

Submission by Ngaanyatjarra Council Aboriginal Corporation's Land and Culture section to the Aboriginal Heritage Act Review Consultation Phase Two

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Overview

Ngaanyatjarra Council's Land and Culture program works with hundreds of Members each year from across all communities to care for country and manage land access by miners and others wanting to work on the Ngaanyatjarra Lands. The land access program manages consultations between mining explorers and local traditional owners to ensure cultural heritage is protected in exploration activities, and has extensive experience in the protection of local Aboriginal heritage values in collaboration with land users. Feedback on the March 2019 Discussion Paper is provided below under the relevant Proposal headings. In addition, the following summarises the key points made by senior Ngaanyatjarra members at the May 2019 AHA Review in Warburton, including senior elders Fred Ward and Bernard Newberry, Ngaanyatjarra Chairperson Dereck Harris, and Ngaanyatjarra Board members Lalla West, Nancy Carnegie and Clive Frazer, amongst others:

- Aboriginal Law is strong and fundamental to Aboriginal wellbeing
- Traditional cultural authority must be respected in heritage matters
- Land use proponents must be compelled to consult with owners and knowledge holders about heritage, and get the okay from them, before they go out onto the country – old people know about lots of important places that haven't been mapped or put on a register yet and members worry for those places
- the new laws should support the good ways Council has established to work with proponents to look after heritage on the Ngaanyatjarra Leases
- Members worry for country where Aboriginal people only have native title or no Aboriginal land tenure
- Members are frightened for country and Law if they hear about proponents out on country without heritage clearance
- Ngaanyatjarra members strongly oppose a system that allows access to country via the 'backdoor' with Ministerial or other external permissions

Feedback on proposals:

Proposal 1: Repeal the *Aboriginal Heritage Act 1972* and deliver new Aboriginal heritage legislation

New Aboriginal heritage legislation is necessary and the proposed Act is a great improvement on the existing one. The primary object of the new legislation should be to empower Aboriginal people to protect and manage their cultural heritage. More emphasis should be placed on active and dynamic resourcing of heritage protection activities, and less on facilitating access to land.

Proposal 2: Update definitions and scope of new Aboriginal heritage legislation

The definition of heritage should be expanded in line with the Burra Charter as proposed. Note that Ngaanyatjarra people are determined to protect in particular places of living cultural significance, in terms of places with tjukurpa (sacred sites with a creation story). The legislation must facilitate the protection of these as well as other areas important to Aboriginal people including birth places, historic living areas, and water sources as

appropriate. The legislation should also cover larger areas of cultural significance such as dreaming tracks, while allowing local knowledge holders to manage land uses along them as they see appropriate.

Proposal 3(A): Local Aboriginal Heritage Services

The proposed model is broadly supported, with some provisos.

The Local Aboriginal Heritage Service should be the first point of engagement for all land use proposals, whether or not heritage is known or predicted to exist in the area of the proposed works (see further discussion relating to the referral mechanism Proposal 5). The Local Aboriginal Heritage Services must be resourced to a level commensurate with their responsibilities under the Act, such that they are able to engage with proponents, fulfil their statutory obligations, and contribute to development of the register.

Under the Ngaanyatjarra Leases and native title, Ngaanyatjarra people already have established mechanisms and processes to deal with heritage matters. The new legislation relating to Local Aboriginal Heritage Services should support existing local processes to identify and consult with traditional owners, native title holders, and knowledge holders, and to form agreements.

The proposal that the functions of a Local Aboriginal Heritage Service be performed by the WA government in the form of the Department of Planning, Lands and Heritage in these cases is problematic, see points under Proposal 3D below. Alternatives for the management of heritage matters where there is no Local Area Heritage Service must be developed.

Proposal 3(B): the Aboriginal Heritage Council

The Aboriginal Heritage Council should not be empowered to make decisions on heritage matters without the involvement of the traditional owners and knowledge holders through the Local Aboriginal Heritage Service, even where land use proposals are deemed to be of low impact.

Proposal 3(C): Functions of the Minister

The functions of the Minister should be focussed on the protection of Aboriginal heritage rather than the facilitation of land use proposals and heritage destruction.

Proposal 3(D): the role of the Department

The Department's proposed role is extensive and requires further consideration and clarification.

The proposal for the Department of Planning, Lands and Heritage to perform the functions of a LAHS where none exists is problematic on a number of fronts. It places management of heritage issues at all stages in the hands of government, with few checks and balances. Identifying and consulting appropriately regarding Aboriginal heritage is highly specialised and sensitive work. The volume of the work rises and falls with the booms and busts of resource development. Rather than an all-or-nothing approach in terms of Aboriginal control of heritage management (i.e. either a LAHS or the Department), the legislation should be explicit in empowering local Aboriginal people as far as possible to manage heritage issues even in the absence of an established LAHS.

The Department's proposed role in maintaining the Aboriginal heritage register is appropriate. However, as the register expands and grows increasingly complex as proposed, holding increasing quantities of sensitive cultural information, LAHS will need support to facilitate this and the Department will need significant ongoing resourcing to enable it. See discussion relating to Proposal 4 below.

