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Assistant Director General, Heritage Services
Department of Planning, Lands and Heritage
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Dear Assistant Director General

Re: Review of the Western Australian Aboriginal Heritage Act 1972

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

Discussion Paper (phase 2)

Thank for you for the opportunity to review your department's consultation paper. Below please find the Authority's comments.

The Aboriginal Areas Protection Authority (the Authority) is a Northern Territory statutory body established under the Northern Territory Aboriginal Sacred Sites Act (Sacred Sites Act). The Northern Territory derives its power to legislate for the protection of sacred sites from the s 73 of the Aboriginal Land Rights (NT) Act. The schema of the Sacred Sites Act relies on voluntary engagement by proponents of development in obtaining an Authority Certificate, which is a legally indemnifying sacred site clearance, and which is balanced against the offence provisions in the Act. The long title of the Sacred Site Act states that the purpose of the Act is to achieve a balance between the protection of sacred sites and the economic, social and cultural aspirations of all Territorians. Overall the Act and its administration delivers certainty for Aboriginal custodians in the protection of their sacred sites, and certainty for developers in the conduct of their projects.

The Sacred Sites Act primarily protects places that are considered to be intangible cultural heritage, and is complemented by the Heritage Act which protects archaeological places, burials, rock art and Aboriginal sacred objects. The overarching framework of the Aboriginal Land Rights (NT) Act whilst enabling the protection of sacred sites, limits the destruction or desecration of these places. It also creates a strong relationship between the representative nature of NT Land Councils who nominate custodians of sacred sites as Board members of the Authority.

The independence of the Authority Board, as a group of senior and respected custodians of sacred sites, is a key to the functioning of the Act. The Board oversight the administration of the Act, and are also critical in the resolution of conflicts between the protection of sacred sites and development through the exercise of their powers. Not only does this ensure Aboriginal control of sacred sites, but ensures that any controversy is at arm's length of government. A rarely used ministerial review provision provides transparency and accountability.

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Proposal 1: a new Aboriginal Heritage Act

The Authority applauds the department's proposal to repeal the Aboriginal Heritage Act 1972 and replace it with new legislation that recognises Aboriginal people's culture and embodies modern approaches to heritage management.

In the Northern Territory, the Northern Territory Aboriginal Sacred Sites Act 1989 (Sacred Sites 1989) has provided a framework for sacred site protection for 30 years and has only undergone minor amendments. In the intervening period, there has been considerable economic, political and social change. The Aboriginal Areas Protection Authority (the Authority), which administers the Sacred Sites Act 1989 is also working towards reviewing its legislation to ensure that it is modern and in line with the aspirations of Territorians in the 21st century.

Proposal 2: what new legislation will cover – Aboriginal heritage places, objects, ancestral remains

The Authority supports the proposal to extend the scope of what is covered by new legislation to include ancestral remains, places that are cultural landscapes and place-based intangible heritage. This will afford protection to a fuller range of Aboriginal cultural heritage.

In the Northern Territory, the Sacred Sites Act 1989, which identifies and protects Aboriginal sacred sites, is complimented by the Northern Territory Heritage Act 2011 which fulfils the role of heritage conservation, including the conservation of a diverse range of Aboriginal heritage places which are not of a sacred nature.

Proposal 3: Key roles in Aboriginal heritage – proposal local and central bodies – functions and selection

Proposal 3(a) creation of a Local Aboriginal Heritage Services

The Authority acknowledges that under the current Aboriginal Heritage Act 1972, there is no requirement for Aboriginal people to be consulted about impacts to their cultural heritage, or role for Aboriginal people in making decisions about their cultural heritage.

The Authority supports the proposal for the creation of a Local Aboriginal Heritage Services as it will help ensure that the appropriate Aboriginal people are consulted about decisions relating to their cultural heritage.

Proposal 3(b) establishment of an Aboriginal Heritage Council

The Authority supports the establishment of an Aboriginal Heritage Council to provide centralised oversight.

The Authority notes, as per the discussion paper, members with skills in the relevant areas, such as anthropology and heritage management, will be selected by the Minister. The selection process will be designed to ensure that suitably qualified Aboriginal people are appointed as a priority and that gender balance is promoted.

In the case of the Authority, the organisation has a Board made up of 10 Aboriginal custodians (5 male and 5 female) and two Government representatives. The Aboriginal custodians are nominated by Northern Territory land councils, and come from across the Territory and provide the Board with the cultural and traditional expertise and advice relating to sacred sites and broader cultural matters.

Proposal 3(c) the Minister's role

The discussion paper states that Ministerial referral is reserved as a further level of oversight and approval for land use proposals that involve major impacts to Aboriginal heritage, or projects that are of State Significance.

