

# A NEW ABORIGINAL HERITAGE SYSTEM FOR WA

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Legal Briefings - By **Melanie Debenham and Emily Wilson**

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In March 2019, the Minister for Aboriginal Affairs released a discussion paper outlining proposals for reforming the *Aboriginal Heritage Act 1972 (WA)* (**Discussion Paper**). The **31 May 2019** date for lodging a submission in response to the Discussion Paper is fast approaching. Any person with land or project development interests in WA should closely follow the course of these reforms.

The Discussion Paper is the second phase of the consultation process and distils outcomes from phase one into reform proposals. It proposes repealing the existing *Aboriginal Heritage Act 1972 (WA)* (**Current Act**) and replacing it with a new Act embodying modern approaches to heritage management and providing a more comprehensive regulatory and administrative framework (**New Act**). Given the tenor of the reform, the Discussion Paper contains a range of new regulatory approaches, as well as refinements to approaches under the current regime.

The Discussion Paper presents the proposals at a high level, therefore, likely implications for land users will be better understood once an exposure draft bill is released. Based on our current knowledge of the proposed New Act's content, we have prepared a summary of the key proposals in the table below, together with our initial thoughts on potential implications.

No	Theme	Position under the Current Act	Proposal for the New Act	Comments
1	<b>Scope of the Act</b>	The Current Act applies to 'places' and 'objects' regardless of registration. A 'place' is a site of importance or significance to persons of Aboriginal descent, which is connected with their traditional cultural life, including sacred, ritual or ceremonial sites. The Act applies to objects of sacred, ritual or ceremonial significance to Aboriginal persons.	A definition of 'place' is proposed that is aligned with the broad definition of 'place' within the <i>Australia ICOMOS Charter for Places of Cultural Significance, the Burra Charter, 2013</i> : "Place means a geographically defined area. It may include elements, objects, spaces and views. Place may have tangible and intangible dimensions". The explanatory notes to the Burra Charter explain that 'place' includes natural and cultural features, such as cultural landscapes, sites with in situ remains, community meeting places and sites with spiritual or religious connections. 'Cultural landscapes' are a collection of places in the landscape that are connected in a clear way (e.g. by a single mythology). Ancestral remains will be protected, while intellectual property rights in stories, songs and bush medicines will remain outside the Act's scope. 'Significance' may not be key to the 'place' definition. A place may be registered without further assessment if non-statutory standards set by the 'Aboriginal Heritage Council' (AHC) regarding information about its significance are satisfied.	The proposal appears to expand what will be considered as a 'place', the key changes being the inclusion of 'cultural landscapes' and intangible heritage values. Protection will still be provided regardless of registration. Potential implications of the proposal may include: • a broader reach for the enforcement regime; • the need for changes in approaches to heritage risk assessments due to departures from the previous place-centric approach; • approvals being required in respect of a broader range of sites and areas; and • new frameworks and standards applying to assessing and registering places.
2	<b>Bodies performing functions</b>	The key actors are currently: • the <b>Minister</b> who grants land use consents, ensures the recording of places and cultural material, and makes recommendations to the Governor about 'protected areas'; • the <b>Registrar of Aboriginal Sites</b> who maintains the register of 'protected areas', places and objects, and grants authorisations to excavate or remove any thing from an Aboriginal site; • the <b>Aboriginal Cultural Material Committee (ACMC)</b> which evaluates places and objects' importance, and provides advice to the Minister and Registrar (e.g. on section 18 land use consents and section 16 authorisations); and • the <b>Governor</b> who makes declarations regarding 'protected areas'. There is a limited express role for traditional owners in the Act's processes.	Roles for traditional owners will be embedded in the new regime, which will also prescribe and elevate the role of the Department of Planning, Lands and Heritage (DPLH). Decision-making responsibility on approvals will be divided between the Minister and the AHC, a new Aboriginal representative council. The key actors are proposed to be: • new <b>'Local Aboriginal Heritage Services' entities (LAHS)</b> appointed by the AHC to perform broad functions including making heritage agreements, co-ordinating knowledge holder consultation and advisory functions; • the new <b>AHC</b> with broader functions than the ACMC, including advisory functions, administering the new heritage register, setting standards, making decisions on some land use proposals and overseeing LAHS appointment and performance; • the <b>Minister</b> who will make decisions on certain land use proposals and issue 'stop work' orders; and • <b>DPLH</b> which will provide advisory and support functions to the AHC, the Minister, land users and LAHS.	The functions and responsibilities allocated by the proposed regime are a mixture of new approaches and refinements of the current regime. Potential implications of the proposal may include: • the LAHS regime providing greater certainty for land users regarding who they should consult where there is no registered native title body corporate or heritage service provider nominated by a native title claim group for an area; • DPLH playing a more active role and providing greater assistance to land users and traditional owners; • different processes and decision-makers for some approvals; • a new body of policy regarding heritage management and decision-making developed by the AHC; and • ensuring adequate resourcing of DPLH, the AHC and LAHS to support their effective operation within the new system.
