



Public Submission – Review of the Aboriginal Heritage Act 1972

Proposals for new legislation to recognise, protect and celebrate Western Australian's Aboriginal Heritage



May 2019

Executive Summary

BHP supports the proposal by the Department of Planning, Lands and Heritage (**Department**) to modernise WA's Aboriginal heritage legislation. BHP supports a new system which recognises, protects, manages and celebrates the places and objects that are important to Aboriginal culture and also provides a clear and efficient framework for land use decisions. BHP recognises that Aboriginal people are custodians of their heritage and firmly believes the new Aboriginal heritage system should give Aboriginal people a meaningful role in decisions affecting their heritage.

Aboriginal heritage values exist across areas in Western Australia that are important for BHP's operations. It is imperative that we seek to avoid, minimise and manage our impact on heritage values co-operatively with the native title holders, traditional owners and knowledge holders for the relevant land. Over many years we have worked hard to reach agreements with many of the Aboriginal groups who have an interest in the land where we operate. Those agreements underpin our ability to manage our impact and provide the business certainty needed to support the significant investment we have made in our WA assets.

It is important that this new legislation achieves the difficult balance of protecting heritage values, facilitating responsible investment and achieving efficient land use decisions. BHP's comments in these submissions, and our endorsement of the Chamber of Minerals and Energy (**CME**) submission, draw on our experience navigating Aboriginal heritage issues in WA and are directed at enabling the State as a whole to prosper from both responsible investment and the responsible management of Aboriginal heritage.

Our key suggestions for the new legislation are:

- to build on the benefits that can be achieved through agreement making (including empowering traditional owners to make decisions about their heritage and promoting efficient land use decisions) by including a mechanism that enables the proponent and the LAHS to reach agreements that, once endorsed by the Minister, can replace heritage assessment and approval processes under the new legislation;
- that decision makers should recognise existing agreements and the information they provide, and consider them when making decisions under the Act. There is no need for these agreements to be ratified first, and there is significant risk for all parties in requiring that to occur;
- that the test for what heritage values are protected by the Act should be 'place based' (and identifiable on mapping systems), objective, and based on the significance of the heritage value to an Aboriginal cultural group;
- that decisions about whether and how land use should proceed involves a balance of a number of broad interests and ultimately needs to be made in the best interests of the State as a whole. Those decisions should be made by the Minister, or (for decisions about land use with no or a low impact on heritage values) in accordance with binding standards in the legislation or that are endorsed by the Minister, with a right of appeal to the Minister;
- to include more mechanisms by which the AHC may give land users certainty that their proposal will not be in breach of the Act;
- for the tiered assessment mechanism to clarify that a land use may only be referred or 'called in' for a decision once. The AHC should also be able to make an expedited decision early in the process that a heritage approval is not required, or that the proposed land use does not impact on Aboriginal heritage values; and
- for appropriate transitional provisions to provide stability for the significant investment decisions made on the basis of the heritage regime under the current Act.

Context

About BHP

BHP has a 150 year history operating in Australia and abroad. We have been part of the Western Australian community for around 70 years, and our operations in WA are central to the Company's global success. Given our extensive operating history across multiple commodities and jurisdictions, BHP is well placed to offer our insights.

BHP's Western Australian assets encompass operations producing iron ore, nickel, oil and gas. These operations comprise of:

- Western Australia Iron Ore, an integrated system of four major processing hubs, rail infrastructure and port facilities in the Pilbara region of Western Australia;
- Nickel West, a fully integrated mine-to-market nickel business consisting of mines, concentrators, a smelter and refinery located in Western Australia;
- Onshore petroleum business includes the Macedon gas processing facility located near Onslow and offshore the operational Pyrenees Floating Production Storage and Offloading facility, which is located within Commonwealth waters in the Exmouth sub-basin; and
- significant non-operated Petroleum interests in Western Australia including the North West Shelf project in Karratha and the Scarborough Area in the North Carnarvon Basin WA.

Agreement making is an important means by which BHP formalises its relationship with the traditional owners of the land upon which it operates in Western Australia. In turn, a key element of BHP's approach to agreement making is addressing heritage management.

Our agreements have provided BHP and traditional owners with a shared understanding of the cultural landscape within which BHP conducts its activities. This understanding has provided a basis for a co-operative approach with regard to land use planning. Specifically, these agreements enshrine the standards and processes through which BHP will seek to understand, assess, manage and, where possible, avoid impacts to heritage values.

