

## **Submission to Review of Aboriginal Heritage Act 1972 Consultation Phase 2 March 2019**

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The following submission has been prepared by Yamati Marlpa Aboriginal Corporation (YMAC).

YMAC is the native title representative body (NTRB) for the Pilbara, Murchison, Mid West and Gascoyne regions of Western Australia (WA), encompassing approximately one-third of the state. YMAC currently represents over 20 native title claims, all with their own language, culture and traditions. Celebrating its 25<sup>th</sup> year in 2019, YMAC is a not-for-profit organisation run by an Aboriginal Board of Directors. It provides a range of services to its members, including claim and future-act representation, heritage protection services, community and economic development, and natural resource management.

This submission responds to the following questions outlined in the Department of Planning, Lands and Heritage *Review of the Aboriginal Heritage Act 1972 Consultation paper*. Where relevant, additional commentary and questions are raised that the Department may also consider in this review process.

Consultation Questions:

- *Will the proposal deliver the desired outcome?*
- *If not, why not and what changes would you suggest and why?*

### **Overarching feedback / comments on Review of Aboriginal Heritage Act 1972 Consultation Paper**

Overall, YMAC strongly supports the creation of a new AHA and a majority of the proposals contained in the Consultation paper. The document (rightly) contains high aspirations, particularly around bringing Aboriginal people into a more central decision-making role.

YMAC believes that the devil will be in the detail, as at this stage funding for the various roles and responsibilities outlined in the paper has not yet been identified.

YMAC believes that transitioning to the new Act will require time and resourcing and recommends a transition plan be developed that facilitates smooth adoption of the new Act and recommends increases in funding to DPLH be allocated to enable it to be fully realised and enacted.

Further, YMAC proposes that clear, published, guidelines/criteria are needed for: LAHS, AHC, intangible heritage sites, impact assessment and significance, transition period, etc. to support the new Act.

The broadening of what constitutes Aboriginal heritage is welcomed, but YMAC notes a resistance to dealing with intellectual property in new legislation. YMAC also proposes the new act could go beyond recognising intangible heritage tied to places.

In terms of approvals YMAC is concerned that it appears nothing will change materially in terms of powers of veto or similar for Aboriginal groups. Under the proposals, it appears likely that more sites will be registered, but – potentially - no real change to the rates of destruction of sites.

**Timeline to achieve change** - YMAC is concerned about the timeline for implementing the new Act. The timeline for review has not changed from when the proposal was to *amend* the current legislation and has concerns that it is perhaps too ambitious to collect Phase 2 consultation, draft a green bill, further collect and analyse feedback and then put it to a vote in Parliament within this same time frame.

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

In principle YMAC essentially supports this proposal, along with the 4 key proposed objects of a new Act, these being:

1. Recognise the central role of Aboriginal cultural heritage to thriving Aboriginal communities, current and future.
  2. Provide for the culturally appropriate identification and documentation of Aboriginal heritage places and objects, including their tangible and intangible aspects.
  3. Provide a clear framework for the protection, conservation and management of Aboriginal cultural heritage, which informs land use and development decisions that respect Aboriginal heritage.
  4. Promote the appreciation of Western Australia's Aboriginal heritage so that the whole community values its preservation.
- YMAC believes a new Aboriginal Heritage Act (AHA) provides the best opportunity to bring legislation into line with the *Native Title Act 1993*, the *Racial Discrimination Act 1975 (RDA)*, and the United Nations Declaration of the Rights of Indigenous People.

### **YMAC suggested change to Proposed Object 1 under Proposal 1**

- **Proposed Object 1 (Recognition)** - YMAC believes that first and foremost the objects of the new Act should clearly state that Aboriginal cultural heritage belongs to the Aboriginal people with traditional or familial connections to the area from which the heritage originated. These types of stronger statements about Aboriginal ownership of heritage are illustrated in the Victorian *Aboriginal Heritage Act 2006 (Vic AHA)* and the draft NSW Aboriginal Cultural Heritage Bill 2018 (NSW Bill)

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

The following feedback refers to the following Key Points:

1. Adopt a new definition of 'place' that is aligned with the Australia ICOMOS Burra Charter<sup>1</sup> (and explanatory and practice notes), which includes 'tangible and intangible dimensions': "Place has a broad scope and includes natural and cultural features. Place can be large or small: for example, a memorial, a tree, an individual building or group of buildings, the location of an historical event, an urban area or town, a cultural landscape, a garden, an industrial plant, a shipwreck, a site with in situ remains, a stone arrangement, a road or travel route, a community meeting

- place, a site with spiritual or religious connections... Places may have a range of values for different individuals or groups”
2. Carry forward the protection of all Aboriginal cultural heritage places and objects, whether registered or not, consistent with the current Act.
  3. Continue to protect Aboriginal objects consistent with the current Act.
  4. Include culturally appropriate procedures to deal with ancestral remains.