3	<b>Land use proposals which may impact Aboriginal heritage</b>	Currently, approvals are obtained as a means of obtaining a 'defence' in respect of an activity which would otherwise be an offence. Consents under section 18 are obtained from the Minister in respect of land uses. Authorisations under section 16 are obtained from the Registrar to excavate or remove a thing from an Aboriginal site.	The approval regime will promote traditional owner consultation, and encourage land users to plan their activities to minimise or avoid adverse heritage impacts. A referral mechanism to facilitate tiered assessments and approvals of land uses, similar to the <i>Environmental Protection Act 1986 (WA)</i> is proposed, involving: • different assessment levels ranging from no formal assessment to full formal assessment depending on the level of risk; • referrals to the relevant LAHS and DPLH for advice; • decision-making functions being divided between the AHC and Minister, with the AHC considering proposals that are low impact, acceptable to the LAHS or not related to a State significant project; and • land users being able to 'self-assess', and/or refer proposals to DPLH to confirm that assessment, where it is clear that there will be no impact on heritage values. Guidance regarding transitional arrangements for pending applications under sections 16 and 18 of the Current Act is required.	The proposal will create a new system for assessing and approving land use proposals. Potential implications of the proposal may include: • heritage approvals being streamlined with other environmental approvals and the reduction of duplication between approvals regimes; • obligations to refer land use proposals arising from a new 'call-in power'; • rights for all land users to apply for approvals, not just a narrow range of 'owners'; • the ability for approvals to 'run with the land' so that subsequent land users do not have to obtain fresh approvals for the same activity; and • a new mechanism for treating activities with positive impacts (e.g. removing an object for preservation) differently to activities with adverse impacts.
4	<b>Ratified Aboriginal heritage agreements</b>	While heritage agreement-making is an established practice, the Current Act does not contain mechanisms to recognise heritage agreements or agreed heritage outcomes.	To encourage agreement-making and seek to assist land users with agreements in obtaining approvals, those agreements may be 'ratified' so that: • heritage outcomes agreed under them can be relied upon to expedite an approval; and • such agreements and outcomes will be mandatory relevant considerations for the AHC and Minister in assessing the acceptability of land use proposals and granting approvals. To be 'ratified', an agreement must not authorise the destruction of heritage without the need for approvals under the Act or seek to circumvent any other part of its operation.	Questions have arisen about the suitability of existing heritage agreements within the new regime. This is likely to be an aspect of focus during the next phase of consultation. Potential implications of the proposal may include: • a new ability to use such agreements to assist in obtaining approvals; • risks that existing agreements may not be 'ratified' or capable of being relied upon to support approvals (i.e. the change has limitations in practice); • parties will need to consider whether provisions of existing agreements could prevent ratification of an agreement; and • new considerations when negotiating future agreements.
5	<b>Transparency of decision-making</b>	One of the criticisms of the current regime is a lack of transparency as there are: • no requirements for decision-makers to provide reasons for their decisions; • no requirement for the ACMC to provide notice of its recommendations to interested parties (e.g. relating to section 16 and 18 applications); and • no statutory review or appeal rights for traditional owners in respect of decisions, who instead must seek judicial review or general law remedies to challenge a decision.	This lack of transparency is sought to be addressed by: • new requirements for publishing reasons for decisions regarding land use proposals and standard-setting; • providing affected traditional owners with the same appeal and review rights as land users; and • a new requirement for notice to consultation process participants of DPLH's recommendations to the AHC on land use proposals.	The proposal is intended to benefit traditional owners and land users. Potential implications of the proposal may include: • greater capacity for parties to understand decision-making processes and considerations; • greater capacity for parties to influence decisions of the AHC and participate in heritage processes; and • more challenges to land use decisions by traditional owners and land users.
6	<b>Enforcement</b>	Other criticisms of the current regime are that its enforcement regime is not strong enough, nor an adequate deterrent. The current regime provides for modest fines, the greatest being \$50,000 for the first offence of a body corporate, and \$100,000 for a subsequent offence, with a daily penalty of \$1,000. Prosecutions must be commenced promptly, within 12 months of the offence. A person can argue an 'Ignorance Defence' – that the person did not know, or could not reasonably be expected to have known, that the Act applied to the relevant place or object.	While the same range of offences for adverse impacts on heritage values without approval will remain, changes are proposed to strengthen the regime, including: • a new requirement to do everything 'reasonably practicable' to inform oneself in order to invoke the 'Ignorance Defence'; • a longer limitation period for commencing prosecutions of 5 years; • for offences, potential fines of up to \$1 million, with a daily penalty of \$50,000, and 12 months' imprisonment for a person who fails to comply with a 'stop work' order; • a new power for courts to make orders requiring remediation and/or compensation to affected traditional owners; • a new power for the Minister to make 'stop work' orders; and • a new power for the Governor to make orders prohibiting certain uses of land for a period of up to 10 years.	Potential implications of the proposal may include: • a higher bar for land users to establish the Ignorance Defence; • land users may be subject to harsher, and a broader range of, penalties; • land users' activities may be affected by 'stop work' orders or restrictions imposed on future uses of impacted areas; and • a stronger enforcement regime may result in more frequent enforcement action.





## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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