



30 May 2019

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

By Post and E-Mail to: AHAreview@dplh.wa.gov.au

Dear Sir,

**Review of the *Aboriginal Heritage Act 1972 (WA)*
Submission on behalf of Miriuwung and Gajerrong #1 (Native Title Prescribed Body Corporate) Aboriginal Corporation RNTBC (ICN 4506) and Miriuwung and Gajerrong #4 (Native Title Prescribed Body Corporate) Aboriginal Corporation RNTBC (ICN 4693) (together, the MG PBCs).**

Thank you for the opportunity to submit the views of the MG PBCs to you with respect to the proposed modernisation of Aboriginal heritage management in Western Australia.

As has been the subject of many earlier submissions, it is universally acknowledged that the existing legislation represents outdated concepts of the rights of Aboriginal people regarding the protection and management of their heritage. The existing system frustrates both the commercial sector and the Aboriginal people seeking to protect their places of historical value. For the MG PBCs particularly, current processes fail to recognise the determined native title rights of the Miriuwung and Gajerrong people and cause confusion for third parties when dealing with Aboriginal people in the region.

MG representatives attended with interest the reform consultation held in Kununurra on 22 May 2019. Please find a submission on behalf of the MG PBCs regarding the reform proposals **attached** as a Schedule to this letter. Areas of particular concern have been italicised.

I look forward to being a part of future stages of this process with the Department of Planning, Lands and Heritage and to continuing to support the Minister with his innovative proposals for much-needed reform. I eagerly await the day when MG people have a recognised role in making decisions that affect their history so that they can protect and enjoy those places, and the stories they tell, into the future.

Yours sincerely,

Dominique Reeves
Senior Legal Counsel
MG CORPORATION

SCHEDULE: SUBMISSION BY THE MG PBCS REGARDING ABORIGINAL HERITAGE REFORM

Proposal 1: Repeal the *Aboriginal Heritage Act 1972 (WA)* (the Act) and deliver new Aboriginal heritage legislation

The MG PBCs agree that reform of the existing legislation regarding the protection of Aboriginal cultural heritage is overdue and support the proposals to protect heritage in a way that reflects international best practice.

MG people are truly grateful that, for the first time, a State Minister is prepared to take a strong and innovative approach to Aboriginal heritage reform.

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

Proposals to extend the scope of what is covered by the Act to include ancestral remains, places that are cultural landscapes and place-based intangible heritage are commended.

Comments made by MG people in the consultation session make it clear that the proposal not to extend the definitions in the new legislation to include intellectual property rights is an unpopular one.

For too long, Aboriginal people's art, stories, songs and medicines have been quietly stolen from them without recognition. Whilst the MG PBCs recognise that intellectual property is generally the remit of Commonwealth legislation, they believe that the State must set a reasonable benchmark for the protection of Aboriginal IP. This historic reform of the Act provides a unique and once-in-a-lifetime opportunity for the State to demonstrate its support of Aboriginal people and to acknowledge the wrongs of the past: this chance to protect Aboriginal IP should not be squandered. *The MG PBCs submit that the Act should be extended to protect Aboriginal people's intellectual property.*

Proposal 3A: Local Aboriginal Heritage Services

The MG PBCs agree entirely with the proposals to entrench in legislation what every Aboriginal person already knows: only the right people can speak for country. Traditional owners and knowledge holders must be actively involved in decision-making for heritage management and land use in their areas of cultural and traditional responsibility.

MG people have managed the protection of their Aboriginal heritage for over 60,000 years. The MG PBCs have been actively engaged in heritage management within the MG native title determination area on behalf of MG people since their native title rights were first acknowledged by the courts in 2003. Established systems have been put in place by the MG PBCs to promote culturally appropriate consultation with the right people to speak for country, to facilitate agreement-making with third party entities and to focus on achieving best practice heritage outcomes for MG people.

The MG PBCs have very serious concerns about the ways in which LAHS may be appointed and the lack of clarity in the reform proposals regarding how such appointments will be made and managed by the Department of Planning, Lands and Heritage (**the Department**).

Notwithstanding the inadequacies of the existing legislation, the MG PBCs have long been working with MG people and the commercial sector to achieve outcomes for both land use and the protection of Aboriginal heritage within the MG determination area. The efficacy of the service that the MG PBCs deliver is embedded in their unique representative status, their established systems of consultation and governance, and their capacity to deliver clear and certain outcomes for all parties.

It is the MG PBCs' position that matters of native title and Aboriginal heritage cannot be separated. To do so would weaken the native title representation of MG people and diminish the clarity and certainty that the MG PBCs are able to provide. It would also cause considerable confusion to all parties and add layers of unnecessary bureaucracy for the commercial sector when trying to progress any land use applications.

Clearly, in areas where there is no determined native title there will need to be other mechanisms to establish LAHS. The MG PBCs also acknowledge that there may be areas where the established PBCs do not have the resources nor the capacity to deliver Aboriginal heritage services and where the PBC directors choose not to become the LAHS. However, *in areas where determinations have been made, it is the MG PBCs' view that the PBCs must have a right of first refusal to become the LAHS.*

Whilst it is understood that there are regions where the registered PBCs are felt by some community members not to accurately represent the broader Aboriginal group, issues of this nature must be dealt with within the native title system. The Aboriginal heritage regime should not be drafted so as to seek to rectify inefficiencies within the native title system.