BHP's approach to Indigenous Advocacy

Our global commitment to Indigenous Peoples is set out in our Indigenous Peoples Policy. The long term nature of our operations allows us to establish long lasting relationships with Indigenous peoples that build trust and deliver mutual benefit. We understand that Indigenous peoples have a profound and special connection to, and identification with, lands and waters and that these are tied to their physical, spiritual and cultural wellbeing. We respect the rights of indigenous peoples and acknowledge their right to maintain their culture, identity, traditions and customs.

For Australia, our commitment to indigenous advocacy is set out in our Reconciliation Action Plan (RAP). This plan outlines how BHP will work with Aboriginal and Torres Strait Islander people to deliver outcomes across four key focus areas; governance (including cultural heritage management), economic empowerment, social and cultural support and public engagement. In January 2019, our advocacy position was reaffirmed by CEO Andrew Mackenzie who publicly stated that BHP "*endorse the call for empowerment of the Uluru Statement from the Heart. We believe the Constitution should be amended so that the voices of Indigenous Australians can fully be heard.*"

At BHP, Aboriginal cultural heritage is managed in line with the RAP, negotiated land use agreements and relevant legislation. We recognise that mining impacts the heritage landscape and that this impact can have a deep effect on Aboriginal people. Therefore, it is critical that cultural heritage is managed in line with community expectations and that Aboriginal people have the opportunity to benefit from the process. The following principles summarise our approach:

- We actively engage Traditional Owners throughout the entire heritage process and seek their expertise and knowledge on heritage management solutions.
- We undertake detailed heritage surveys and scientific research to fully understand the heritage landscape, influence planning decisions and reduce risk.
- We avoid heritage sites wherever possible through engineering solutions and considered design.
- We seek to understand and mitigate our impact through detailed site recording, and community engagement.
- We contribute to the broader societal goals of understanding the human past, building cultural resilience and promoting Indigenous culture through our community programs.

Response to proposals

In this submission responding to the Review of the *Aboriginal Heritage Act 1972* Phase Two Discussion Paper¹ released by the Department in March 2019 (**Discussion Paper**), BHP comments on the priority issues arising from the proposal. BHP also supports the comments made by the CME on the proposal more generally.

Proposal 2: Coverage of Aboriginal Heritage Places

BHP supports the proposal to extend the protection afforded by the Act to cultural landscapes as it is important that the protection is afforded to all places that hold significance for Aboriginal people.

BHP considers that the test for what is of heritage value should be 'place based' (and identifiable on mapping systems), objective, and include the significance of the heritage value to a cultural group of Aboriginal people, rather than individuals. The protection afforded under the Act should also be commensurate with that heritage value and the broad range of other interests associated with the proposed use of the relevant land.

Extending the protection to cultural landscapes will mean a much larger range of places and a much bigger area of the State will be affected by the protection afforded by the Act than is currently the case. Further, a much greater number of land uses will be at risk of having an unlawful impact on Aboriginal heritage values, whether known, registered or unknown, unless the land use has been approved. The risks for the State and land use proponents arising from the new regime will therefore be significantly amplified as the new Act will have the potential to affect most economic activity in the State. In light of this, several of BHP's comments on the proposal are directed at finding an appropriate balance to manage this risk effectively.

¹ Department of Planning, Lands and Heritage, Review of the Aboriginal Heritage Act 1972 Discussion Paper Proposals for New Legislation, 2019, Page 18, <https://www.dplh.wa.gov.au/getmedia/ab8c0b4a-7941-4b31-aa89-658b74c976ad/AH-Review-AHA-discussion>

Proposal 3a, 3b, 3c and 3d: The roles of the LAHS, Aboriginal Heritage Council, Minister and DPLH

BHP supports the creation of the Aboriginal Heritage Council (**AHC**), including its membership, but has concerns that there are some uncertainties in the scope of its proposed role and that its proposed role goes beyond what is suitable in light of its composition.

BHP supports the AHC being a body chaired by an Aboriginal person and the Department's aim to fill AHC positions with Aboriginal persons, as this will help ensure Aboriginal people are involved in decision making processes relating to their heritage. A body with this composition is well placed to oversee Local Aboriginal Heritage Services (**LAHS**) and to advise on Aboriginal heritage assessments and on how impact on Aboriginal heritage can be avoided, minimised or mitigated.

However, decisions about whether and how land use should proceed involves a balance of a number of broad interests and ultimately needs to be made in the best interests of the State as a whole. Those decisions should be made by the Minister, or (for decisions about land use with no or a low impact on heritage values) in accordance with binding standards in the legislation or that are endorsed by the Minister, with a right of appeal to the Minister.

