

Review of the Aboriginal Heritage Act (1972) – Phase 2
Submission of the
Aboriginal Cultural Material Committee

“It’s been a long time coming.” (ACMC Member)

Overview

The Aboriginal Cultural Material Committee is established under sections 28 to 32 of the Aboriginal Heritage Act 1972 (‘the Act’) as the specialist heritage body to the Minister of Aboriginal Affairs.

In March 2018 the ACMC presented a submission to the first phase of the AHA Review. The key principles underpinning that submission (and which remain relevant) were:

- Protection – the primary role of the Act must be to establish a comprehensive regime which provides meaningful and ongoing protection for places, objects and intangible aspects of Aboriginal cultures that retain importance for First Nations peoples across WA;
- Acknowledgement – firstly of the fact that distinct Aboriginal laws and cultures continue to guide Aboriginal people’s lives, and provide the basis for determining the nature and importance of their heritage;
- Recognition – particularly of the key role local traditional owners and knowledge holders in making decisions about important places and objects on their country; and
- Respect – for all aspects of Aboriginal heritage, based on increased understanding, promotion and celebration of this significant aspect of Aboriginal cultures.

The ACMC is pleased that a number of recommendations put forward in their original submission now appear as proposed elements of a new heritage act. These include a primary role for local traditional owners and knowledge holders in identifying, and speaking for important stories, objects and places, a streamlined process of recognising and protecting Aboriginal heritage, and greater deterrents for damaging Aboriginal heritage.

The ACMC is supportive of the Government’s approach to legislate a new AHA. It agrees with the suggestion that changes required to the current Act are so widespread and so comprehensive, that tinkering with the existing Act is not an option.

In general then, the ACMC supports the thrust of specific proposals for new legislation. It has particular comments to make about a number of proposals, and these are detailed in the remainder of this submission.

Proposal 1: Repeal the Aboriginal Heritage Act 1972 and deliver new Aboriginal heritage legislation

The ACMC agrees that new legislation is required because of the scope of change required of the outdated 1972 Act. It is hoped that drafting new legislation will enable comprehensive change to the entire heritage system, which implements key themes of local Aboriginal control, increased transparency, and increased protection.

Renovation of the old Act is not an option. What's needed is a complete rebuild. It's time to start again.

Proposal 2: Update definitions and scope of new Aboriginal heritage legislation

The ACMC supports the proposal to expand the definition of Aboriginal heritage, and increase the scope of new heritage legislation.

The ACMC is particularly pleased that its recommendation to adopt a wider definition of heritage that recognises cultural landscapes, has been adopted. It is essential that dreaming tracks are covered by any new definition. This understanding of the continuing importance of 'intangible heritage' such as songs and stories, aligns more closely with that of many Aboriginal people.

The Committee anticipates a number of positive developments will flow from this broader recognition, including greater understanding of Aboriginal heritage by the wider community, as well as increased collaboration between Aboriginal Heritage Services to look after heritage which exists over large tracts of country.

The ACMC also believes the newly proposed protection of Aboriginal ancestral remains is long overdue.

Proposal 3(A): Local Aboriginal Heritage Services

The ACMC supports the formation of Local Aboriginal Heritage Services (LAHS) to ensure the right traditional owners and knowledge holders speak for country and heritage, but makes the following comments:

It is acknowledged that existing corporations such as proscribed bodies corporate (PBCs) that already deal with land matters are likely, as the Discussion Paper notes, to take on the role of LAHS. Critically, these bodies must ensure the right people are having a say about their heritage. As with other LAHS, PBCs will need to ensure that not just native holders, but all those Aboriginal people with knowledge of cultural places are consulted. ACMC members have experience of some PBCs where a lack of cultural authority means it is not always the right people who are engaged in activities such as heritage surveys. Monitoring of LAHS (by the Aboriginal Heritage Council) will therefore be important, particularly in the early stages of implementing a new Heritage Act.

The ACMC again notes that a positive development within the proposed heritage regime is that it should encourage collaboration between neighbouring LAHS in protecting heritage places and stories that ‘cross boundaries’ of different LAHS. Again, this brings the heritage regime more in line with the way Aboriginal people have been operating for thousands of years.

Given that a number of PBCs already struggle with resources, the ACMC has some concern that if these bodies are given more work to do in becoming LAHS without being provided more funds, and capacity building assistance, they may be being set up to fail.

Proposal 3(B): The Aboriginal Heritage Council

The ACMC supports the formation of the Aboriginal Heritage Council (AHC), and makes the following comments:

As stated in its submission to Phase 1 of the Review, members of the ACMC expressed their unease at evaluating the importance of other people’s heritage. The committee endorses the proposal that this new central committee, the AHC, will not have that role, which is more properly carried out by local traditional owners and knowledge holders.

The ACMC agrees with the creation of this central oversight committee which is to provide expert strategic advice to the new heritage regime, both ‘down’ to LAHS (by formulating guidelines, providing advice and oversight) as well as ‘up’ to the Minister (by advising on major proposals, and those that heavily impact Aboriginal heritage).

The role of monitoring the set up and operation of new local heritage bodies will require a broad range of skills and experience, with reference to Aboriginal law and culture, tenure, land management and planning, agreement making and commercial negotiations.

