



# Aboriginal Lands Trust

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OUR REF: PLH0037-2018A/01  
YOUR REF: 69-07306

Hon Ben Wyatt MLA  
Minister for Aboriginal Affairs  
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By email: [Minister.Wyatt@dpc.wa.gov.au](mailto:Minister.Wyatt@dpc.wa.gov.au)

Dear Minister

*Ben*

## **ABORIGINAL LANDS TRUST SUBMISSION - REVIEW OF THE ABORIGINAL HERITAGE ACT 1972 - STAGE ONE**

Thank you for your correspondence dated 13 March 2018 regarding the review of the *Aboriginal Heritage Act 1972* (AHA) aimed at reforming legislation to meet the needs of all stakeholders.

The Aboriginal Lands Trust (ALT) received a brief on the status of the AHA review from Mr Graeme Gammie, Assistant Director General, Heritage, at our last board meeting held on 19 April 2019. The ALT is pleased with the current progress of the consultation involved and the facilitation of workshops to strike a balance for preserving Aboriginal heritage/culture involving both industry and the Aboriginal community.

On behalf of the ALT, I wish to submit the attached response to the Phase One Consultation Paper released earlier this year. I look forward to hearing how effective the phased consultation has been and the incorporation of feedback into the draft of the amendment bill.

Yours sincerely

*Dr Robert Isaacs*

Dr Robert Isaacs AM  
CHAIRPERSON

22 May 2018

Att.



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## Feedback to Phase One of the *Aboriginal Heritage Act 1972* (AHA) Review

### **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 is not clear. Is the intent to protect all places and objects customarily used by or traditional to Aboriginal people or is the intent to protect only those that are considered significant, important, rare or unusual?

All Aboriginal heritage places and objects are important to Aboriginal people, to maintaining our culture, our connection to the land and enables us to fulfil our cultural obligations. The legislation needs to clearly articulate its intent and the types of places and objects that may be afforded legal protection under this act.

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

It is important that Aboriginal people are involved in the protection of heritage places and decisions about potential impact to these places. Greater clarity is needed between the interfaces of the AHA, the *Aboriginal Affairs Planning Authority Act 1972* (AAPA) and the *Native Title Act 1993*. Identifying the most appropriate Aboriginal groups to engage is important but it is also essential that dissenting Aboriginal voices are not displaced in consultation processes.

Consideration needs to be given to Aboriginal people who have customary authority and responsibility for heritage places, those that have native title authority and responsibility for the management and preservation of these places, and like the Aboriginal Lands Trust (ALT), legislative responsibility for managing land on which these places are located.

The AAPA is charged with the duty of promoting the well-being of persons of Aboriginal descent in Western Australia and *shall* take into account the views of such persons and in doing so to recognize and support as may be necessary the traditional Aboriginal culture (section 13.1 (a)). One of the functions of the ALT itself is to use and manage that land for the benefit of persons of Aboriginal descent (section 23). In making decisions in this capacity the ALT gives due regard to the wishes of the Aboriginal people living on the land however greater clarity regarding the operations of the AHA in relation to the protection of Aboriginal heritage places and objects is essential.

A more formalised process for consultation that addresses the connection between Aboriginal customary authority and native title rights and responsibilities should be clearly articulated and incorporated into the legislation. It is also essential that any consultation process developed allows for the voice Aboriginal people who may disagree with the general consensus to be heard but given the appropriate level of recognition in the discussion.





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

There is an opportunity for the review of the AHA to recognise the growing success of many Aboriginal ranger programs in WA. The review of the AHA provides the opportunity to bestow appropriate authority to Aboriginal rangers to empower them to better protect Aboriginal heritage places and objects in the course of their duties.

