



Ms Gail McGowan
Director General
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Dear Ms McGowan

REVIEW OF THE *ABORIGINAL HERITAGE ACT 1972*

Thank you for your letter dated 11 March 2019 regarding the review of the *Aboriginal Heritage Act 1972*.

The Transport Portfolio provides the attached comments in relation to the proposals outlined in the discussion paper.

Yours sincerely

Richard Sellers
Director General

30 / 05 / 2019

Att

Public Transport Authority

Overview

- Proposal 3(C) - Please define “proposals of State Significance or where significant impact... is involved”.

Proposal 1

- “Intangible heritage values such as songs or stories that are tied to particular places will also be acknowledged by inclusion on the Aboriginal Heritage Register.”
 - What impacts will this have on the controls that will be applied for intangible heritage values over the sites currently in the register?
 - These songs and stories often are associated over larger land areas, how will this be managed? Particularly over inter-state boundaries?

Proposal 3

- How will having an Aboriginal Heritage Service (local body), that is an Aboriginal Corporation ensure there is no bias in the selection of the heritage consultants for surveys? How will this improve and ensure the ‘right people speaking for country’ heritage consultants are involved in the survey?
- What other functions will this corporation have? In other jurisdictions they assist in the regulation and management of agreements and native title. Is this the case here?
- Where Local Aboriginal Heritage Services will be formed to meet an initial need (bodies corporate etc.) how are they proposed to be formed financially in their infancy? Is there provision for funding support from the Department/Aboriginal Heritage Council?

Proposal 5

- “referral process analogous to that provided in the *Environmental Protection Act 1986* (EP Act) is a means to accomplish this. Indeed, it may be possible (even preferable) to use the same referral document to reduce duplication.”
 - If indeed this process uses the same referral document, then the heritage approval timeframes will always be linked and locked to the environmental approvals process (>2 yrs). This may present a risk to many development organisations. A separate process not linked to the EP Act should be considered.
 - In the above scenario utilising the EP Act referral, what will be the role the Minter for Environment?
- “Where a proponent has a ratified heritage agreement covering the area of a land use proposal, the heritage processes contained within it may be completed prior to a land use proposal being referred. The results can be tendered with any referral to expedite approvals processes.”
 - It is unclear how this will this work and expedite the approvals process.
- “Consents to undertake an activity or range of activities will run with the land, so that proponents acquiring rights and interests in land can pursue activities that have already been consented to without further approvals being sought under the new legislation. However, where a new proponent significantly modifies the activities or proposes entirely different land uses, fresh approvals will be required.”

- Recommend a decision-making process or flow chart to be released for this to provide clarity.
- It is acknowledged in the discussion paper that heritage can be lost through accidental or needless destruction and that this has occurred previously.
 - Will any actions or measures from this review assess opportunities to reinstate or recover some heritage values where opportunities exist?

Department of Transport

The Department of Transport (DoT) is supportive of the review proposals and welcomes the modernisation of the legislation and more streamlined process to ensure protection of Aboriginal heritage. DoT would like to be consulted further during the legislation drafting stage.

Proposal 1

- The retention of key elements within the current legislation is supported, including:
 - Covenants (s 27) - This section enables the Minister to bind the land, or a portion of it, for a period of time or permanently, to preserve heritage values and impose conditions. Section 27 could be readily utilised to protect heritage values in agreements with Aboriginal people to ensure the protection of heritage values within an area for an agreed amount of time.
 - Honorary Wardens (s 50) have the potential to assist Aboriginal people and land owners to effectively manage Aboriginal heritage values on the land. While the current proposal does not support the retention of Honorary Wardens, consideration should be given to incorporating this role into the powers of Local Aboriginal Heritage Service providers and/or Government employees actively involved in land management such as National Park Rangers.

Proposal 2

- The *Aboriginal Heritage Act 1972 (AHA)* fails to acknowledge intangible values Aboriginal people place on country, nor does it adequately address the legislative status of Aboriginal mortuary practices and skeletal remains. Therefore, the definitions should be updated in any revision of the legislation.

Proposal 3(A)

- The Discussion Paper identifies a desire to enable local Aboriginal people/bodies to provide heritage services. The following questions regarding these bodies need to be addressed in any new legislation:
 - How are Traditional Owners or holders of cultural knowledge that are not part of the Local Aboriginal Heritage Service engaged in the consultation and approval process?
 - Will there be a mechanism for aggrieved parties (e.g. Traditional Owners excluded from the Local Aboriginal Heritage Service, and land owners/proponents) to appeal against the actions of the Local Aboriginal Heritage Service?
 - Will fees for services be regulated under the proposed legislation/regulations, and if so, how?
 - Will mechanisms be put in place to ensure timely responses to requests for services?