YMAC agrees with the following aspects of the proposals:

- **Key Point 1** - A wide definition of “place” that incorporates cultural landscapes and tangible and intangible aspects of places etc. **However**, this should not be limited to the Burra Charter 1.1 definition as a “geographically defined area”. The concept of “place” needs to expressly take into account Aboriginal traditions and beliefs as to places of significance. YMAC recommends that if the term “tradition” is used, that it be made clear, as in the South Australian *Aboriginal Heritage Act 1988*, that this includes tradition as it has developed since European colonisation.
- **Key Point 2** - The proposal to carry forward protection of all Aboriginal cultural heritage places and objects whether registered or not. Please also refer to YMAC comments regarding the strengthening of this aspect under Proposal 8, to ensure that it is abundantly clear that all Aboriginal places and objects, regardless of if they are known and registered are protected by the operation of the new AHA.
- **Key Point 3 - *In principle***, YMAC agrees with the continued protection of Aboriginal objects and inclusion of procedures to deal with ancestral remains. The inclusion of ancestral remains is important. **BUT**, YMAC would need to see the details of what the procedures are to confirm support. Agreed-upon procedures do already exist and YMAC would welcome inclusion of these in a new AHA.
- **Key Point 4** – This is supported and should be extended to include repatriation of ancestral remains and Aboriginal objects held in museums and research collections around Australia that have not yet been repatriated. Further, this review may like to consider that repatriation could include the many thousands of objects which have been "salvaged" under S.18 and now stored/held in mine-site locations e.g. storage containers and boardrooms.

### **YMAC suggested changes and points for consideration regarding Proposal 2**

YMAC believes the definitions and scope of Aboriginal heritage proposed in Proposal 2 could be further (and with minimal impact) expanded, and raises the following for consideration with respect to Intellectual Property (IP) and Intangible Heritage

- The consultation paper proposes not to deal with intellectual property rights; these being the remit of the Commonwealth legislation. The extension of the definition of Aboriginal heritage to include intangible heritage and landscapes is a step forward, **BUT** YMAC is deeply concerned that the new Act also proposes not to deal with *intangible heritage* beyond reference to intangible heritage of *places*.
- Whilst the Commonwealth government has jurisdiction over copyright, trademarks, patents etc which are key intellectual property (IP) matters, it may depend on how it is framed as the Commonwealth legislation does not appear to cover the field in terms of intangible Aboriginal heritage and therefore does not prevent the States from legislating in that area.
- The Vic AHA Part 5A (from s79A to s79L) does provide for a register to provide protection for intangible heritage which includes performing arts, oral traditions, rituals, crafts, environmental and ecological knowledge etc. The NSW Bill also deals with this type of intangible heritage in a similar way. Therefore, YMAC proposes that the new AHA should also not restrict itself to places and objects.
- Excluding IP and then by extension protecting material such as songs, language, dance, stories, cultural practises etc. is a missed opportunity - if the stated aim is to protect and promote, then these should also be protected and promoted.

- The exclusion of IP also limits the tone and intent of the Act; reiterating that it is essentially concerned with places to be managed and land access. A meaningful piece of legislation that seeks to protect and promote Aboriginal heritage should not be limited to things that can be given a boundary in the European sense.
- A definition of intangible heritage (sacred, ceremonial and ritual) could also provide the basis for the tangible dimension; that is, the places and objects defined in S.5 of the current Act. The intangible provides the meaning and purpose for Aboriginal people in the practice and transmission of traditional law and culture. Without law there is no authority. The intangible must be linked intrinsically with the tangible for without the intangible there is no tangible (and not vice versa!). As the discussion paper states, "intangible heritage values such as songs or stories...are tied to particular places.
- These songs and stories are embodied in the landscape and traditional law connects Aboriginal people to their ancestors and these places through ritual and ceremony organising societies and kin groups to continue their role and responsibilities as custodians of land. This understanding is well understood by the Minister and could form the basis of a preamble that adequately expresses the true spirit of legislation that not only protects Aboriginal heritage but respects Aboriginal culture and the people who carry this knowledge since sovereignty and into the future.
- YMAC suggests that the terms "intangible" and "sites" are not necessarily compatible; that is, the phrase contains an internal contradiction. However, a version of the Northern Territory's sacred sites legislation could be adopted to address potential adverse legal reaction.

