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Dear Sir / Madam

## **REVIEW OF ABORIGINAL HERITAGE ACT 1972 – CONSULTATION PAPER**

I refer to the invitation to make a submission on the *Review of the Aboriginal Heritage Act 1972 Consultation Paper* (Consultation Paper) dated March 2019.

Department of Mines Industry Regulation and Safety (DMIRS) welcomes the review process and has attached a submission addressing those questions in the Consultation Paper that directly interface with the legislative, regulatory and administrative functions of DMIRS.

If after reviewing the submission, the Department of Planning, Lands and Heritage requires additional information about DMIRS's business functions or its systems, then please contact Rick Rogerson, Executive Director Resource Tenure Division.

In due course, DMIRS looks forward to the opportunity to comment on an Exposure Draft of the new Aboriginal Heritage Legislation as outlined in the Consultation Paper.

Yours sincerely

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Phil Gorey  
Deputy Director General  
Resource and Environmental Regulation Group  
17 June 2019



Government of **Western Australia**  
Department of **Mines, Industry Regulation and Safety**

# Review of the Aboriginal Heritage Act 1972 (WA) Consultation Paper

30 May 2019

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*Aboriginal Heritage Act 1972 (WA)*

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## 1. Introduction

The Department of Mines, Industry Regulation and Safety (**DMIRS**) is pleased to make a submission in response to the Department of Planning, Lands and Heritage's (**DPLH**) release of the *Review of the Aboriginal Heritage Act 1972 (WA) Consultation Paper (Consultation Paper)*. This submission outlines DMIRS's general position in relation to the proposal for new legislation to replace the existing *Aboriginal Heritage Act 1972 (WA) (the AH Act)*. DMIRS's comments have been made from the perspective of the questions posed in the Consultation Paper in the context of the legislative, regulatory and business functions administered by the department pursuant to the *Mining Act 1978 (WA) (MA78)*, *Petroleum and Geothermal Energy Resources Act 1967 (WA) (PGERA)* *Petroleum (Submerged Lands) Act 1982 (WA) (P(SL)A82)* and the *Petroleum Pipelines Act 1969 (WA) (PPA)*, and general observations about the reform proposals.

The Resource and Environmental Regulation Group (**REG**) within DMIRS provides regulatory and policy oversight of the resources sector in all areas apart from worker safety. This group also delivers the department's geoscience functions of reducing investment risk for explorers and increasing the attractiveness of Western Australia (**WA**) as a destination of choice for resources companies to explore.

The REG play a critical role in building and strengthening WA's economy whilst ensuring the State's resources are developed in sustainable and responsible manner.

The delivery of these functions occurs across three business areas; Resource Tenure Division (**RTD**), Resource and Environmental Compliance Division (**RECD**) and Geoscience and Resource Strategy Division (**GRSD**).

RTD administers the grant of tenure for resource exploration and production, facilitates access to land for resource activities and prevents the sterilisation of resources. RECD ensures that tenure holders comply with their obligations under the various Minerals and Petroleum Acts and associated Regulations, and assesses environmental applications to deliver sound environmental outcomes for the community. GRSD incorporating the Geological Survey of WA is responsible for the strategic resource policy setting and facilitation of investment through the provision of geoscience data and products.

In the delivery of these functions pursuant to the MA78, PGERA, P(SL)A82, PPA and the Regulations, the REG interfaces with the operation of the AH Act through the following departmental business activities listed in order of frequency:

- **Environmental Regulation** - of the mineral, petroleum, geothermal energy and pipeline operations of the resources sector in accordance with the various Acts and Regulations (i.e. Program of Works, Mining Proposals and Environment Plans);
- **Native Title Act 1993 (Cth), Future Act** - Administration of the *Native Title Act 1993 (NTA)* (Cth) future act requirements for mineral, petroleum and

petroleum pipeline applications including notifications, consultation, inquiry and negotiations about the grant of the tenure, including Aboriginal heritage arrangements;