This approach contrasts to the framework established under the Sacred Sites Act 1989, where the Authority is responsible for protecting sacred sites and is independent from Government.

Proposal 3(d) the role of the Department of Planning, Lands and Heritage

The Authority supports the proposal for the department to support the day-to-day operation of any new Act. As per the discussion paper, the department will perform the role of the Local Aboriginal Heritage Service for areas where no suitable body exists or has been nominated to on these functions.

Proposal 3(e) heritage professionals

The Authority supports the proposal for the creation of a heritage professionals register to assist in the selection of professionals with the appropriate qualifications and skills.

The Authority recommends that the register be open to all professionals nationally and not limited to those in Western Australia.

In the case of the Authority, it has on staff a team of in-house research staff for most of its fieldwork. From time to time, for example, due to the need for specific expertise in a specific region, the Authority will engage consultant anthropologists.

Proposal 4: how heritage information will be managed – the Aboriginal heritage register

The Authority supports the proposal to rename the register (to reflect the extended scope of what the new legislation will cover) and maintain its primary role as an information repository. It also supports efforts to improve the accuracy and usefulness of the register and a transparent system which indicates the level of reliability attached to the information in the register.

In the Northern Territory, the Authority maintains a purpose built database which contains all of its sacred sites data. To date the Authority's database contains records of over 12,000 sacred sites across the region. The Authority's experience with its sacred sites database demonstrates that the proposed move towards a register based on consistency and quality will provide clarity and confidence to all parties that engage with a new WA legislation.

Proposal 5: Managing land use proposals that may impact on Aboriginal heritage

The Authority understands this proposal is intended to create a more streamlined and tiered approval process for land use projects that avoid or minimise impact on Aboriginal heritage sites.

The Authority believes that is possible to have a cultural heritage system that balances the protection Aboriginal heritage with development. In the case of the Sacred Sites Act 1989, the Authority has issued over 4500 Authority Certificates. This number of Authority Certificates translates to over 25,000 conditions which provide for the effective protection and management of sacred sites. In addition the schema of the Sacred Sites Act provides certainty for development.

Proposal 6: Encourage and recognise agreement making

The Authority supports the proposal to encourage and recognise agreement making. As noted in the discussion paper, agreement making has become an increasingly accepted means of reconciling the interests of Aboriginal people and land users/land use proponents.

Under the Sacred Sites Act 1989, section 22(1)(b) allows for the issuing of Authority Certificates from agreements between the developer and custodians of sacred sites. When applied appropriately, this provision in the Sacred Sites Act 1989 saves time and resource duplications and is of benefit to developers in meeting commercial timeframes.

The Authority notes the need for free, prior and informed consent to be enshrined in the statutory recognition of agreement making. The provision should specifically require agreements to be negotiated at arm's length.

Proposal 7: greater transparency

Under the current Aboriginal Heritage Act 1972, the Minister in making a decision about a land use application that impacts Aboriginal Heritage, is not required to publish the reason for a decision. The Authority supports the proposals in the new legislation to promote a more transparent and equitable system, in particular the proposals to:

- (i) Publish reasons for decision by the relevant decision-maker at key decision-making states, enabling parties to seek review of these decisions; and
- (ii) Giving Aboriginal people and land users whose legal rights and interest are affected by the decision-maker's actions the same rights of review and appeal if they are aggrieved by a decision on proposed land use and other administrative decisions.

Proposal 8: A modernised enforcement regime

The Authority supports the introduction of a modern enforcement regime that will bring offences and penalties into line with other contemporary legislation.

The proposal to increase the statute of limitations from 1 years to 5 years is also welcomed, as it will enable Government, Aboriginal people and custodians to effectively prosecute for breaches and offences under the new legislation.

Proposal 9: Protected areas

The Authority supports the proposal to carry forward the existing Protected Areas into new legislation and the process for declaring new ones. It also supports the need for a new process for authorising specific management activities by the relevant Aboriginal groups(s).

The Authority notes that it may be practical to also consider making a provision in the new legislation to allow access for other authorised people (for example compliance officers) to access protected areas to investigate alleged breaches under the legislation.

Conclusion

Overall the Authority views many of the proposals as positive for Aboriginal heritage protection in Western Australia. We applaud the decision to replace the Aboriginal Heritage Act 1972 with a new legislation.

The noted in the above submission, the Authority is also in the process of reviewing its Sacred Sites Act 1989 and it is considering a number of similar issues identified in your department's discussion paper. We look forward to the opportunity to speak with you and your department about shared experiences and challenges in relation to our respective Acts.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Ben Scambary', written in a cursive style.

Dr Ben Scambary
Chief Executive Officer