### ***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?***

No. The role of Aboriginal people needs to be clarified and articulated in the legislation. The current AHA states that of the appointed members, one shall be a person with specialised experience in anthropology, and there are three ex-officio members representing government agencies, including Landgate, the WA Museum and the Department of Planning, Lands and Heritage. It is concerning that there are not specific requirements for the involvement of Aboriginal people in any of the decision making roles under the current Act. This is particularly concerning as there is no explicit requirement for Aboriginal people to be consulted under the Act. The only way to obtain the required information about the Aboriginal heritage for a particular area is through consultation with the relevant Aboriginal people.

The involvement of Aboriginal people in the decision making process is a critical success factor. Aboriginal people are best placed to understand, determine and take responsibility for the protection of Aboriginal heritage places and objects and this would also alleviate the need for a person with specialised experience in anthropology. The role of the Registrar and the membership of the committee should be comprised of persons of Aboriginal descent and ex-officio membership requirements should be reviewed similar to the requirements of the AAPA (section 21 (1)).

### ***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?***

No. Section 5 currently provides a very broad interpretation of the places the AHA applies to. Greater clarity in the type of places that should be protected is essential. It is essential in all the land use activity and in the development and consideration of community layout plans that Aboriginal heritage aspects are taken into account. The lack of clarity that currently surrounds the identification of places of importance and significance that may attract legislative protection hampers our ability to manage the ALT effectively. Particularly when there are conflicting views held by the community.

There needs to be an agreement reached by Aboriginal people regarding the type and nature of heritage places that should attract legislative protection to allow them to be clearly identified in the legislation. Aboriginal people need to be involved in identification of these types of places and consultation undertaken to clarify what types of land use activity may be permissible. Cultural obligations need to be taken into account during this process.





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Aboriginal people are best placed to determine the type and nature of sites that need to be protected. If this part of the legislation is not changed it becomes even more critical for Aboriginal people to be involved in the decision making process.

**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?**

No. Greater clarity is required. The implications for land users should also be articulated.

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

The legislation needs to have the capacity to better protect Aboriginal heritage places of outstanding significance. The process for determining these areas needs to include the involvement of relevant Aboriginal people. However in doing so Aboriginal people will still need the ability to access, manage and determine the future of these places. In some instances Aboriginal groups may elect to leverage these places to develop economic initiatives (for example cultural tourism initiatives) that will benefit the community. Any changes to the current legislation should enable Aboriginal people to continue to access, manage and utilise these places in a manner that they determine to be culturally appropriate.

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

Yes. While most Western Australians are buried in proclaimed cemeteries, the diverse cultural practices of the Aboriginal community have resulted in burials occurring outside of proclaimed cemeteries. At the express wishes of Aboriginal people, the repatriation and reburial of ancestral remains often occurs on land managed by the ALT. However in many instances the preference of Aboriginal people is to have the remains protected in situ and to protect the area rather than recovery and reburial in a community, non-gazetted cemetery. It will be important that the AHA recognises and protect burial sites and includes a process that goes further than simply reporting the location of burial grounds. Consideration needs to be given to future access to these areas which is often complicated by different land tenures.

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

- The ability to identify the extent of impact an activity will have is also difficult to assess. The correct balance between land-use to leverage a greater economic benefit for Aboriginal communities versus the appropriate protection of important heritage places is a challenge that this review will need to address.



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Any type of land use activity that may have a high degree of detrimental impact to Aboriginal heritage places should require approval. It is important that Aboriginal people drive this discussion and that the legislation articulates:

- the types of activity that may be permissible on/to certain types of heritage places;
- quantify the degree of impact to heritage places, i.e. what would a low, medium or high impact be;
- what the process is for any activities that will totally destroy heritage places; and
- the process for activities that may impact on ceremonial places that are still in use.

An easy to follow matrix will assist land users to determine the levels of consultation required prior to submitting proposals for consideration by the ALT. The management and protection of heritage is an important aspect in developing and considering community layout plans and management plans.