- **Spatial Systems** - Spatial information management systems data interface with the Aboriginal Heritage Inquiry System (**AHIS**);
- **Tenure Administration** - Tenure management administration associated with the AH Act (e.g. Noongar Standard Heritage Agreement);
- **Strategic Policy** - Operational and strategic policy and strategy, within the Whole of Government Framework (e.g. State's Standard Heritage Agreement);
- **Stakeholder Engagement** - Liaison functions administered from bases located in the Kimberley, Pilbara and Kalgoorlie Regions of Western Australia about issues pertaining to Aboriginal heritage and the resources sector;
- **Land Access Planning** - Land Access planning and implementation issues associated with, prospecting, exploration, mining, production and infrastructure development activities of the resources sector;
- **Geoscientific Investigation** - Geoscience mapping and scientific investigations conducted on behalf of the Minister for Mines and Petroleum (**Resources Minister**) which involve on-country activities and coexistent Aboriginal sites for the purposes of the AH Act; and
- **Geoscientific Attraction**- Release of petroleum exploration acreage on behalf of the Resources Minister pursuant to the PGERA and P(SL)82 in relation to coexistent Aboriginal sites.

## 2. Detailed Response to the Consultation Paper

### **Proposal 1 - Repeal the *Aboriginal Heritage Act 1972* and deliver new Aboriginal heritage legislation.**

**Context:** Repeal the AH Act and replace it with modern legislation, regulations and policies.

**Question:** Will the proposal deliver the desired outcome? If not, why not and what changes would you suggest and why?

**Comment:** DMIRS recognises that a new Aboriginal heritage legislation will enable contemporary legal recognition of the rights and interests of Aboriginal people in WA. In doing so, encapsulating the value of recognition, of preservation and protection of Aboriginal sites and transparency about decisions by Aboriginal people about those sites. DMIRS supports the proposal for new modernised Aboriginal heritage legislation in WA.

### **Proposal 2 - Update recognitions and scope of new Aboriginal heritage legislation.**

**Context:** Extend the scope of what is covered by the new legislation to include ancestral remains, places that are cultural landscapes and place-based intangible heritage.

**Question:** Will the proposal deliver the desired outcome? If no, why not and what changes would you suggest and why?

**Comment:** DMIRS respectfully notes the proposal for the new legislation to include the management of Aboriginal ancestral remains and supports this proposal.

DMIRS also notes the intention to include cultural landscapes and place-based intangible heritage into the new legislation. DMIRS has no specific comment to make about the appropriateness or otherwise of the inclusion of these additional definitions into what constitutes a place under the new legislation. However, DMIRS would like to request that DPLH give careful consideration to the effect of evolving intangible landscapes on land-use planning activities by the resource sector, and land access arrangements between native title parties and resource companies, specifically in respect to the effect on the compliance requirements associated with resource tenure.

### **Proposal 3(A) - Local Aboriginal Heritage Services**

**Context:** Provide for the appointment of Local Aboriginal Heritage Services (**LAHS**) to:

- ensure the right people speak for particular area of country and related cultural heritage are identified; and
- make agreements regarding Aboriginal heritage management and land use proposals in their geographic area of responsibility.

**Question: Will the proposal deliver the desired outcome? If no, why not and what changes would you suggest and why?**

**Comment:** DMIRS notes the intention is to legislate for a LAHS to be incorporated under the *Corporations, Aboriginal and Torres Strait Islander Act 2006* (Cth) to perform a parallel function to that administered by the registered native title bodies corporate (**RNTBC**) and a representative Aboriginal/Torres Strait Islander body (**NTRB**) pursuant to the NTA for the purpose of Aboriginal heritage administration.

In accordance with the NTA, a RNTBC, or a NTRB on behalf of a native title party, can negotiate Aboriginal heritage arrangements for the purpose of the grant of the resource tenure. The NTA also provides for the RNTBC to request fees from the applicant for the costs associated with negotiating an agreement. It is noted that under the new legislation the LAHS will be able to charge a fee for the service or advice provided about land use proposals, e.g. a mining activity or petroleum operation.

