

Department of Planning,
Lands and Heritage
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**By Registered Post / Email
09 May 2019**

Assistant Director General
Heritage Services
Department of Planning, Lands and Heritage
Locked Bag 2506
PERTH WA 6001



By email: AHAreview@dplh.wa.gov.au

Dear Sir / Madam,

Submission to the Aboriginal Heritage Act 1972 Review Consultation Phase 2

Horizon Power welcomes the opportunity to respond to the *Aboriginal Heritage Act 1972* Review Consultation Phase 2 for the Department of Planning, Lands and Heritage's consideration.

Horizon Power supports all recommendations in the proposal and is available to work with the Department to further develop this initiative.

Horizon Power operates across regional Western Australia, servicing more than 48,000 residential homes and businesses across a service area of approximately 2.3 million square kilometres.

At least 15 per cent of Horizon Power's customers identify as Aboriginal. In addition to our Aboriginal customers living in towns, we operate the electricity networks and provide power to 53 Aboriginal communities, including 39 remote and town-based Aboriginal communities and 15 communities which operate their own networks that we provide retail services to.

We are committed to building stronger relationships with Aboriginal customers, stakeholders, and Traditional Owners and Knowledge Holders – relationships which are based on trust and respect. We actively support reconciliation, and we see a new Aboriginal Heritage Act as an important part of improving how we engage and conduct our business in future.

Horizon Power supports that Aboriginal people have a greater role in assessing and managing cultural heritage values on their country, with decisions regarding overall land use remaining with the Minister (or Government). Horizon Power fully supports that the assessment and management of heritage be transparent, fair and flexible.

Please find attached Horizon Power's response to the Department of Planning, Lands and Heritage's proposals and desired outcomes for a new Aboriginal Heritage Act. Please do not hesitate to contact Alastair Trolove, Land Environment Native Title & Heritage Manager, on 08 6310 1815 should you require any further information.

Yours Faithfully,

A handwritten signature in blue ink, appearing to read "Stephanie Unwin".

**Stephanie Unwin
Chief Executive Officer**

Horizon Power Response to Aboriginal Heritage Act Review Phase 2 Consultation

Proposal	Desired Outcome	Horizon Power Response
<p>1. Repeal the Aboriginal Heritage Act 1972 and deliver new Aboriginal heritage legislation</p> <p>Repeal the Aboriginal Heritage Act 1972 and replace it with modern legislation, regulations and policies.</p>	<ul style="list-style-type: none"> The legislation to protect Aboriginal cultural heritage reflects development in best practice in heritage management and the rights of Aboriginal people under national and international law. 	<p>Supported.</p> <p>The existing legislation is outdated and Horizon Power fully supports repealing and replacing it. To facilitate this, Horizon Power requests that a sound interim/transition structure is put in place.</p> <p>There needs to be a balance between further recognition of the importance of Aboriginal people in decision-making and the provision of a clear, workable framework for the efficient and effective management of land use.</p> <p>Horizon Power supports and welcomes the proposed introduction of a "Green Bill" for public consultation prior to the introduction of new legislation into Parliament.</p>
<p>2. Update definitions and scope of new Aboriginal heritage legislation</p> <p>Extend the scope of what is covered by new legislation to include ancestral remains, places that are cultural landscapes and place-based intangible heritage.</p> <p>It is not proposed to extend the definitions in the new legislation to include intellectual property rights.</p>	<ul style="list-style-type: none"> The legislation to protect Aboriginal cultural heritage is sensitive to the culture it is designed to protect and therefore, more effective and trusted by Aboriginal people. 	<p>Supported with qualification.</p> <p>Clear definitions are required to ensure certainty for Traditional Owners and Knowledge Holders, and will reduce margin of error from a proponent perspective.</p> <p>Further, to provide additional guidance to all stakeholders regarding the interpretation of the legislation, it would assist if the Department's intended application of the scope of the Act is set out in Regulations and Guidelines.</p>
<p>3. a) Local Aboriginal Heritage Services</p>	<ul style="list-style-type: none"> Active involvement of traditional owners and knowledge holders in decision making and 	<p>Supported with qualification.</p>