The proposal is uncertain as to the extent of the delegation conferred on the AHC, and this uncertainty creates a significant risk that land use decisions will not be made in the best interests of the State. The ramifications of this are amplified by the broader definition of Aboriginal heritage that is proposed to be protected under the new legislation.

The proposal appears to confer on the AHC a potentially broad decision making role about land use, including discretion to reject or condition land use proposals. It is not clear what decisions are delegated to AHC, nor the scope of the discretion given to the AHC. BHP considers that decisions to reject a land use and decisions about the conditions to be applied to it should ultimately be made by the Minister with broader considerations in mind, and with the benefit of the AHC's advice about impacts on heritage values.

BHP recommends that the proposal should be clarified as follows:

- The AHC's decision making role should be limited to decisions to approve proposals with no or a low impact on Aboriginal heritage values, and decisions that implement agreements reached between LAHS and land use proponents.
- When exercising that discretion, the AHC should be required to operate in accordance with standards endorsed by the Minister, and the proponent and LAHS should have a right to appeal AHC decisions to the Minister.
- All other land use decisions should be made by the Minister, with the benefit of advice from the AHC.

The proposal could also be improved by including more mechanisms that give land users certainty that their proposal will not be in breach of the Act. The AHC could play a significant role here. Our suggestions in this regard are that:

- the legislation identify land uses that may proceed, without approval, within cultural landscapes;
- the AHC prepare standards, for endorsement by the Minister, that identify land uses that may proceed without heritage assessment or approval; and
- the AHC be empowered to make binding decisions that some land use proposals do not need to be assessed or approved under the legislation (because they do not affect heritage values, or have an acceptable low impact on heritage values).

BHP also endorses the proposal for the creation of Local Aboriginal Heritage Services (**LAHS**), for the AHC to oversee their performance and for the AHC to have the power to enable the Department to perform the role of LAHS in circumstances where an LAHS is not performing its role. As heritage values are held by a community, it is important that the community has the opportunity to make decisions about what those values are, and to provide the view of the community on how they should be managed in light of land use proposals. BHP considers that the LAHS (only) should hold the rights to be consulted, to make submissions, to lodge appeals and to enter agreements that have statutory effect under the Act. It should be the responsibility of the LAHS to ensure that the right people have been consulted and shared their views about heritage values and the impact of a proposed land use. This promotes self-determination and will enable the LAHS to provide the authorised view of the community about their heritage, and to resolve internal conflicts within the community.

BHP agrees that registered native title bodies corporate should perform this role where an area is covered by a native title determination, and an important role of the AHC is to ensure the LAHS properly represents the traditional owners and knowledge holders of the relevant area.

BHP also endorses the proposal for the AHC to prepare standards for identifying and assessing the Aboriginal heritage values of a place, and for assessing the impact of a proposed land use on those heritage values. These should include the scope of heritage assessments, the timeframe for their completion and the associated fees. These standards will assist to set a reasonable and cost effective benchmark for these enquiries and therefore underpin the efficient operation of the legislation. It is important that they are endorsed by the Minister so as to achieve a reasonable and cost effective benchmark.

Proposal 6: Encourage and recognise agreement making between Aboriginal People and land users

Encourage new agreements

BHP firmly supports the proposal to encourage agreements and to respect the investment that has been made in existing agreements. These agreements provide significant value to Aboriginal groups, and underpin project investment over many years.

BHP like many other resources project proponents has entered into a number of significant agreements with native title holders (or claimants) that underpin its operations in Western Australia. These agreements represent a significant investment of time and resources to negotiate and implement, and cover a very broad range of issues associated with BHP's operations across the area where the group holds / claims native title. In relation to heritage management, the agreements have been made following often detailed assessments that have identified the heritage values in an area, and enabled the parties to reach an agreement about how best to avoid, minimise or mitigate impact on those values. The financial and non-financial benefits packages included in these agreements ensures the native title party shares in the benefits arising from the operations on their country.

BHP has found that agreements between proponents and Aboriginal groups are an effective way to:

- consult Aboriginal groups about a proposed grant of tenure, and the associated use of land;
- hear Aboriginal groups' broad concerns (including, but not limited to the impact of the proposal on heritage values) and negotiate a way to address them in a manner that also enables the project to proceed;

- ensure Aboriginal groups receive financial and non-financial benefits for the impact of the proposed land use (and often past grants of tenure as well);
- facilitate communication and build relationships with Aboriginal groups across the life of the project; and
- ultimately enable the proposed land use to occur with the full support of the Aboriginal group, underpinning the significant economic investment in the projects to be undertaken on their country.