### **Proposal 3(A): Local Aboriginal Heritage Services**

YMAC agrees **in principle** with the proposal to provide for the Appointment of Local Aboriginal Heritage Services (LAHS) to:

- Ensure the right people to speak for particular areas of country and related cultural heritage are identified
- Make agreements regarding Aboriginal heritage management and land use proposals in their geographic area of responsibility

YMAC agrees with the following Key Points:

1. The local Aboriginal community determines who the right people to speak for the relevant cultural heritage are and what is important to them.
2. Provides a first point of contact for proponents seeking advice on heritage matters in a particular area.
3. Undertakes or co-ordinates surveys and management of Aboriginal heritage.
4. Consults with other Local Aboriginal Heritage Services where heritage values extend beyond their area of responsibility.
5. May provide updates to the Register. PROPOSAL Provide for the appointment of Local Aboriginal Heritage Services to:
  - ensure the right people to speak for particular areas of country and related cultural heritage are identified;
  - make agreements regarding Aboriginal heritage management and land use proposals in their geographic area of responsibility. DESIRED OUTCOMES:
  - Active involvement of traditional owners and knowledge holders in decision making and management of heritage matters in particular areas of country that they have connection to and cultural responsibility for.
  - Consultation and agreement making processes with Aboriginal people are culturally appropriate, transparent and provide more certainty for land users.

6. May make agreements regarding Aboriginal heritage and the management of heritage matters in the context of land use proposals with land users (which may be subject to endorsement by the Aboriginal Heritage Council and, in some circumstances, the Minister).
7. May give advice (when sought) to the Aboriginal Heritage Council on the acceptability of all land use proposals in their area of responsibility, whether subject to an agreement or not.
8. Time frames and standards will apply to the advice and services provided.
9. The Aboriginal Heritage Council will be responsible for appointment and performance monitoring.
10. It is anticipated that Prescribed Bodies Corporate will apply to become a Local Aboriginal Heritage Service.
11. Requirements for Local Aboriginal Heritage Services:
  - a. Be 100 per cent Aboriginal-owned.
  - b. Have genuine connection with the area it proposes to represent (including through member and Board composition).
  - c. Have demonstrable support from a broad constituency of the Aboriginal people within, and 'cultural authority' over, the area it proposes to represent.
  - d. Be incorporated under either the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act) or Corporations Law.
  - e. Have rules that are consistent with the requirements imposed on Prescribed Bodies Corporate, especially in terms of obligations to consult on certain decisions.
  - f. Have demonstrable capacity to undertake the functions required of it and maintain appropriate standards of good corporate governance.
12. There is no compulsion for a community to establish a Local Aboriginal Heritage Service.

General comments on above-listed Key Points:

- YMAC believes these proposals are aspirational and places Aboriginal people - who have been determined by native title to be the right people for an area - front and centre in heritage management.
- While the LAHS may be the first point of contact for proponents, it should be made clear that they act in the interests of the local Traditional Owners, not proponents.
- YMAC believes that using LAHS to review lower-level land access permits and to update the register, decide on sites etc. could lead to faster timeframes and possible reduced cost to government (e.g. staffing) due to decentralisation; **BUT**, see points raised below.

**YMAC suggested changes / issues with Proposal 3A**

**YMAC strongly disagrees with Key Point 13** - *In areas where there is no Local Aboriginal Heritage Service, the Department of Planning, Lands and Heritage will perform the above functions.*

- YMAC believes this represents a significant conflict of interest as the developer may often be the government or be supported by the government.
- Given current levels of DPLH resourcing, YMAC is also concerned this could result in disastrous outcomes for Traditional Owners.
- YMAC recommends that in the absence of a LAHS, Traditional Owner groups should instead be able to nominate a provider and that Native Title Representative Bodies (NTRBs)/Native Title Service Providers (NTSPs) be considered as alternate/default LAHS heritage service, as they will meet the requirements of the proposed LAHS'.
- NTRBS/NTSPs such as YMAC have statutory responsibilities and are accountable to Ministers to ensure they provide appropriate service.