An obvious question with respect to the establishment and management of a LAHS is regarding funding. *The reform must ensure that LAHS are adequately and appropriately resourced to allow for an efficient and capable service to be delivered and to ensure that the needs of the traditional owners and knowledge keepers are met.*

The MG PBCs already deliver a highly successful and popular heritage service. They look forward to a time when they can be formally recognised as the providers of that service.

Proposal 3B: Aboriginal Heritage Council

It is agreed that a system needs to be established by the State to provide strategic oversight and advice in respect of the protection, conservation and management of Aboriginal heritage.

The establishment of an AHC as the central body to provide advice and strategic oversight of the Aboriginal heritage system is commended, as is the proposal that the AHC provides a central point of advice to other authorities regarding matters Aboriginal heritage and promotes Aboriginal heritage and ensures that it is respected, maintained and managed in accordance with best practice.

Concerns were raised by MG representatives in the consultation meeting regarding the composition of the AHC, with a generic view that a higher proportion of the AHC should comprise Aboriginal people.

The MG PBCs would like the role of the AHC to complement that of the LAHS but not to usurp the decision-making power of the native title holders when it comes to matters of Aboriginal heritage. In particular, the proposal that the AHC may make decisions on land use proposals that could affect Aboriginal heritage if the proposals demonstrate a neutral or positive impact on heritage should only be made by the AHC in the event that the LAHS agrees with that position. *No decisions on any land use proposal should be made by the AHC unless already accepted by the relevant Aboriginal people who speak for that country.*

Proposal 3C: The Minister's Role

The MG PBCs do not object to the Minister retaining overall accountability and decision-making with regards to the Aboriginal heritage system but submits that *the Minister's powers must be subject to the views of the relevant Aboriginal people.*

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

The MG PBCs have no objection to the Department retaining control of Aboriginal heritage management but strongly submits that it must:

- be given adequate resources to efficiently administer and manage Aboriginal heritage matters;
- ease the existing backlog regarding the registration of Aboriginal heritage sites;
- be sufficiently resourced to deliver enforcement action when needed; and
- provide Department employees with appropriate cultural training regarding Aboriginal people and the importance of the protection of their sacred sites.

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

The MG PBCs welcome reform to regulate industry professionals and assist LAHS to use appropriately qualified people to assist them in the management of their Aboriginal heritage.

Further clarity is needed on what will constitute a Heritage Professional, what the appropriate level of qualification is considered to be, how those qualifications will be assessed and by whom. *The MG PBCs seeks assurance from the Department that the use of a Heritage Professional would never replace the role of the LAHS or the unique expertise of the appropriate knowledge-holders.*

The MG PBCs submit that all Aboriginal people with traditional and cultural knowledge should qualify as Heritage Professionals within their own country and that paper qualifications should not serve to discriminate against people with unique experience and expertise. Similarly, the role of the Department in setting standards required for heritage investigations, community consultation and reporting of heritage information should not serve to favour non-Aboriginal professionals with better paper skills but no local knowledge.

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

Improvements in the use, reliability and management of the Aboriginal Heritage Register are welcomed by the MG PBCs.

The MG PBCs particularly welcome the protection of unregistered sites by the Act and the Minister's recognition of the reasons why many Aboriginal people choose not to register sites of historic value or importance.

The role of LAHS in updating and improving information for their areas of responsibility is a good idea provided that it is sufficiently resourced.

The idea of predictive modelling is of concern to the MG PBCs. They wish to submit strongly that modelling mechanisms can and should never replace the knowledge of local Aboriginal people.

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

The MG PBCs submit that the use of the word 'streamline' by State Government often walks hand-in-hand with a diminution in Aboriginal people's rights and the ability for State Government to make decisions on their behalf.

The assessment of activities which may affect Aboriginal heritage may only be undertaken by the relevant Aboriginal people who speak for that area. Neither the AHC nor the Department should be given the right to assess whether or not an activity is 'low impact' and such an assessment will be entirely arbitrary based on the fact that many sites remain unregistered.

Consultation with traditional owners by third party applicants is not simply a matter of obtaining consent to the proposed activity, but is necessary so that Aboriginal people can be kept aware of how their country is being used and given an opportunity to welcome people to their country.

Proposal 6: Encourage and recognise agreement-making

Reform proposals to recognise and encourage the making of agreements between LAHS and applicants are encouraged and they acknowledge practices that the MG PBCs have followed for many years. Proposals to accept existing native title agreements which include heritage protection components are also welcomed.

Whilst the MG PBCs accept the role of the AHC to formally recognise agreements, they strongly submit that:

- the AHC should never replace the role of the LAHS in making agreements with third party applicants;
- no agreement should be valid without the appropriate LAHS as a party; and
- the AHC should never interfere with the making of any native title agreement.

Proposal 7: Transparency and appeals

The MG PBCs welcome proposals to provide transparency for all stakeholders by publishing reasons for decisions by relevant decision-makers at each appropriate stage.

The introduction of rights of review and appeal for Aboriginal people by the Minister are applauded and long overdue.

Proposal 8: A modernised enforcement regime

Experience under the existing legislative regime has demonstrated to MG people that their sites of Aboriginal heritage are insufficiently protected. Historic enforcement action has proven weak and insipid.

The MG PBCs agree wholeheartedly with an increased duty of care to avoid damage to Aboriginal heritage and an extension of the statutory limitation period. It is their experience that existing penalties are not necessarily an issue but that the enforcement of those penalties presents the problem. Increased resourcing is necessary for the Department to allow enforcement action to efficiently take place.

Proposal 9: Protected Areas

The MG PBCs agree with the proposal to create a mechanism that recognises Aboriginal heritage places of outstanding importance and affords them with robust legislative and on-ground protection.