The Consultation Paper has raised concerns for DMIRS about duplication of function and procedural fairness for holders of resource tenure as outlined in the following questions:

- How will the new Aboriginal heritage legislation address the potential for duplication of fees and charges for the delivery of Aboriginal heritage services, as a consequence of an agreement pursuant to the NTA, and by a fee and charge raised by a LAHS for the delivery of the same service? Essentially the potential exists for the holders of resource tenure to be burdened with unplanned fees and charges as a consequence of the new legislation provision for LAHS.
- Could the new legislation have transitional provisions which allowed for the continuation of existing commercial arrangements negotiated with RNTBC pursuant to the NTA, for the current term of the tenure? This would ensure that there were no additional (duplicate) requirements place on the registered holders of the tenure to enter into new agreements about the delivery of Aboriginal heritage services in local areas, unless agreed to by all parties.
- To what extent will the new legislation mirror the notification and prescribed timeframes for the consultation processes with native title party rights and interests pursuant to the NTA? It is pertinent to note that once resource tenure is granted that the registered holders of resource tenure are required to comply with the work program commitments. Aboriginal heritage is not deemed to be force majeure grounds for seeking ministerial consent for deferral or extension of term of tenure. Accordingly any protracted delay by the LAHS could result in non-compliance of the conditions of grant of the resource tenure, which would be procedurally unfair on registered holders of resource tenure, whereby the grant occurred prior to the proclamation of the new Aboriginal heritage legislation.
- To what extent will the new legislation mirror the NTA registration test provisions in respect to the requirement to comply with entry criteria for the establishment of the LAHS?

### **Proposal 3(B): Aboriginal Heritage Council**

**Context:** The new legislation proposes to establish an Aboriginal Heritage Council (**AHC**) as the central body providing advice and strategic oversight of the Aboriginal heritage system and abolish the Aboriginal Cultural Material Committee (**ACMC**).

**Question: Will the proposal deliver the desired outcome? If no, why not and what changes would you suggest and why?**

**Comment:** DMIRS has no comments in respect to the proposed composition of the AHC, but recommends that careful consideration be given approval timeframes for decision-making by the AHC, in particular with the objective of reduction of the current protracted lead-times for section 18 application to the ACMC.

DMIRS has no comments or recommendations in respect to the proposal to abolish the role of the ACMC.

DMIRS notes that there are positive advantages in the reduction of regulatory burden by enabling some land-use proposals to be determined by the AHC, as opposed to the existing requirement under the AH Act for the Minister for Aboriginal Affairs (**Minister**) to make the decision.

The Consultation Paper has raised the following questions for DMIRS:

- To what extent will the AHC be required under the new legislation to act consistently with previous Aboriginal heritage case law, premised on the current AH Act?
- How will current section 18 applications before the Minister for Aboriginal Affairs be treated on proclamation of the new legislation?
- To what extent will the new legislation and decisions made by the AHC in respect to decisions about land use proposals be aligned to any Commonwealth National Native Title Tribunal determination pursuant to section 32(4) of the NTA, specifically in respect to the requirements of section 237(b) of the NTA? Noting that in the context of resource tenure the Commonwealth's determination will occur prior to the grant of tenure, and any decision by the AHC will generally occur once the tenure is granted and the registered holder is seeking to use to the land and or waters.
- If a resource project is being assessed by the Environmental Protection Authority (EPA) pursuant to part IV of the *Environmental Protection Act 1986* (EP Act), will the AHC and/or the Minister be constrained under section 41 of the EP Act from making a decision as is the case for other regulatory authorities?
- Will the Minister have statutory powers to dismiss an individual member, or the AHC, if there were evidence that the entity were not performing its functions pursuant to the new legislation?



### **Proposal 3(C): The Minister's Role**

**Context:** The Minister retains overall accountability and decision-making powers for the Aboriginal heritage system in WA, but may delegate certain decisions and functions to the AHC.

**Question: Will the proposal deliver the desired outcome? If no, why not and what changes would you suggest and why?**

**Comment:** DMIRS notes the importance that the new legislation include a clear definition about projects of State Significance, based on existing whole of government models and the Lead Agency Framework.

The Consultation Paper has raised the following questions for DMIRS:

- How will the new legislation address prior arrangements within existing State Agreements and approved Mining Proposals pursuant to the MA78 in relation to decisions about land-access and land-usage?
- In accordance with the new legislation, to what extent will there be a requirement for the Minister to consult with, and obtain the concurrence of the Resources Minister, prior to the issue of a stop-work order, specifically in the context of prior ministerial consent to conduct a mining activity or petroleum operation pursuant to the respective resource legislation?

### **Proposal 3(D): The role of the Department of Planning, Lands and Heritage**

**Context:** DPLH remain responsible for day-to-day operation of the Act.

**Question: Will the proposal deliver the desired outcome? If no, why not and what changes would you suggest and why?**

**Comment:** DMIRS has no comments in respect to the proposed functions of DPLH. However in the context of the whole of government framework, DMIRS recommends once the new legislation has been proclaimed that DMIRS and DPLH consider the development of operational arrangements between the two agencies so as to ensure seamless transition in the context of the registered holders of granted resource tenure and the regulatory functions of DMIRS under the mining and petroleum legislation.