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Proposal	Desired Outcome	Horizon Power Response
<p>Provide for the appointment of Local Aboriginal Heritage Services to:</p> <ul style="list-style-type: none"> ensure the right people speak for particular areas of country and related cultural heritage are identified; make agreements regarding Aboriginal heritage management and land use proposals in their geographic area of responsibility. 	<p>management of heritage matters in particular areas of country that they have connection to and cultural responsibility for.</p> <ul style="list-style-type: none"> Consultation and agreement making processes with Aboriginal people are culturally appropriate, transparent and provide more certainty for land users. 	<p>Horizon Power supports the idea of Local Aboriginal Heritage Services (LAHS), as these will remove uncertainty for proponents as to which groups to consult. It puts responsibility on Traditional Owners and Knowledge Holders to ensure the right people are consulted.</p> <p>As part of its support of LAHS, Horizon Power also supports the proposal to set out a process for nomination and selection according to clear, published criteria. This extends to the proposed published register of people with authority to speak for country, which would further ensure certainty, good governance, and transparency.</p> <p>In addition, Horizon Power suggests that the Department further clarify what is intended by "100% Aboriginal". In some cases, the requirement that the LAHS be "100% Aboriginal" may not match the requirement that the body has capacity to undertake the functions required.</p> <p>As a result, Horizon Power recommends the legislation to align with the State's Aboriginal Business Directory definition of an Aboriginal Business:</p> <ul style="list-style-type: none"> Be at least 50 per cent owned by an Aboriginal interest; and The Aboriginal interests are represented in the management and operations of the entity. <p>While it is acknowledged that some native title holders have established corporate structures as required under the Native Title Act 1993, and that the Department proposes, where appropriate, the Prescribed Body Corporate fulfill the functions of the proposed LAHS, Horizon Power queries what would happen in the event that the Aboriginal body appointed as the LAHS is no longer able to perform the functions? Will the Minister retain a right to "step-in" until a new body is appointed? In that regard, Horizon Power also acknowledges its concern as to whether the Department is appropriately</p>

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Proposal	Desired Outcome	Horizon Power Response
		<p>resourced to act as a LAHS for areas without existing services, or as an interim LAHS for areas where the appointed Aboriginal body is no longer able to perform the functions, as this could create a bottleneck for land use proposals.</p> <p>Horizon Power suggests that for LAHS bodies to be successfully established the State provide funding to help with start-up costs so that Traditional Owners and Knowledge Holders can adhere to and support the application of the new legislation. Moving forward, Horizon Power is supportive of a fee for service model.</p>
<p>b) Aboriginal Heritage Council</p> <ul style="list-style-type: none"> • Establish an Aboriginal Heritage Council (AHC) as the central body providing advice and strategic oversight of the Aboriginal heritage system. • Abolish the Aboriginal Cultural Material Committee. 	<ul style="list-style-type: none"> • The system for the protection, conservation and management of Aboriginal heritage benefits from the strategic oversight and advice of people who are highly skilled and experienced in Aboriginal heritage management. • Aboriginal heritage is respected and valued by the non-Aboriginal community. • Aboriginal people have a greater say in the operational and strategic decisions that affect their heritage. • Equitable agreements between land users and Aboriginal people at a local level are encouraged and best practice recognised. 	<p>Supported.</p> <p>Horizon Power supports the idea of a central Aboriginal Heritage Council (AHC) providing strategic oversight and advice to Local Aboriginal Heritage Services as it might be better placed to fulfil the roles and functions than the current system.</p> <p>Horizon Power supports a fair and transparent selection process that ensures the appointment of a diverse group of suitably qualified Aboriginal and non-Aboriginal people to the AHC.</p> <p>Horizon Power further supports the AHC be given the power to establish sub-committees and co-opt "independent" professional advisers to assist with its functions (where and when necessary and appropriate).</p>