### **Broader concerns regarding capacity / resourcing, practical application**

- Whilst highly aspirational, YMAC believes that for this proposal the devil will lie in the detail.
- For example, there may have issues with practical application unless additional funding for Prescribed Bodies Corporate (PBCs), or Traditional Owner Corporations under non-native title settlements, to undertake these responsibilities is also made available. In areas where groups are large enough and have enough surveys, this role is already undertaken by the PBC. YMAC and other organisations also act in this space for PBCs that do not have the capacity to take this work in house.
- YMAC has strong concerns about how the proposed Aboriginal Heritage Council might identify/appoint LAHS's for areas:
  - that are not yet determined yet so don't have a PBC and may not have a representative corporation set up to perform heritage services
  - that are not yet claimed?
  - where a claim has been dismissed but people still hold interests?
  - where there are overlapping claims?
  - where relationships between PBCS (and by extension LAHS) are contentious and they are unlikely to communicate effectively with one another to organise surveys in these areas.
- These scenarios demonstrate why having a default body such as the relevant NTRB/NTSP available to perform functions of the LAH in the absence of an appointed LAH is vital.
- The range of obligations proposed to be handled by LAHS are extensive and go beyond what the majority of groups who do have capacity currently undertaken in-house. YMAC recommends that substantial capacity building and funding will need to be set aside for groups to handle heritage, future acts, agreement making, invoicing, ministerial advice etc. in house.
- YMAC also believes that Key Point 8 regarding applying timeframes and standards to advice and provision and services would benefit from further detail at this stage of consultation, as they will have a critical impact on outcomes of the final legislation.

### **Proposal 3(B): Aboriginal Heritage Council**

YMAC agrees with the Proposal to:

- a) Establish an Aboriginal Heritage Council (AHC) as the central body providing advice and strategic oversight of the Aboriginal heritage system.
- b) Abolish the Aboriginal Cultural Material Committee

To ensure success, it will recommend that serious consideration needs to be made about funding levels and resourcing of the proposed AHC, so that it can effectively carry out its extensive role.

YMAC has the following feedback and recommendations with respect to the Key Points outlined in this proposal.

**Key Point 1** - Aboriginal Chair and a further eight members appointed by the Minister on the basis of skills and experience relevant to Aboriginal heritage; non-statutory criteria in the selection process will be used to ensure suitably qualified Aboriginal people are appointed and promote gender balance.

- YMAC agrees that establishing an Aboriginal Heritage Council is vital, but proposes the following with respect to membership, outlined in the Consultation Paper:
  - YMAC agrees that skills and experience are critical for this council, but the proposals appear insufficient given that one of the main purposes of the changes to the Act is to ensure a greater voice and decision-making role for Aboriginal people.
  - YMAC supports establishing selection criteria to ensure that suitably qualified Aboriginal people are appointed and gender balance; but is not convinced that such criteria should be non-statutory. Also, the criteria need to be framed to ensure broad Aboriginal representation. Understandings of local Aboriginal cultures from within those cultures are important specialised skills and experiences.
  - YMAC recommends instead that the proposed AHC have 100% Aboriginal membership, with a professional advisory panel to that group, and definitely regional representation, and gender balance (e.g. Elders, man and women from each WA region). This may require extending the number of members proposed (i.e. currently 8 – may need more to represent each region)
  - Otherwise, this will create a tiered Aboriginal heritage system where local Aboriginal people are in the decision-making hierarchy, but only at the bottom tiers (such as LAHS).

**Key Point 2** - Strategic focus, not regionally representative.

- **See notes under Key Point 1 above.** Whilst YMAC recognises why this is recommended, it does have concerns that this may result in the AHC not having strong enough Aboriginal membership to be truly representative of the people on whose behalf they will be making decisions or to have the cultural knowledge for different areas.

**Key Point 3** - Sets standards for services provided by Local Aboriginal Heritage Services (LAHS) and Heritage Professionals.

- YMAC agrees *in principle* with this point, **BUT** recommends that the standards and studies required are agreed in advance with input of Traditional Owners, Local AHS and Aboriginal Heritage Council, NTRBs, NTSPs, etc.
- YMAC anticipates consultation with peak bodies (including industry) will occur to design standardised recording models (such as current Site Identification, Site Avoidance, etc.).
- YMAC further recommends the AHC and DPLH ensure new standards will be equal to or higher than methods currently employed by Traditional Owners, archaeologists and anthropologists who are currently working to industry best-practice.

