



Our Ref: D08184; 19/074890

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

Dear Mr Davies,

ABORIGINAL HERITAGE ACT 1972 REVIEW

Thank you for the opportunity to provide a submission to the above review. In Western Australia the Department of Fire and Emergency Services (the Department) performs a critical role coordinating emergency services for a range of natural disasters and emergency incidents threatening life and property.

Traditionally the Department has been an emergency response focussed organisation. However, in following the recommendations from the January 2016 Waroona Bushfire Special Inquiry and community feedback, a new Rural Fire Division has been established to broaden the focus on bushfire management. The Rural Fire Division will decentralise and improve rural fire management by the Department through increased investment in bushfire risk mitigation and bushfire prevention.

The comments provided below take into account this new emphasis for the Department as well as being mindful of the role of the Department in responding to natural disasters and emergency incidents.

Proposal 3(C) (III) – Functions of The Minister

Where the Minister for Aboriginal Affairs is intending to make a decision on a land use proposal that may have a significant impact on Aboriginal heritage values or involve projects deemed to be of State significance, the Department would want to ensure the Minister takes into account any bushfire risk that may arise from the proposal and consider options to mitigate the risk.

This can be achieved by ensuring the referral process outlined in *Proposal 5* incorporates the criteria currently used for referrals to the Department's Land Use Planning area in accordance with *State Planning Policy 3.7 - Planning in Bushfire Prone Areas* and the *Guidelines for Planning in Bushfire Prone Areas*, which guides decision makers on bushfire risk issues for planning proposals.

The criteria are set out below:

- All strategic planning proposals in designated bushfire prone areas;
- If the Bushfire Attack Level (BAL) has been calculated using a Method 2 assessment as outlined in the Australian Standard AS3959;
- One or more of the bushfire protection criteria elements have been addressed through the use of a performance principle;
- Unavoidable development in BAL-40 or BAL-FZ;
- Subdivision or development applications involving vulnerable or high-risk land uses;
- Where there is a conflict of opinion between the decision maker and proponent in relation to bushfire risk;
- Expert technical advice on bushfire risk is required by the decision maker where refusal of the application is contemplated; and
- Expert technical advice on bushfire risk is required by the decision maker for review at the State Administrative Tribunal.

Proposal 4 – Aboriginal Heritage Register

The proposed new Act should allow arrangements to be made for the sharing of information, including spatial data, with entities that have legislative functions, including but not limited to, emergency management functions for use during emergency incidents.

Allowing the sharing of contact details for local Aboriginal groups related to an area would be beneficial for use when undertaking bushfire risk mitigation activities to ensure there is not any unnecessary impact on the cultural values of the area.

General – Mitigation and Emergency Response Activities

The Department requests the proposed new Act consider the following matters in relation to mitigation or response activities for bushfires and other emergencies which may occur under the *Bush Fires Act 1954*; the *Fire and Emergency Services Act 1998*; the *Fire Brigades Act 1942*; and the *Emergency Management Act 2005* (the Emergency Acts) or other written laws.

Item 1 – Application to Emergency Activities

Clause 2 (page 13) of the *Esperance Nyungar Government Standard Heritage Agreement* (ENGSHA) states:

This Agreement does not apply to Activities which are urgently required to secure life, health or property, or to prevent or address an imminent hazard to life, health or property of any person in accordance with the law.

Whilst section 25 of the *Criminal Code* may apply to remove criminal responsibility for persons who have acted in response to a sudden or extraordinary emergency, a similar provision to Clause 2 of the ENGSHA should be included in the proposed new Act to ensure clarity regarding the application of the proposed new Act to actions taken in response to an emergency, whether under the Emergency Acts or other written laws.

Item 2 – Define Allowable Minimal Impact Activities

There should also be consideration of how the proposed new Act will apply to the undertaking of mitigation or prevention activities under the Emergency Acts or other written laws when there is not an emergency. The ENGSHA defines the terms *Low Ground Disturbance Activity* and *Minor Impact Activity*. Both of these terms refer to firebreaks at items (j) and (i) respectively. The first term refers to maintaining, which includes widening, expanding or moving. The second term refers to maintaining, but does not include widening, expanding or moving.

It is requested that defined terms similar to the above from the ENGSHA should be incorporated into the proposed new Act. These should ensure that low/minimal impact mitigation or prevention activities undertaken pursuant to the Emergency Acts or other written laws for public safety reasons do not contravene the proposed new Act.

Item 3 – Provide Exemption for Certain Activities

Schedule 6 of the *Environmental Protection Act 1986* (the EP Act) provides circumstances in which clearing can be done without requiring a permit under the EP Act. The Department requests consideration be given to inserting a similar Schedule in the proposed new Act to exempt activities undertaken pursuant to a written law, such as the requirement for land owners or occupiers to clear a firebreak (s.33 *Bush Fires Act 1954*), or a function such as the FES Commissioner carrying out fire prevention measures that are considered necessary (s.10(1)(e) *Bush Fires Act 1954*).

Clauses 1, 10, 11 and 12 of Schedule 6 of the EP Act are the applicable references to the Emergency Acts.

If you require clarification regarding any of the above matters please contact Mr Paul Simpson, Principal Policy Officer Office of Bushfire Risk Management, on 08 6551 4041 or paul.simpson@dfes.wa.gov.au.

Yours sincerely



**DARREN KLEMM AFSM
COMMISSIONER**

29 May 2019