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<p>c) The Minister's Role</p> <p>The Minister retains overall accountability and decision-making powers for the Aboriginal heritage system in Western Australia, but may delegate certain decisions and functions to the Aboriginal Heritage Council.</p>	<ul style="list-style-type: none"> System reliance on the Minister as the sole decision maker on all land use proposals is reduced. The Minister, who is accountable for an effective Aboriginal heritage management system, can focus on the effective and efficient running of the system. The system is not clogged with matters on which the parties agree and where heritage is not impacted. Ministerial intervention is available but reserved for contentious matters and those where the project is of State Significance or is likely to have a significant impact on Aboriginal heritage. All stakeholders are confident in an Aboriginal heritage system that is fair, effective, efficient and respects Aboriginal people, their culture and their heritage. 	<p>Supported.</p> <p>Horizon Power supports the Minister's proposed functions, including a transparent decision-making process, where reasons for decisions are published. In addition, Horizon Power recommends clear timeframes be imposed for decision-making.</p> <p>Horizon Power suggests the Department further clarify the circumstances in which the Minister can issue a "stop work order".</p>

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<p>d) The role of the Department of Planning, Lands and Heritage</p> <p>The Department of Planning, Lands and Heritage remains responsible for the day to day operation of the Act.</p>	<p>That the department supports the Minister and Aboriginal Heritage Council in:</p> <ul style="list-style-type: none"> the strategic oversight of the Aboriginal heritage system; undertaking strategic and operational policy development and capacity building in the system; ensuring timely and efficient performance of the functions of Local Aboriginal Heritage Services where no such service exists; and maintaining the register as a reliable source of data on Aboriginal heritage and actively enforcing the provisions of the Act. 	<p>Supported with qualification.</p> <p>Horizon Power would like to seek confirmation that the Department's functions will be carried out against agreed procedures, with clearly defined timeframes, in relation to:</p> <ul style="list-style-type: none"> risk assessment of land use proposals; and the Department's performance of the role of LAHS (where no suitable body exists). <p>Horizon Power considers this proposal vital to the successful implementation of the legislation, and therefore clarification is required on how the Department proposes to fulfil these functions with adequate resources so that delays are not incurred to land use proposals and industry projects.</p>
<p>e) Heritage Professionals – aiding selection of those with appropriate qualifications and experience and improving standards</p> <p>Aid people needing to engage a Heritage Professional with appropriate qualifications and experience, and promote higher standards by publishing on the</p>	<ul style="list-style-type: none"> Improved outcomes for Aboriginal heritage. Elimination by market selection of substandard consultants. No regulatory burden. 	<p>Supported.</p> <p>Horizon Power supports the establishment of a public "Directory of Heritage Professionals" and "clear minimum documentary standards" to all materials generated by Heritage Professionals. This is a significant improvement to the current system as there is no quality control at the moment.</p> <p>Horizon Power suggests the following questions be considered for the practical implementation of the proposal:</p> <ul style="list-style-type: none"> Who will determine appropriate qualifications and experience?