- What process will exist in instances where services or agreements cannot be agreed?
- Will agreements or heritage decisions made at the Local Aboriginal Heritage Services level be registered and publicly available?
- Are Local Aboriginal Heritage Services in any way to replace Honorary Wardens under section 50 of the current legislation (i.e. have powers of inspection etc)?
- Will there be an easy way to identify who the Local Aboriginal Heritage Service is for an area or project and a clear process to follow where there isn't a Local Aboriginal Heritage Service, for example a list on the DPLH's website?

Proposal 3(B)

- Greater clarity is sought on:
 - The composition of the Aboriginal Heritage Council (AHC), its governance structure and role.
 - The support provided to AHC and relationship with the Department of Planning, Lands and Heritage (DPLH).
 - How and when the AHC decision-making processes and outcomes will be made available to the public.

Proposal 3(C)

- It is not clear how the process is intended to work, or how and when the Minister's involvement is to be determined.

Proposal 3(D)

- Consideration of the following is required:
 - DPLH must be adequately resourced with appropriately qualified and experienced professionals.
 - Clearly defined accountability within DPLH are required to ensure actions and advice are consistently applied under the legislation.

Proposal 3(E)

- The Heritage Information Submission Form for site recording should be reviewed.
- Information/Fact Sheets should be provided on the identification and reporting of various 'site types'.
- Guidelines and Templates be provided to improve the standard of Heritage Survey Reports.
- Greater clarity required on the use of surveys including expiry date of surveys and on the potential sharing of surveys for an area where like projects are being undertaken.

Proposal 4

- The following actions are recommended:
 - The Register must be maintained, regularly updated and be publicly accessible.
 - The method by which access to site files and heritage survey reports is provided must be reviewed. The current system of providing access via 'lock-

lizard' is ineffective, with electronic access often expired by the time the requested files are sent by DPLH.

- Mistakes and inaccuracies in the Register must be able to be easily notified to DPLH and those inaccuracies corrected in a timely manner.
- The Register must include the mapping of Protected Areas.
- Greater search functionality must be incorporated into the Register using search engines based on 'site type', 'site informant', 'site recorder' etc.
- Heritage Survey Areas should be differentiated by the type of heritage survey conducted, e.g. 'desktop', 'site avoidance', 'site identification' etc.
- The Register should display approval areas and agreement areas.
- The Register should display the areas in which the various Local Aboriginal Heritage Services operate and the contact details for those services.

Proposal 5

- Further detail is required on:
 - how disputes will be arbitrated and/or resolved.
 - the expected timeframes, fee structures, recording and publication of the process and outcomes; and
 - the ability for assessments and approvals to be transferred with the ownership of the land.
- At present, non-deleterious works that enable site protection and management can be undertaken under Regulation 10. Consideration should be given to ensuring a process is put in place that allows for timely works to be undertaken for the protection and management of heritage values.

Proposal 6

It is unclear if agreements ratified by the AHC will be registered and/or publicly available.

Proposal 7

- The AHC/DPLH should be required to keep all parties informed of each stage of the approvals process so that issues can be avoided and/or appeals lodged in a timely manner.

Proposal 9

- DPLH should be adequately resourced for their protection/management role and Protected Areas be recorded on the Aboriginal Heritage Register.

Additional Comments

- Consideration should be given to providing copies of "open" site files and heritage survey reports (i.e. those records that currently do not require the consent of the Aboriginal informants to view) to State Government agencies and Government Trading Enterprises that have land vested in them and/or hold reserves under management order, and are directly responsible for the day-to-day management of land that contains Aboriginal heritage values. Provision of this information would enable informed and effective management of heritage values.

Main Roads

Proposal 1

A key element will be ensuring adequate resourcing in providing administration for the legislation, regulations, policies and guidelines so that consistent and timely advice is provided to all stakeholders navigating the new regime.

Proposal 2

Main Roads supports the proposal to use the Burra Charter's definition of places, and the protection of all Aboriginal places, whether registered or not, which is consistent with the provisions of the current *Aboriginal Heritage Act 1972*.

The provisions should consider an assessment of the evidence of the utilisation of specific natural objects before being considered an object under the new Act.

Definitions of places would need to consider regional ideas of significance and importance, particularly in terms of intangible values. Definitions of archaeological places and objects (containing physical evidence of past Aboriginal people) need to be more detailed to inform clarity as to what needs to be avoided or managed during development works (e.g. determining when an artefact is scattered and not regarded as a place). These definitions should include an assessment on the scientific merit and value of the place.

Main Roads supports the proposal that burials, skeletal and ancestral remains are protected under the new Act, which also needs to provide for their management. Aboriginal ancestral remains, and any associated cultural material, should be recognised as Aboriginal heritage and should be reported with the assistance of a specialist and managed according to the wishes of the appropriate descendants.