DMIRS would also recommend and give support to, the inclusion of technical advice about mining activities and petroleum operations in the context of any capacity building activities facilitated by DPLH with the LAHS.

### **Proposal 3(E): Heritage Professionals – aiding selection of those with appropriate qualifications and experience and improving standards.**

**Context:** To aid people needing to engage a Heritage Professional with appropriate qualifications and experience, and promote higher standards by publishing on the Department's website a public Directory of Heritage Professionals and the standards

required for heritage investigations, community consultation and reporting of heritage information.

**Question: Will the proposal deliver the desired outcome? If no, why not and what changes would you suggest and why?**

**Comment:** DMIRS has no comments to make in respect to the Directory of Heritage Professionals. However, DMIRS notes that the concept of “stop-the-clock” applies when the approval needs to be assessed outside the jurisdiction of the State. In this context, would the new legislation provide for rejection of the application on the basis that it is not strictly compliant with the requirements of the new legislation and therefore the AHC does not have jurisdiction to make a decision?

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

**Context:**

- a) Rename the Register of Aboriginal Places and Objects to the Aboriginal Heritage Register (**AHR**) to reflect the proposed shift of emphasis from ‘sites’ to the revised scope of the legislation.
- b) The AHC will set and regulate reporting standards and improve accuracy and utility of the register as a mechanism for Aboriginal people to record their heritage and as a land use planning tool.

**Question: Will the proposal deliver the desired outcome? If no, why not and what changes would you suggest and why?**

**Comment:** DMIRS has no comment on the proposal to change the name of the register to the AHR under the new legislation.

Relatedly, DMIRS notes that under the new legislation, the proposal is that places identified by Aboriginal people as being culturally important will be registered on the proviso that sufficient evidence is provided about the location and reasons for why the place is important to the standards set by the AHC.

DMIRS recommends that the proposed AHR continue to provide the functionality that exists within the existing Aboriginal Heritage Inquiry System, enabling spatial analysis by mining, petroleum or pipeline tenure. In addition, DMIRS recommends that consideration be given to upgrading the spatial analysis functions of the system to enable any NTA, registered and/or unregistered native title party rights and interests, and any LAHS, to be shown and reported on in the context of the resource tenure and any Aboriginal heritage sensitivities in the coexistent area.

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

**Context:**

- a) Introduce a referral mechanism to facilitate tiered assessments of proposed land uses, with early advice (non-binding) provided by the department or AHC on standards of consultation and/or research necessary to support the approval process for a development.
- b) 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.
- c) A 'call in power' will ensure that proposals that should have been referred, but have not been, can be assessed.

**Question: Will the proposal deliver the desired outcome? If no, why not and what changes would you suggest and why?**

**Comment:** DMIRS notes the proposed new legislation will introduce a tiered system of assessment for land use proposals, including the provision of advice on assessment requirements. DMIRS observes that this approach mirrors the methodology applied for by the EPA pursuant to part IV of the EP Act. It is also noted that Aboriginal heritage can be considered within the EPA assessment process under the environmental factor of 'social surroundings'. In this context, proposals that have major impacts would be assessed pursuant to both Acts (the EPA and new legislation), which is a duplication of administration burden and goes against the government's 'Streamline WA' objective. Whilst it is noted that the extent to which the EPA assesses heritage is limited to the extent to which those impacts are linked to physical or biological surroundings, there is the question as to why heritage assessments cannot be streamlined so it is clearly dealt with via a single process? Accordingly, DMIRS suggests that consideration be given to considering that the legislation is drafted in such a way as to remove any potential duplication of assessment processes under the AH legislation and the EP Act.

Furthermore, DMIRS in its regulation of the minerals and petroleum sectors administers environmental approvals (i.e. Program of Works or Environment Plans) for low impact prospecting and exploration activities, pursuant to the various Acts and associated regulations cited earlier in this submission. These approval processes include an assessment of whether there is likely to be an impact on Aboriginal heritage in the coexistent area. DMIRS recommends that consideration be given to the reduction of administrative burden through harnessing existing regulatory functions for resource activities in order to expedite the advice functions of the new legislation. For example if the registered holder has lodged sufficient information with the program of works or environment plan for prospecting or exploration activities in order to determine that there no need for further assessment and conditions to be imposed about Aboriginal heritage and then land use proposal could be approved under both the resource legislation and the new Aboriginal heritage legislation under delegation of the Minister.