**Key Point 4 – Oversight of the Aboriginal Heritage Register**

- YMAC agrees that a properly constituted AHC as set out above should have oversight of the Register.

**Key Point 5** - Makes decisions on land use proposals that could affect Aboriginal heritage if the proposals:

- a. demonstrate a neutral or positive impact on heritage; or
- b. demonstrate a low impact on heritage or that mitigation actions will result in a low impact on heritage;
- c. are accepted by the relevant Aboriginal people; and
- d. do not relate to a project of State Significance.

- Subject to the comments below at Key Points 6 and 8, YMAC agrees with Key Point 5a through to 5d, **BUT** questions *who* will decide if a matter is **low** impact and how are the decisions made? Whilst this proposal will have a positive impact through improving existing processes and timelines, YMAC believes when reviewing land use projects:
  1. it will need to be clearly defined *who* decides the impact of a project (YMAC recommends these decisions should be made by the LAHS).
  2. and this process needs to be published and clear.

**Key Point 6** - Provides advice to the Minister where a land use proposal will have a significant negative impact on Aboriginal heritage or involve a project of State Significance. Advice to be:

- a. The AHC's assessment of the evidence of importance of the heritage to the relevant Aboriginal people or its potential scientific value.
  - b. The AHC's level of satisfaction that all reasonable attempts have been made to mitigate damage to important heritage
- YMAC agrees *in principle* with **Key Point 6**, and notes this would still allow the AHC to override proposals accepted by the relevant Aboriginal people to safeguard intergenerational equity **BUT** believes decisions as to significance of and damage to Aboriginal heritage need to be made not by the AHC and/or Minister, but by the LAHS. The AHC's role here should be limited to evaluating whether the decisions of the LAHS need to be overridden to safeguard intergenerational equity but should otherwise accept the LAHS' decisions and recommendations.

**Key Point 7** – Ensures consultation and any related agreement-making processes have been conducted in good faith.

- YMAC agrees *in principle* with this point. The AHC playing a role to ensure consultation and any related agreement-making processes have been conducted in good faith will help to ensure a benchmark standard across the board.
- **BUT**, YMAC has concerns regarding resourcing the AHC.
  - There are thousands of agreements currently in place which would need review; this will likely create a backlog at the AHC, similar to site assessments and permit applications at the ACMC now.
  - It appears the AHC will have considerably more responsibilities than the ACMC.
  - YMAC hopes that the AHC is intended as a full-time body, so as to address timeliness concerns.
  - A full-time body is particularly important if the AHC is also expected to *promote* heritage as well as undertake all the other activities listed.

**Key Point 8** - Refers land use proposals to the Minister where there are disputes that cannot be resolved by the parties and/or are contentious.

- YMAC agrees to a point but recommends that the AHA should set out a clear process as to who receives applications first, and how it gets to the Minister.
- YMAC proposes that the LAHS receives them first, as they should be involved in the project from the beginning, right through to any final proposals and should provide their recommendations to the AHC and the Minister.
- **Determining impact** - YMAC strongly recommends that the question of whether there is low impact on Aboriginal heritage can *only* be decided by the people whose heritage it is, and not the AHC or the Minister. YMAC recommends that LAHS assess



proposals first and then advise the AHC on the level of impact they consider a proposal to represent. The Aboriginal people whose heritage it is are the only people who can properly address what the impact means to them.

**Key Point 9** - Provides a central point of advice to other decision-making authorities whose decisions could impact Aboriginal heritage.

- YMAC agrees this could be a beneficial role for the proposed AHC in relation to general advice as to heritage requirements and the like. However, YMAC believes decision-making authorities should always be referred back to the LAHs, or NTRBs/NTSPs in relation to any decisions about particular places.

**Key Point 10** - Promotes Aboriginal heritage and assist in ensuring that Aboriginal heritage in Western Australia is respected, maintained and managed in accordance with best practice.

- YMAC strongly supports this proposed role.

**Key Point 11** - Aboriginal Cultural Material Committee will be abolished.

- YMAC agrees.

**Key Point 12** - As the Aboriginal Heritage Council will assume responsibility for the Aboriginal Heritage Register, it is not proposed to carry forward the statutory function of Registrar of Aboriginal Sites into the new legislation.

