



Government of Western Australia  
Department of Finance

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Our ref: 02865069  
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Dear Ben

## REVIEW OF ABORIGINAL HERITAGE ACT 1972 CONSULTATION PAPER

I refer to the Review of the *Aboriginal Heritage Act 1972* Consultation Paper released by your Department in March 2018 and inviting comment by 1 June 2018.

The Department of Finance's (Finance's) Strategic Projects and Building Management and Works business units have had significant interaction with *Aboriginal Heritage Act 1972* (the Act) as part of the planning and delivery processes for public non-residential building projects and managing various Government owned sites.

The importance of conserving and protecting Aboriginal heritage is acknowledged for relevant sites, ultimately defined in a new Aboriginal Heritage Act. However, Finance is of the view that there are a range of enhancements that could be made within the approval process to discern between different levels of heritage significance and the scale of a proposed development.

One of key opportunities from a review of the Act is enhancement of the integrity and status of the Register of Places and Objects as a central 'source of truth'. This would provide information to enable development impacts on heritage to be properly assessed. It could lead to a streamlined approval process and provide a higher level of certainty than currently exists to Aboriginal people and proponents on heritage matters.

The new Aboriginal Heritage Act could model the registration process of the *Heritage of Western Australian Act 1990*, whereby the act only applies to sites on the State Register of Heritage Places. This could include interim registration for nominated sites until formally assessed to determine the level of heritage significance and associated protection.

The delegation of decision-making to officers within the responsible Department for minor or low impact proposals (based on the model adopted by the Western Australian Planning Commission for delegation to officers within the Department of Planning, Lands and Heritage) would reduce approval timeframes.

Rather than respond specifically to the questions raised in the Consultation Paper, the attached Appendix provides more detailed comments on how a modernised Act could operate in the interests of all stakeholders based on the Department's experiences in working with the Act.

Yours sincerely



Richard Mann  
ACTING DIRECTOR GENERAL

30 May 2018

Att.

## APPENDIX

# COMMENTS ON THE ABORIGINAL HERITAGE ACT 1972 AND A NEW MODERNISED ABORIGINAL HERITAGE ACT

## 1. SCOPE OF ABORIGINAL HERITAGE

### Issue:

Section 5 of the *Aboriginal Heritage Act 1972* (the Act) broadly outlines what constitutes an Aboriginal site to which the Act applies, whether identified on the Register of Places and Objects (the Register) or not.

As outlined in Section 17 it is an offence to impact on an Aboriginal site unless authorised by the Registrar (Section 16) or Minister (section 18).

Because an Aboriginal site exists irrespective of the Register, this can create uncertainty for all stakeholders on understanding the level of risk associated with a development proposal on any given site.

### Proposal:

Enhance the integrity of the Register to record all heritage sites as a central 'source of truth'.

## 2. THE REGISTER OF PLACES AND OBJECTS (THE REGISTER)

### 2.1 Integrity of the Register

#### Issue 1:

Section 15 of the Act places the onus on people with knowledge of heritage sites to report these to the Registrar who shall in accordance with Section 38, maintain these on a Register.

Anecdotally it is understood that numerous heritage sites throughout the State are not currently recorded on the Register due to reticence by some parties to provide information. Withholding this information presents an ongoing breach of Section 15 of the Act and undermines the Duties of the Minister as set out in Section 10 to record such places and evaluate their relative importance for the preservation and protection of such places.

#### Proposal 1:

The current limitations of the Register leads to an inconsistent approach in the way individual sites are maintained throughout the State and undermines the intent of the Act to record, preserve and manage Aboriginal sites.

Enhancing the integrity and status of the Register as part of the new Heritage Act would provide clarity and transparency on Aboriginal sites that can inform decisions on proposals in a way that provides a streamlined and equitable approach for Aboriginal people and proponents in the conservation of heritage and future development throughout the State.

To be effective, Aboriginal people will need to be confident that recording heritage sites on the Register protects heritage, provides clear benefits and that issues around confidentiality are addressed.

Issue 2:

One of the challenges for proponents is identifying the correct Aboriginal people to consult with on heritage. Apart from traditional owners comprising native title claimant groups or a prescribed body corporate, there may be multiple language groups that occupy and live in any location, with differing layers and places of heritage, notwithstanding that the significance of each site remains important under the Act.

These circumstances can lead to divergent views amongst Aboriginal people about heritage and development proposals.

Proposal 2:

Aboriginal people who nominate heritage sites for the Register could be identified as the first point of contact (but not the only point of contact, recognising potential for other Aboriginal stakeholders in any given location) for consultation when a development is proposed.