Proposal 3(A)

Suitably qualified heritage practitioners with the appropriate level of knowledge should have a mandated involvement with the Local Aboriginal Heritage Services (LAHS). This will ensure that the appropriate management techniques are upheld in accordance with other proposed aspects of new legislation and regulations. The LAHS will no doubt be obligated to adhere to heritage survey and management standards as established elsewhere with the proposed new Act.

Main Roads is of the view that the role of the Aboriginal Heritage Council to seek advice on the acceptability of the land use proposals should be restricted to that area within an Aboriginal heritage site and not for the overall land use activities.

In order for proponents to adequately undertake the risk assessment envisaged in the diagram, "Process for assessing land use impact on Aboriginal heritage" it should be a requirement as opposed to an option that the Aboriginal Heritage Register is updated by the LAHS. The level of cultural detail to be recorded is for the LAHS or Department of Planning, Lands and Heritage (in the absence of a LAHS) to determine; however, the presence or absence of a site where prior surveys have been undertaken is instrumental in a risk assessment.

As noted below under Proposal 6, a substantial amount of resources are invested in negotiating heritage agreements. Adhering to a template agreement that has been agreed to by the LAHS and the Government, and is reviewed every two years, would reduce the time taken to negotiate agreements, particularly if the template was to stipulate timeframes and cost schedules.

Where an agreement cannot be made between a proponent and a LAHS, it is suggested the matter is referred for a resolution after a set period of time of the parties negotiating in good faith has elapsed.

Proposal 3(B)

The ability to establish sub-committees would greatly assist the Chair in fulfilling the functions of the Aboriginal Heritage Council (AHC). A key consideration for this Council is the frequency of meetings and the remuneration for their time. The current experience with the Aboriginal Cultural Materials Committee (ACMC) is that there has been a bottle neck in decision making, which could potentially also occur with the AHC if it does not meet regularly enough to action outcomes.

Main Roads suggests that the standards set by the AHC are compiled in consultation with experienced heritage practitioners and Aboriginal groups and that statutory timeframes are applied to the process of making decisions and referrals to the Minister. This will ensure the operation of the new system is efficient.

Proposal 3(E)

Main Roads supports this proposal. A Directory of Heritage Professionals would assist proponents' contract people assessed by DPLH as holding the appropriate qualifications and experience.

A standardised listing, similar to the Heritage Council's inContact, would guide proponents unfamiliar with heritage professionals and their areas of expertise to make a selection based on their needs.

Proposal 4

Main Roads considers that it would be beneficial to review the status of current places on the Register that are listed as 'Stored Data/Not a Site' and what consultation is required for these areas under the new system.

The use of predictive modelling to assist in risk assessments is supported, as it will increase the level of awareness as to why a heritage survey is required despite no sites appearing on a register.

Proposal 5

Main Roads would encourage the consideration of low and high levels of ground disturbance (impacts) in relation to activities as well as a category of temporary (impacts) for sites would only be impacted for a short period and not permanently altered. For example, Main Roads undertakes bridge maintenance, which has a temporary impact on ethnographic sites such as waterways. The change from consents being restricted to a specified landowner, to consents being linked with an area of land is welcomed.

Main Roads notes that there would need to be clear distinction that the “new” users (or their agents) are responsible for any conditions set for proposed activities on a site, to limit the liability of the original proponent or the landowner. Main Roads is supportive of the proposal that the reasons for a decision on the acceptability of a land use should be provided, and is also supportive of all parties having a right of appeal.

Proposal 6

As a Government agency, Main Roads expends a considerable amount of resources towards negotiating Heritage Agreements with groups across Western Australia. While Main Roads supports the empowerment that Heritage Agreements provide Aboriginal Native Title Claims, this aspect of heritage management is the single most timely and problematic aspect. In a number of cases, we have found that an agreement cannot be reached or that the responses by Native Title Groups has not been timely. A mechanism to assist Government agencies to obtain timely responses so equitable agreements can be made is needed to make this aspect of the new system for Aboriginal Heritage management in Western Australia work.

Main Roads is of the opinion that it would assist all stakeholders if a standard schedule of costs and timeframes can be developed such as that utilised in the Government Standard Heritage Agreement.

Proposal 7

Main Roads is supportive of the proposal to improve transparency of decision making by publishing decisions. Main Roads is also supportive of all parties having rights of review and appeal, and of the nomination of the State Administrative Appeals Tribunal being the review body for any person potentially negatively impacted by a decision.

Proposal 8

Main Roads is supportive of the proposal to modernise enforcement regime through limiting the ‘ignorance defence’, increasing the limitation period and increasing penalties.

Proposal 9

Main Roads supports the inclusion of Protected Areas into the new legislation that is assisted by a clear process for the identification of new areas, noting that existing Protected Areas will continue to be protected.”