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<p>Department's website a public Directory of Heritage Professionals and the standards required for heritage investigations, community consultation and reporting of heritage information.</p>		<ul style="list-style-type: none"> • Will it be an endorsement/accreditation system (i.e. more experienced members need to endorse new members)? • Who will maintain the register's currency? • Utilising accredited consultants (i.e. consultants on the register) should help to expedite approvals. <p>In addition, Horizon Power suggests further consultation is required amongst stakeholders to determine the level of regulation/scrutiny which should be applied to Heritage Professionals.</p>
<p>4. Retain the current form and function of the register of Aboriginal places and objects but rename it the Aboriginal Heritage Register</p> <ul style="list-style-type: none"> • Rename the Register of Aboriginal Places and Objects to the Aboriginal Heritage Register to reflect the proposed shift of emphasis from 'sites' to the revised scope of the legislation. • The Aboriginal Heritage Council will set and regulate reporting standards and improve the accuracy and utility of the register as a mechanism for Aboriginal people to record their heritage and as a land use planning tool. 	<ul style="list-style-type: none"> • Improved accuracy of records and information on Aboriginal heritage. • The State's database of Aboriginal heritage is a trusted source of information that is captured and managed in a culturally appropriate way. • Increased utility of the register as a record of heritage and planning tool. 	<p>Supported with qualification.</p> <p>Horizon Power supports and welcomes the proposal for the AHC to "set and regulate reporting standards and improve the accuracy and usefulness of the register".</p> <p>Horizon Power suggests the AHC be resourced appropriately to keep the register up-to-date, and to address the backlog of sites awaiting assessment, as far as practicable. The register needs to be the sole source of truth for sites of significance in order to provide certainty in proponents' own due diligence processes.</p> <p>Horizon Power suggests further clarification be provided regarding the "proposed shift of emphasis from 'sites' to the revised scope of the legislation".</p> <p>Horizon Power questions if there should be a distinction between "Registered Sites" and "Other Heritage Places" in the new legislation – maybe they should all be "Sites of Significance" with only "Protected Areas" being differentiated due to different legislative requirements.</p>

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<p>5. Introduce a referral mechanism to facilitate tiered assessments of proposed land uses</p> <ul style="list-style-type: none"> Introduce a referral mechanism to facilitate tiered assessments of proposed land uses, with early advice (non-binding) provided by the department or Aboriginal Heritage Council on standards of consultation and/or research necessary to support the approvals process for development. Non-compliance with standards of consultation or documentation will result in the application not being accepted and the clock will stop on any agreed timeline until correct documents are submitted. A 'call in power' will ensure that proposals that should have been referred, but have not been, can be assessed. 	<ul style="list-style-type: none"> Land use proposals are designed to co-exist with Aboriginal heritage places wherever possible. Approvals for low impact activities can be streamlined. Reduced risk and cost for land use proponents through early referrals and advice. 	<p>Supported with qualification.</p> <p>Whilst Horizon Power supports a tiered assessment system as a sensible approach to cutting "red-tape" and streamlining approval processes, the Department must ensure that the legislation clearly defines the different types of activities and the likely impact on Aboriginal heritage.</p> <p>Furthermore, proponent's own due diligence should be taken into account in this tiered system. The current proposal makes it sound like <u>all</u> proposals will need to be submitted to DPLH, including low impact. This is not workable and completely inefficient for industry. It does not support or facilitate a risk based approach (refer to FAQs) and remove's industry's ability to do their own due diligence and proceed on that basis, within the bounds of the legislation.</p> <p>For example, defined "low impact" activities on previously disturbed ground, or maintenance works required under other legislation (e.g. vegetation maintenance on high voltage power lines) should not have to be referred to the Department.</p> <p>The proposal to "set standards for research, consultation and reporting to be undertaken for each level of assessment" would assist with land use planning and project scheduling, but again, it would need to include proponent's own due diligence.</p> <p>Horizon Power would support legislation which:</p> <ul style="list-style-type: none"> Establishes an effective land use proposals approvals system; Creates a "tiered approach" to land use consents based on the significance of the heritage value and the land use purposes; Clearly defines what types of activities constitute "low impact" activities (and streamlines the approval process in those cases); and

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<p>6. Encourage and recognise agreement making</p>	<ul style="list-style-type: none"> Aboriginal people have more opportunity to determine better outcomes for their heritage 	<ul style="list-style-type: none"> Takes into consideration: <ul style="list-style-type: none"> Previously "disturbed" areas; and Previously "surveyed" areas. <p>Accordingly, Horizon Power recommends all heritage survey reports (excl. sensitive information) should be made available publicly so that the same areas are not being "over-surveyed". If an area has been surveyed within the last 5 years, proponents should be able to rely on that report and only have to undertake a community consultation regarding their proposal. Not another full survey.</p> <p>In addition, further consultation is required to determine which types of permits, authorisations, or consents should be issued by the Department, the AHC, or the Minister and to define appropriate timeframes for responding to different tiers of assessment. There should also be a mechanism which allows changes to be made to proposals (unlike the current system which makes it very difficult to make changes to a s18 consent once lodged).</p> <p>On a related note, Horizon Power supports the proposal that "consents to undertake an activity or range of activities will run with the land so that proponents acquiring rights and interests in land can pursue activities that have already been consented to without further approvals being sought under the new legislation".</p> <p>Further guidance should also be provided to assist stakeholders to undertake risk assessments in a way that can be easily understood and interpreted by the decision-maker.</p>
	<ul style="list-style-type: none"> Supported. 	

