the s18 application area remains constant.

**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 existing s19 of the AHA - Protected Areas could include provisions that the underlying land tenure of the protected area be changed to allow long term protection. This could be in the form of a managed reserve, leased to the relevant Native Title Prescribed Body Corporate or similar.

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

The major inadequacy of the enforcement provisions is the lack of administrative resources to investigate and prosecute those entities that are alleged to have breached the AHA. The role of the Honorary Warden is underutilised and may need their powers modernised, similar to those under the current Aboriginal Heritage Act 2006 in Victoria.

There needs to be a mechanism in the AHA to allow for 'stop-work' orders that can only be issued by the Minister. The orders are issued if there is reasonable grounds to believe an unauthorised activity is harming Aboriginal cultural heritage.

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

Penalties under the AHA could be changed to a tiered system with penalties increasing in proportion to the severity of the breach of the AHA.

If the current penalty structure is to remain, than those for individuals are adequate. The penalties for body corporates are too low and penalties need to be linked to the CPI or a similar mechanism to maintain relevance.

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

NTP's do not need to disclose the reasons behind a site being culturally sensitive. However, accurate boundaries of the site should be supplied and made available to the public on the AHIS.

However, the AHIS requires a significant upgrade and modernisation for it to be accurate enough for proponents to be confident of avoiding sites.

**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 is fine, but the AHA lacks any definition of key terms within s39(2) and (3) such as:

- aesthetic values;
- sacred beliefs;
- ritual or ceremonial usage; and
- significance.

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

DPLH need to create standardised administrative procedures for the heritage sector to adopt and have these procedures clearly available to everybody on their webpage. They also should create a register of qualified heritage consultants.

Nominating, assessing, amending or removing entries from the Register should be done by the Registrar based on the reporting and recommendations of DPLH staff that have qualifications and/or extensive experience in Aboriginal anthropology, archaeology or a similar field. Currently, the DPLH has a shortage of people with these qualifications and/or experience.

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

This has been addressed in previous questions and includes:

- The power for the Minister to issue 'stop work orders'.
- Definitions for important terms within the AHA.

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

This has been answered in previous questions.