### ***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 current criteria states that anyone who excavates, destroys, damages, conceals or in any way alters an Aboriginal site commits an offence. This is not very clear to either land users or Aboriginal people. The discussion on this aspect of the review needs to be driven by Aboriginal people. Once it has been determined the type of places that need to be protected under this legislation Aboriginal people need to reach a consensus on what would constitute a detrimental impact.

Noting that a 'one size fits all' would not be suitable, some of the categories that need to be considered and assessed for the potential impact to heritage places are:

- Low impact activities that may involve a small level of ground disturbance;
- Medium impact activities that may involve mid-level ground disturbance;
- High impact activities that involve substantial ground disturbance;
- Activities that will involve the complete destruction of places;
- Activities that may impact on mythological places;
- Activities that may impact on Song cycles and/or dreaming lines; and
- Activities that may impact on ceremonial places that are still in use.

Examples of each type of these activities would also be beneficial for land users (i.e. the ALT considers a range of land use activities from building a small scale shed, building a swimming pool to developing a school complex etc).





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

There are a number of considerations that may need to be considered:

- whether or not the sacred site is a place which is still accessed and actively used;
- whether or not there is or may be a potential impact (physical or spiritual) to those that are charged with the cultural responsibility for looking after the place, song or story;
- whether or not there is a belief held by the relevant Aboriginal people that the activity will have a detrimental impact on the place, song or story;
- will the activity restrict access to the place and is the area of land that is to be used for the activity on an important part of the sacred site (i.e. is the area identified for the land use the site of a significant activity traditionally associated with the place); and
- whether or not there is a belief that the land use activity will weaken the cultural connection to the place (i.e. if the area is a water way associated with a mythological story or song – will stopping the water flow impact the cultural/spiritual connection that Aboriginal people have with the sacred site).

It is important to acknowledge that whilst sacred sites may not have physical signposts that are recognisable to non-Aboriginal people, the existence, continued use and recognition of sacred sites reflects the ongoing spiritual and cultural connection that Aboriginal people have with the land. Impacts to sacred sites are as significant to Aboriginal people as tangible, visual heritage places like artefacts or rock art.

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

- The relevant Aboriginal people should be consulted on any potential impact to important or significant heritage places.
- Aboriginal people should be involved in the decision making process.
- The Minister for Aboriginal Affairs should retain an authorisation responsibility for the impact to Aboriginal heritage places.

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

The current section 18 process is cumbersome and lengthy. A streamlined approvals process that is consistent with other legislative frameworks and avoids duplication is required. Aboriginal people need to be consulted and be involved in the decision making process.



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**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?**

In the case of the land held by the ALT, divest the estate back to the Aboriginal community. This will afford greater autonomy and increase their ability to effectively access, manage and protect Aboriginal heritage places.

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

The enforcement provisions should be equitable to other legislative frameworks like the State. Any penalties need to be enforceable.

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

Penalties should be consistent with other similar legislative frameworks. Unless those frameworks are not enforceable or in need of review such as the AAPA.

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

Yes. Aboriginal people have the cultural responsibility to manage their heritage places in the appropriate manner. This may require keeping the location of heritage place/s secure for their own protection and the protection of others.

**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?**

Yes the current criteria are adequate. However they need to be consistently applied in line with any changes made to sections 5 and 6. Any changes to these criteria need to be determined by Aboriginal people.

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

The Register is an administrative process that needs to be managed by the Department. Any places that are removed from the register need to be clearly identified, the relevant Aboriginal people notified and the information retained for future reference.





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The process for making information about heritage places public needs to be reviewed and should include endorsement by the relevant Aboriginal people prior to publication. The Register needs to be up to date and should reflect:

- The current status of heritage places;
- Identify all of the protected areas;
- Identify the areas that have been surveyed;
- Identify the heritage places that have been impacted (this needs to be updated within defined timeframes).

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

How the AHA will interact with the *Native Title Act 1993*.

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

Consideration should be given to the compilation of the Aboriginal Cultural Material Committee. This committee should be comprised of Aboriginal people.