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<ul style="list-style-type: none"> Encourage and recognise agreement making between Local Aboriginal Heritage Services or other relevant Aboriginal body and land use proponents. The Aboriginal Heritage Council will consider and, if appropriate, ratify agreements where land users wish to rely on an agreement to expedite approvals under the new Act. 	<p>through agreements that focus on avoiding or minimising impacts on heritage.</p> <ul style="list-style-type: none"> Better heritage outcomes are achieved through agreements that are based on respectful and positive relationships. New and existing agreements concerning heritage outcomes between relevant Aboriginal people and land users can be used to expedite land use assessments and permitting decisions if they meet certain requirements. 	<p>Horizon Power supports the proposal to recognise and "ratify" existing agreements to allow proponents to expedite approvals.</p> <p>Whilst it is acknowledged and supported that an existing agreement must not "contract out" of legislation or authorise the destruction of Aboriginal heritage without the need for formal approvals, if an agreement already exists between a proponent and, for example, a PBC (which is ultimately appointed as the LAHS), then a prior agreed approach to heritage management should be taken into account in the assessment process.</p>
<p>7. Transparency and Appeals</p> <ul style="list-style-type: none"> Reasons for decisions are to be published. Land users and Aboriginal people whose legal rights and interests are adversely affected by a decision will have the same rights of review and appeal. Retain the State Administrative Tribunal as the primary review body. 	<ul style="list-style-type: none"> All stakeholders in Aboriginal heritage have confidence in the administrative decisions that affect Aboriginal heritage. Rights of review and appeal are equitable. 	<p>Supported.</p> <p>Horizon Power supports and welcomes the Department's proposal regarding transparency and appeals to ensure procedural fairness is afforded to all parties subject to the legislation clearly setting out timeframes.</p>

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<p>8. A modernised enforcement regime</p> <ul style="list-style-type: none"> • Create a modern enforcement regime by ensuring offences and penalties are brought into line with the Heritage Act 2018 and other modern statutes. • The statutory limitation period is extended to 5 years. • Conducting compliance inspections and proceedings will be the responsibility of the Department of Planning, Lands and Heritage. 	<p>The duty of care to avoid unauthorised damage to Aboriginal heritage is taken seriously.</p>	<p>Supported.</p> <p>Horizon Power considers the proposal to review and update the enforcement regime is justified, given the age of the current legislation.</p>
<p>9. Protected Areas</p> <ul style="list-style-type: none"> • It is proposed that the existing Protected Areas and the ability to declare new ones will carry forward into new legislation. • A new regulation will be created to authorise specific management activities by the relevant Aboriginal people. 	<p>The mechanism for recognising Aboriginal heritage places of outstanding importance is more flexible and allows for active management.</p>	<p>Supported.</p> <p>Horizon Power considers the retention of "Protected Areas" for heritage places of outstanding significance is justified and supports the proposal for a "mechanism for recognising Aboriginal heritage places of outstanding importance [that] is more flexible and allows for active management".</p> <p>Horizon Power suggests the Department should take into account the existence of the following Commonwealth regimes:</p> <ul style="list-style-type: none"> • The National Heritage List established under the Environment Protection and Biodiversity Conservation Act 1999 (Cth); and • Declarations made under the Aboriginal And Torres Strait Islander Heritage Protection Act 1984 (Cth).