### **Proposal 6: Encourage and recognise agreement making**

**Context:** To encourage and recognise agreement making between LAHS or other relevant Aboriginal body and land use proponents and the AHC will consider and, if appropriate, ratify agreements where land users wish to rely on an agreement to expedited approvals under the new Act.

**Question Will the proposal deliver the desired outcome? If no, why not and what changes would you suggest and why?**

**Comment:** DMIRS notes that this proposal to ratify agreements negotiated between native title parties and holders of resource tenure presents significant sovereign risk for the State, through ambiguity and uncertainty about access to land and waters. In addition the proposal could create disharmony between native title party and LAHS stakeholders at a local level.

Given the short term duration of mineral and petroleum prospecting and exploration tenure, DMIRS's recommends that the new legislation contain transitional provisions which enable the operation of existing agreements to the term of the tenure at the time of proclamation of the new legislation. This would enable the nature attrition of the major of existing agreements in force across the State and the gradual uptake of the agreement framework established under the new legislation. Upon renewal of mineral and petroleum tenure, there is a reduction in the overall area, which means that there could be a reduction in the corresponding number of LAHS.

Overall, a transitional approach mitigate against delay and disruption in enabling access to land and or waters for resource prospecting and exploration activities.

### **Proposal 7: Transparency and Appeals**

**Context:**

- a) Reasons for decisions are to be published.
- b) 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.
- c) Retain the State Administrative Tribunal as the primary review body.

**Question: Will the proposal deliver the desired outcome? If no, why not and what changes would you suggest and why?**

**Comment:** DMIRS respectfully notes and acknowledges the important that the new legislation has requirements for the inclusion of reasons for decisions, procedural review and appeal rights for Aboriginal people and intention that the State Administrative Tribunal will be the primary review body.

### **Proposal 8: A modernised enforcement regime**

**Context:**

- a) Create a modern enforcement regime by ensuring offences and penalties' are brought into line with the *Heritage Act 2018* (WA) (HA) and other modern statutes.
- b) The statutory limitation period is extended to 5 years.
- c) Conducting compliance inspections and proceedings will be the responsibility of the Department of Planning, Lands and Heritage.

**Question: Will the proposal deliver the desired outcome? If no, why not and what changes would you suggest and why?**

**Comment:** DMIRS notes the proposal to align the offence provisions of the new legislation to the HA and the extension of the period of statutory limitation to 5 years.

However, the Consultation Paper has raised the following question for DMIRS:

In the context of mining activities and petroleum operations whereby under the new legislation, conditions have been imposed on the title, to what extent will there be an opportunity for reduction in the duplication of regulatory compliance activity by both DPLH and DMIRS? DMIRS notes that environmental compliance inspections are carried out for mineral activities and petroleum operations, and so to what extent is it intended that compliance monitoring be coordinated in unison between DMIRS and DPLH within the whole of government framework?

### **Proposal 9: Protected Areas**

#### **Context:**

- a) It is proposed that the existing Protected Areas and ability to declare new ones will carry forward into new legislation.
- b) A new regulation will be created to authorities specific management activities by the relevant Aboriginal people.

**Question 9 Will the proposal deliver the desired outcome? If no, why not and what changes would you suggest and why?**

DMIRS notes the proposal for new legislation for regulations about access to protected areas, for the protection of the places. DMIRS has no specific comments to make in respect to this proposal.

## **3. CONCLUSION**

DMIRS commends the proposal to deliver a new Aboriginal heritage legislation and recognises the breadth of consideration that's being given to the effectiveness of the Acts operation within the context of the State Government's reforms agenda focused on client and community needs, effectual service delivery and reduction of duplication of public sector functions and enhancement of digital service delivery.

DMIRS looks forward to the opportunity to further participate in discussions with DPLH about synergies in regulatory functions in respect to the key synergies between the departments in respect to the reform proposals outlined in the Consultation Paper and further participation in subsequent legislative processes associated with the AH Act reform agenda.

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