- YMAC agrees.

**YMAC further comments / questions *beyond* Key Points:**

- **Resourcing the AHC** - YMAC supports the establishment of an Aboriginal Heritage Council. To ensure success, YMAC recommends that serious consideration be made to the funding and resourcing of the proposed AHC to carry out its extensive role. This will require increased funding to the Department of Planning, Lands and Heritage as the current ACMC meets one day a month and has significantly less of a work load, and more members.
- **Decisions about damage to heritage** – YMAC recommends that consideration be given to the role of LAHS and AHC in cases of State significance, and significant damage to heritage. YMAC proposes that the LAHS and AHC make decisions on significance and potential damage to that significance, and the Minister then decides on public interest matters only.
- **Stop Work orders** – YMAC recommends that the DPLH considers whether the AHC should also have the power to issue stop work orders where heritage is threatened.
- **Publishing decisions** - YMAC strongly recommends that AHC be required to publish reasons for a decision where it is not by consent of the LAHS and local Traditional Owners. This could apply for example, to disagreement on significance, or the impact level of the proposal. Publication of these opinions may alleviate concerns around transparency.

## Proposal 3(C): The Minister's Role

**Key Point 1** - The Minister may delegate decision-making to the Aboriginal Heritage Council in respect of land use proposals that may impact on Aboriginal heritage values where such proposals:

- a. demonstrate a neutral or positive impact on Aboriginal heritage; or
  - b. demonstrate a low impact on heritage or where mitigation actions will result in a low impact on heritage; or
  - c. are acceptable to the relevant Local Aboriginal Heritage Service; and d. do not involve projects deemed to be of State Significance.
- YMAC seeks clarity on Key Point 1, regarding situations where the Minister may delegate to the AHC, etc. This Point appears to be worded such that it will be at the discretion of the Minister to decide if a decision is delegated. YMAC recommends that the decision making be assessed in the first instance by the LAHS and move up the chain. (please also refer comments under Key Point 8, Proposal 3(B))

**Key Point 2** - Receive advice from the AHC on land use proposals that may have significant impact on Aboriginal heritage values or involve projects deemed to be of State Significance (irrespective of whether the heritage impacts are likely to be significant or not).

- YMAC agrees that the Minister should receive advice from the AHC on land use proposals that may have significant impact or be of State significance, **BUT**:
  - seeks confirmation that the Minister will also **accept** advice as to significance from LAHS or TOs for reasons set out above.
  - recommends the Minister not be involved in the process of deciding significance or impact on places, except where there is disagreement between LAHS and AHC and TOs on these points.

**Key Point 3** - Make decisions on land use proposals (and agreed outcomes relating to them) that may have significant impact on Aboriginal heritage values or involve projects deemed to be of State Significance.

- With respect to decisions about damage to heritage, YMAC recommends that consideration be given to the role of LAHS and AHC in cases of State significance, and significant damage to heritage.
- YMAC proposes that the AHS and AHC make decisions on significance and potential damage to that significance, and the Minister then decides on public interest matters.

**Key Point 4** - Have due regard to the social and cultural effects of the land use proposal and the views of the relevant Aboriginal people and the public interest as part of the decision-making process.

- YMAC agrees with this Point **BUT** please refer above point (Key Point 2). The Minister is currently obligated to do this; it appears that the economic value of a project always triumphs over social and cultural effects of land use proposals.

**Key Point 5** - Publish reasons for decisions.

- YMAC strongly supports Key Point 5, that the Minister publish reasons for decisions. This is an excellent and necessary proposal and an important step forward.
- YMAC strongly recommends that AHC also be required to publish reasons for a decision where it is not by consent of the LAHS and local Traditional Owners. This

could apply for example, to disagreement on significance, or the impact level of the proposal. Publication of these opinions may alleviate concerns around transparency.

**Key Point 6** - Support the AHC's Aboriginal heritage promotion activities as appropriate.

- YMAC agrees this involvement would be beneficial.

**Key Point 7** - Issue a stop work order in cases where Aboriginal cultural heritage is threatened by unauthorised land use activities.

- YMAC strongly supports Key Point 7 and believes it to be an excellent proposal.
- YMAC recommends that a non-political body such as the AHC should also have the power to issue stop work orders.