Whether this would be seen as an incentive for Aboriginal people to formally nominate sites for registration remains to be seen, but if successful it may go some way towards modernisation of the Register and improving the efficiency and certainty of the Act.

The Department of Planning, Lands and Heritage should also be able to specify those parties with whom the proponent should consult.

## **2.2 Scalability and Levels of Significance in the Register**

Issue:

Where an Aboriginal site is recorded on the Register, the same approval processes are required regardless of the scale of the development, its impact on Aboriginal site and the level of significance of the Aboriginal site.

Furthermore, the current practice to place a large 'box' around a site when viewing the on-line Aboriginal Heritage Inquiry System confuses the significance of heritage and complicates approval processes.

Proposal:

The Register must be able to clarify heritage factors relating to a specific site so that informed decisions can be made by Aboriginal people, approving authorities and proponents regarding proposals. Information from the on-line Aboriginal Heritage Inquiry System needs to be improved and become more accurate in the detail it presents.

It could also include the identification of acceptable land uses and development control, buffers zones and no-go areas. The process for assessing the impact of development on heritage needs to be clearly articulated and agreed to by Aboriginal people.

Furthermore, as any given development proposal may have a varying impact on Aboriginal sites, the assessment should consider the scale of the development and extent of intervention against the level of heritage significance afforded any given site.

Intangible heritage significance including spiritual and mythological aspects of Aboriginal culture recorded in the Register requires a set of protocols to determine how a proposed development could be approved without compromising heritage significance. In particular, clarification on the heritage values of mythological sites would provide proponents with greater certainty on minimising and managing impacts.

Consideration could be given to assigning Aboriginal sites of local interest, State significance, or National importance, along the lines of the *Heritage of Western Australia Act 1990* and *Environment Protection and Biodiversity Conservation Act 1999* (Commonwealth), with different statutory requirements outlined in the new heritage act depending on the risk of any proposed impact on a site.

The Swan River is an example of a heritage site where the heritage values appear to be environmentally-based but where the River and its environmental values are already protected by a number of other agencies operating under various legislation.

Furthermore, as part of staged strategy to upgrade the status of the Register, any site nominated could be immediately placed on the Register on a temporary basis (at least) pending formal assessment and final registration. The process for assessment requires articulation and dealing with information on sensitive material requires careful management under agreed protocols with Aboriginal people.

### **3. APPROVAL PROCESSES**

#### Issue:

If the integrity and status of the Register can be enhanced to contain all Aboriginal heritage sites with an associated level of significance determined, the potential exists to establish a more streamlined and effective approval regime based on a higher level of confidence that the impact of any development on an Aboriginal site can be properly and proportionately assessed.

#### Proposal:

The default position should be that where there are no registered Aboriginal sites within a project development area, then the proposal proceeds without reference to the Act. However, given certain circumstances, specifically in remote regional areas, a process could be implemented to impose appropriate conditions to ensure adequate surveillance during the works such as a requirement for a Heritage Management Plan which would establish the appropriate protocols, including a 'stop work' requirement in the event that an artefact or cultural material is identified during construction.

Where an Aboriginal site is registered and impacted by a proposed development, a tiered approval regime could be considered based on the level of significance of the Aboriginal site and the associated impact by the proposal. Decisions could be determined by the Minister, an assessment committee such as the Aboriginal Cultural Materials Committee, or similar, or by delegation to senior departmental officers as the case may be.

The delegation of decision-making powers by the Western Australian Planning Commission to officers of the Department of Planning, Lands and Heritage may be a model suitable for consideration.

Regulation 10 could be modified to widen the scope of low-risk proposals which could be approved by the Registrar.

Section 18 provides an approval for the owner of the land to undertake agreed work that impacts on a registered site with or without conditions. The approval, while granted to the owner, is not automatically transferred to a new owner if the land is sold as it would for example, for a development application determined under the *Planning and Development Act 2005*. As a streamlining mechanism, consideration should be given to enabling an approval granted under a new heritage act to be transferred to another party for the same proposal.

#### **4. ABORIGINAL HERITAGE AND THE PLANNING PROCESS**

##### Issue:

Aboriginal heritage can be a hidden factor when land use plans support development in a given area.

##### Proposal:

State planning processes for developing structure plans, local planning schemes and rezoning proposals should identify Aboriginal heritage implications upfront so adequate protective measures can become transparent and readily addressed when a development proposal is contemplated at a later date.