As such, the ACMC understands and supports the need for an expertise based committee, whose membership reflects a broad array of skills and experience – noting ‘skills and experience’ are not the same as, or only require, the acquisition of university degrees. As such, the committee firmly believes the requirement for expertise is compatible with a strong Aboriginal presence on the committee.

Given that it is Aboriginal people’s heritage that is rightly at the centre of any new legislation, the ACMC feels strongly that the AHC, while comprising a broad range of experts, should also be made up of a majority of Aboriginal people. New legislation should be explicit in stating not only that the chair of the AHC be an Aboriginal person, but that *at least* 4 of the remaining 8 members be Aboriginal as well.

The ACMC believes that such an outcome would be far more in keeping with the reforming intent of new legislation than the current proposal to only mandate that the chair of the AHC be Aboriginal.

Proposal 3(C): The Minister's Role

The ACMC supports the continuing role of Minister, but makes the following comments:

Given the reality that WA is a mining state, the ACMC understands it is very unlikely that an Aboriginal body (such as a LAHS or the AHC) would have the final say on a significant heritage matter, rather than the Minister (as happens to some extent in Victoria). However, we know this continues to cause heartache for many Aboriginal people, and maintains the illogical position that a non-Aboriginal person has the ultimate say about the protection of Aboriginal heritage.

The ACMC supports the proposal that the Minister may delegate decisions to the AHC where proposals have a low impact on Aboriginal heritage, and agrees that this should act to relieve some of the existing backlog.

It is also encouraging that the Minister will be required to both explain and publish heritage decisions. This increased transparency should increase the level of trust Aboriginal people – and others – have in the new heritage regime.

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

The ACMC supports the described role for the Department.

However, the committee notes the Department is likely to need an increase in human and other resources to carry out the range of activities foreshadowed in current proposals, including to

- Support the AHC,
- Advise the Minister,
- Capacity build LAHS,
- Carry out the role of a LAHS where there is none, and
- Investigate breaches of the Act.

The proposal that DPLH acts as a LAHS due to the absence of failure of an Aboriginal body is cause for some concern. Whether is in statute of legislation, it may be worth stating that any Departmental role in acting as a LAHS should be for a limited time only.

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

The ACMC supports the proposal to establish a register of Heritage professionals.

Proposal 4: Retain the current form and function of the register of Aboriginal Places and Objects but rename it the Aboriginal Heritage Register

The ACMC supports the proposal to retain the current form and function of the register but rename it the Aboriginal Heritage Register

Proposal 5: Introduce a referral mechanism to facilitate tiered assessments and approvals of proposed land uses

The ACMC supports the proposal that a tiered assessment process for proposed land uses is introduced.

The Committee endorses a process where land use which avoids or has minimal impact on heritage can be endorsed by the AHC, after assessment by traditional owners or knowledge holders, via the LAHS. This will go some way to avoiding the bottlenecks which are created in the current process where the ACMC is required to adjudicate on multiple, low level matters.

The process will only work, however, if there is clear and explicit recognition of the critical importance of consulting with the LAHS.

The ACMC supports the increased transparency inherent in the current proposal, whereby again, reasons for decisions are to be provided, as is a right of appeal.

Proposal 6: Encourage and recognise agreement making

The ACMC supports the proposal to support and encourage agreement making.

The committee endorses any mechanism that encourages a collaborative rather than adversarial approach to managing Aboriginal heritage.

As proposed, it will be important for the AHC to consider and ratify agreements made by LAHS and proponents, particularly considering the different levels at which LAHS are likely to develop. While some bodies in regions like the Pilbara may have a relatively long history of agreement making with miners and other proponents, other LAHS may be newly established, and require more intensive assistance in negotiating and concluding heritage agreements.

The ACMC applauds the greater integration between native title and the new heritage regime that will be afforded by the recognition of existing native title agreements, including ILUAs.

Proposal 7: Transparency and appeals

The ACMC supports the proposal to increase transparency in the new Heritage regime.

The committee strongly support new right of Traditional Owners to appeal decisions. This long overdue reform corrects the glaring injustice inherent in the existing Act whereby land users, not Aboriginal people, could appeal decisions they felt were unfair.

It also strongly supports the new emphasis on decisions being published so as to increase transparency and accountability. This will also increase trust in the system.

Proposal 8: A modernised enforcement regime

The ACMC supports the proposal to introduce a modernised enforcement regime.

The committee strongly supports the strengthening of penalties from as low as \$20,000 to \$1 million.

This will assist with increasing the authority of the new regime, particularly with respect to land users. It is also likely to increase the level of trust Aboriginal people have in a new heritage act, and the regime set up around it.

Proposal 9: Protected Areas

The ACMC supports the proposal to retain and provide increased flexibility in Protected Areas.

Concluding Remarks

For close to five decades, Aboriginal people in WA have had to put up with a heritage regime that fails to respect and prioritise the very people whose heritage it purports to protect. The Aboriginal Cultural Material Committee applauds the Government of Western Australia not only for its broad ranging review of the Aboriginal Heritage Act, but importantly, for also undertaking a comprehensive consultation as part of that review.

The ACMC supports existing proposals which place Aboriginal knowledge holders at the centre of a new regime which will be more transparent, more efficient, and allow Aboriginal people at a local and state level to oversee a system that truly protects their heritage.

The Committee looks forward to the next phase of the review with hope that the key guiding principles articulated by Aboriginal people all over WA will be evident in proposed new legislation.

As one member of the ACMC rightly put it, *'it's been a long time coming'*.