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

Key Points:

The proposed functions of the department are:

1. Provide secretariat and other support to the Aboriginal Heritage Council.
2. Provide operational advice to the Minister responsible for any new Aboriginal Heritage legislation.
3. Provide capacity building to Local Aboriginal Heritage Services.
4. Receive reports of Aboriginal heritage places and objects for inclusion on the Aboriginal Heritage Register.
5. Physically maintain the Aboriginal Heritage Register.
6. Support the Aboriginal Heritage Council in the development of policies and procedures to fulfil its responsibilities.
7. Provide or facilitate the provision of financial and technical assistance or other Aboriginal heritage management and conservation incentives.
8. Manage the Directory of Heritage Professionals.
9. Facilitate research and investigations relating to Western Australia's Aboriginal heritage.
10. Investigate alleged breaches of the Aboriginal Heritage Act (including of conditions attached to any permits issued in respect of land use proposals).
11. Assist in the prosecution of breaches where sufficient evidence has been collected.

YMAC **agrees** with proposed functions 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, and 12.

**YMAC has serious concerns about Key Point 4** - Perform the role of a Local Aboriginal Heritage Service for areas where no suitable body exists or has been nominated to take on these functions.

- YMAC recommends conditions be placed on Key Point 4, about the DPLH performing the role of the LAHS where no suitable body exists or has been nominated.
- This would be a last resort where no one else is available. YMAC recommends that NTRBs/NTSPs should be first default body.

### **Overarching concern - Resourcing, financing and operational function of DPLH -**

- As mentioned previously, YMAC has concerns regarding the resourcing and financing of the proposed functions of DPLH and hopes the size of the department will be expanded.
- YMAC also anticipates that some of the above roles will not be exclusively managed by DPLH; but instead be carried out in consultation with TOs, LAHSs etc.
- YMAC recommends consideration be given to the kinds of professionals to be hired by the AHC, for example, archaeologists and anthropologists could contribute significant expertise.

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

**Overall**, YMAC supports the idea of recognising that there are minimum qualifications that a heritage professional should have, as well as setting minimum standards for certain types of survey and recording. This will provide certainty for Aboriginal people, heritage professionals and proponents.

**However**, if the DPLH intends to rely on Proponents, such as the Australian Minerals and Energy Council (AMEC), in setting standards, this may result in enshrining standards *lower* than those considered appropriate by Aboriginal people and heritage professionals. i.e. if the equivalent of site avoidance becomes the standard for land use proposals then recording and reporting time will be significantly reduced – this will cost Proponent's less but will also leave scant record of places for Aboriginal people.

**Key Point 1** - To be entered on the Directory, Heritage Professionals will be required to evidence their relevant qualifications and experience. This will be published to enable users to make informed choices of appropriate professionals.

- YMAC agrees that heritage professionals need to be entered on a Directory and need to provide evidence of qualifications and experience which will be published.

**Key Point 2** - Aboriginal people and land use proponents will be encouraged to select from the Directory, but the department will accept information received from a person not on the Directory if it meets the required standard.

- **Use of directory-listed professionals or not** - Regarding Key Point 2, people being encouraged to select from the Directory by DPLH but will also accept **information** from a person not on the Directory if it meets the required standard.
- If 'information' is defined as reporting a place or object they have found or are aware of, then YMAC supports this as this will enable Aboriginal people to report their own sites without a heritage professional. Every site reported should be placed on the register (and given benefit of the doubt), until further scrutiny can take place by heritage professionals and the LAHS. The AHC/DPLH may need to assist the person reporting the place or object to ensure proper restrictions are placed on the Register – see comments on Key Point 4 in relation to the Register at Proposal 4 below.
- However, this this should not apply to information that will be used to inform land use proposals.

**Key Point 3** - In response to a land use proposal, the department will advise what studies and standards are required.

- YMAC agrees.

**Key Point 4**- Materials that do not meet the standards set by the Aboriginal Heritage Council will not be accepted and the proponent notified that the 'clock has been stopped' on approvals processes until the appropriate standard has been met by the Heritage Professional.

- YMAC agrees.

**Key Point 5** - The department will work with peak bodies to develop guidelines and standards of service for endorsement by the Aboriginal Heritage Council.

- YMAC submits that the Aboriginal Community should also be consulted in the development guidelines and standards.
- YMAC agrees with DPLH working with peak bodies to develop guidelines and standards for service and recommends these be:
  - The Australian Institute of Consulting Archaeologists
  - The Australian Archaeological Association
  - the Australian Anthropological Association
  - NTRB's
  - NTSPs.