BHP would like to see the proposal build on the benefits that can be achieved through agreement making by including a mechanism that enables the proponent and the LAHS to reach agreements that, once endorsed by the Minister, can replace the heritage assessment and approval processes under the new legislation. South Australian and Victorian legislation includes this function.

The Minister's endorsement of an agreement should only consider whether the heritage assessment and management provisions in the agreement meet standards acceptable to the State as an adequate substitute for the statutory approval process. The endorsement should not consider the other aspects of the agreement, such as benefits payable, which often address a much broader range of issues between the parties, and on terms agreed by the parties. Further, the Minister should not consider the contractual effect of the agreement, but should leave any questions about that aspect to the parties to resolve as a matter of contract law.

All parties to existing agreements would benefit from this process as it ensures the heritage outcome that has been agreed (and which may have been fully compensated) can be implemented promptly and without risk of amendment. It would also remove the risk that can arise from changes to project scope for which heritage outcomes can be promptly agreed with the relevant native title party, but then result in project delays because of the additional, lengthy approval process that needs to be followed under the Act.

To encourage efficient agreement making, it is important that the new Act:

- incentivise agreement making by providing efficient and fair alternatives to a negotiated outcome, this should set minimum standards and enable a decision about land use to be made in light of heritage values if an agreement is not reached; and
- give full effect to agreements, with no need for further approvals – to make agreements an attractive alternative to the statutory approval process.

BHP encourages the Department to include this mechanism in the new Act.

Recognise existing agreements and heritage information

BHP has significant concerns about the proposal that a decision maker may not 'take into account' agreements, and information gathered under existing agreements, if that agreement has not been 'ratified' by the AHC. This proposal raises several concerns, and in particular, unnecessarily undermines the agreements, their legal status and the significant investment that has been made in them by both parties. Decision makers should recognise agreements and the evidence they provide and consider them when making decisions under the Act.

Many agreements have been reached following processes under the *Native Title Act 1993* (Cth) (**NTA**) which cover a range of issues, including heritage. These agreements have been entered into with an authorised representative of a native title party, and some have involved extensive community authorisation processes. Any question as to their legally binding effect should be left for the parties to determine as a matter of contract law. The agreements, and information obtained under them, should be simply taken into account on their terms in decisions made under the Act, without need for ratification by the AHC.

Proposal 5: Tiered assessments of proposed land uses

BHP supports the proposal to create a tiered assessment process for decisions about land uses that may have an impact on heritage values. It is important that the system operates efficiently, particularly in light of the breadth of potential heritage values, and the breadth of land uses that may affect those values. BHP also recommends that the process include some additional measures to give land users certainty as to the lawfulness of a land use, particularly where there is some uncertainty about the existence of heritage values, but a low risk of interference.

To achieve that, BHP suggests that:

- the new Act should provide that a land use may only be referred or 'called in' for a decision once; and
- the AHC should be able to make an expedited decision early in the referral process that a heritage assessment and approval is not required, or that the proposed land use otherwise does not impact on Aboriginal heritage values. This decision should provide a defence against any offence regarding the impact of that land use on any Aboriginal heritage values.

Transitional Provisions

It is critically important that effective transitional provisions are included in the new legislation. This is to provide stability for the significant investment decisions made on the basis of the heritage regime that applies under the current Act.

BHP proposes that:

- applications that have been made under the existing Act, but not decided at the time the new Act commences, should continue to be assessed and decided under the existing Act;
- Section 16 and 18 consents that have been granted under the existing Act should be recognised under the new Act and should receive the same status as land use decisions under the new Act; that is, they should provide a full defence to offences under the new Act and run with the land; and
- existing or approved land uses, at the time the new Act commences, should not be subject to the new offences that apply the extended definition of Aboriginal heritage under the new Act.

In particular, there will be many cases where a proponent has made decisions, based on extensive heritage assessments, not to seek a section 18 consent because the heritage assessment has confirmed that no Aboriginal heritage exists in the relevant area based on the current definition. Significant investment decisions have been made on this basis, and those land uses may not have been fully implemented at the time the new Act commences. This is particularly relevant to mining projects where it may take some years for the project to reach its full disturbance or development footprint.

If the new Act were to apply in those areas, it could mean that heritage assessments need to be revisited, and new approvals may be required to undertake the relevant land use (where no heritage approval was required before). This gives rise to a risk that the land use will not be approved, or will be approved subject to more onerous conditions than those on the basis of which the investment decision was made. Such an outcome would give rise to significant uncertainty and risk for those projects, which is not in the best interests of the State.

We are grateful for the opportunity to provide our input on this very important reform and welcome the opportunity to review and comment on the Draft Exposure Bill (Green Bill) in the third phase of consultation.