Proposal 3(E): Heritage Professionals

A register of heritage professionals and their qualifications is welcomed but organisations must remain free to engage heritage professionals according to their own requirements.

Proposal 4: retain the current form and function of the register of Aboriginal places and objects but rename it the Aboriginal Heritage Register

The primary role of the register as an information repository is in principle supported, but the proposal to use it as a planning tool, which could circumvent consultation with local knowledge holders, is fraught with risk and opposed. The absence of heritage on the register should never be used to trigger or bypass formal assessment processes, as it is not a reliable indicator of the absence of actual heritage. The proposal for the register to include areas of likely Aboriginal heritage sensitivity identified by modelling, which would then act as a trigger for formal assessment processes, is deeply concerning. Protection of heritage should not rely on predictive modelling, but should be based on consultation with representatives of knowledge holders themselves.

The legislation and referral mechanisms must be designed with the acknowledgement that the register is incomplete and often inaccurate. Ngaanyatjarra native title was determined over 180 000 square kilometres, large parts of which have never been surveyed and mapped, let alone recorded on the State register. Yet traditional owners hold intimate knowledge of and deep concern for a dense network of heritage areas across their lands. Resources to document that knowledge are very limited. Land use referral processes must function effectively with an incomplete and out of date register, as this is the reality.

The proposal for the register to act as a record of heritage for future generations is admirable, but will only be achieved if explicit and tangible support for knowledge holders and representative organisations to document their heritage and to add information to the register is provided. Aboriginal organisations hold heritage information for some areas (usually where heritage surveys have been funded prior to mineral exploration), but would require additional resourcing to validate this data, consult with knowledge holders about how their heritage information should be handled, and prepare records for submission to the register. Proposal 4 does not provide for any resourcing of LAHS to support this, mentioning only the Department's role to 'encourage' LAHS to improve the register records, whilst leaving as implicit the threat that land use proponents could gain unfettered access to areas that have no registered heritage.

The proposal for the register to be made more culturally sensitive and culturally appropriate is supported. However the proposal does not spell out how the Department will be resourced to achieve this. The register needs to manage sensitive Aboriginal information about heritage places, often living cultural knowledge, access to which is managed by strict traditional protocols. Perhaps more significantly, the proposal does not address how the Department would manage and facilitate access to this often highly sensitive cultural information in the future. Information is only of future value if protocols for future access are clear. All these activities will require the investment of considerable resources.

Proposal 5: Introduce a referral mechanism to facilitate tiered assessments of proposed land uses

Consultation with local knowledge holders through representative bodies at the earliest stages is the highest priority of Ngaanyatjarra Council members, as highlighted in the introductory points. Therefore, as noted above, the Local Aboriginal Heritage Service or equivalent body should be the first point of contact for heritage matters, whether or not heritage is known or predicted to exist in the area of the proposed works. When land use proponents invest early to acknowledge and address heritage issues, both proponents and local people obtain confidence and clarity to progress their projects.

We oppose aspects of this proposal that would allow the absence of heritage register records in an area to fast-track land-use or to avoid consultation with traditional owners and knowledge holders, regardless of the type or level of impact. For example, Proposal 5(ii) to ‘provide a tiered assessment of land use proposals dependent upon known or predicted Aboriginal heritage and the nature of the proposed land use’ is unacceptable to Ngaanyatjarra members. Absence of records on the register should never be taken to indicate the absence of heritage. Only consultation and heritage survey with the right people, informed of the specific land use proposal, can definitively identify relevant heritage or the absence thereof. Traditional owners and knowledge holders should be consulted and LAHS must be resourced to conduct on-the-ground heritage surveys before any works are conducted. The possibility that land use proposals assessed as ‘low impact’ could bypass the Local Aboriginal Heritage Service is of great concern to our Members. Land uses might be assessed as low-impact by the Department but still present significant threats to heritage, for example in the case of sacred areas to which even entry is restricted by traditional law. To bypass this level of consultation is to risk damage to or destruction of heritage, and to risk increased conflict between local Aboriginal people and land use proponents.

Proposal 6: Encourage and recognise agreement making

The proposals for the involvement of the Aboriginal Heritage Council and the Minister in agreements between land users/proponents and the LAHS, through considering them before issuing land use permits and through ratifying agreements, are complex. It is difficult to assess their impact on existing heritage management processes across the different Ngaanyatjarra land tenures. It is important that proposals protect the autonomy of Ngaanyatjarra people to manage impacts on heritage, and also that the extra administrative burden placed on the Council’s existing heritage team is manageable or resourced.

Proposal 7: Transparency and Appeals

Increased transparency and a process for appeals are supported.

Proposal 8: A modernised enforcement regime

The Proposal is supported; however the enforcement regime should use a penalty units system so that fines do not effectively shrink over time. The Department must be properly resourced to monitor compliance with the Act, and to prosecute breaches. Monitoring of heritage sites, impacts and damage are activities that could be contracted out to local Aboriginal ranger groups where appropriate on a fee-for-service basis.

Proposal 9: Protected Areas

Retention with improvement of the protected areas legislation is supported.