**Key Point 6** - Inclusion in the Directory does not constitute an endorsement or warranty in respect of any services delivered by a Heritage Professional.

- YMAC agrees.

**Key Point 7**- The department will not engage in disputes between Heritage Professionals and their clients.

- YMAC suggests
  - an appropriate mechanism, or mediation body be identified to support mediation of disputes, such as the State Administrative Tribunal, like for other professionals.
  - A process be identified to address situations where a consultant who is on the register does not adhere to the minimum standards. e.g. sanctioning or removal from register.
  - DPLH could further consider vetting and imposing conditions on both remaining on the Directory, and removal from the Directory for misconduct?

**Key Point 8** - Fees will not be regulated and will remain open to market fluctuations, which is consistent with other professional service providers (geologists, lawyers, accountants, etc.) and national competition policy.

- With respect to complaints and mediation, while YMAC agrees with fees not being regulated, etc. it does recommend that:
  - An appropriate mechanism, or mediation body be identified to support mediation of disputes, such as the State Administrative Tribunal, like for other professionals?

- DPLH could further consider vetting and imposing conditions on both remaining on the Directory, and removal from the Directory for misconduct?

#### Further considerations

- **Future Proofing** - The Aboriginal Heritage Register also serves as a record for places which have been destroyed as a result of land use proposals. The minimum level of recording prior to disturbance has to be sufficient to allow for future studies (given evolutions in analytical techniques) and should be considered when developing new standards.
- **Levels of experience** - YMAC queries how newly-graduated archaeologists and anthropologists will be reflected on the Directory. Undertaking fieldwork under the guidance of an experienced practitioner is essential to gain experience. Will the Directory require listings of individual consultants and their affiliations, will consultancies be able to register as an approved corporate entity, which will in turn enable nurturing and development of emerging heritage professionals in a recognised and responsible entity?

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

Overall YMAC agrees with Key Points as it believes it will provide much needed consistency across the industry.

**Key Point 1** - The register will be renamed the Aboriginal Heritage Register.

- YMAC strongly agrees.

**Key Point 2** - Aboriginal heritage will continue to be protected whether it is registered or not.

- YMAC strongly agrees.

**Key Point 3** - Heritage professionals will be required to provide reports that meet the reporting standards set by the Aboriginal Heritage Council.

- YMAC strongly agrees.

**Key Point 4** - Reports from non-heritage professionals may be entered onto the register, providing minimum information standards are met to identify and locate the heritage place or object and their associated stories.

- **Protecting Secret / Sacred information** – This Key Point states reports from non-heritage professionals may be entered on the register providing minimum information standards are met to identify and locate heritage objects place and stories.
  - YMAC is concerned that detail may not be able to be provided for cultural reasons and recommends that the option for groups to provide minimal information with the caveat that the information is secret / sacred and cannot be shared should be maintained.
- **Non-heritage professionals reporting of sites** - YMAC supports non-heritage professionals being able to report sites. LAHS, Aboriginal people, pastoralists, bush

walkers all identify sites outside of the land use process and there should be a process to recognise these places.

- YMAC recommends this be supported and encouraged through an online form (like the current Heritage Information Submission Form that allows for a minimum record to be made).
- **Unqualified registered professionals** - YMAC does have concerns regarding reporting by unqualified individuals in relation to the register of heritage professionals.
  - There are several unqualified archaeologists and anthropologists currently favoured by Proponents due to low pricing.
  - Key Point 4 would allow for the registering of their reports so long as they met the minimum standards.
  - YMAC suggests that a stronger definition of what constitutes an “unqualified registered professional” will be needed.

**Key Point 5** - The register will show the level of confidence in accuracy of information.

- YMAC strongly agrees.

**Key Point 6** - Local Aboriginal Heritage Services will be encouraged to update and improve information for their areas of responsibility

- YMAC strongly agrees.

**Key Point 7** - There will be standardised language and methods of spatial reporting.

- YMAC strongly agrees.

**Key Point 8** - Use of predictive modelling to highlight areas of likely Aboriginal heritage sensitivity to aid risk assessments.

- YMAC offers the following comments in relation to predictive modelling:
  - YMAC recognises that proponents are already encouraged to use the DPLH’s due diligence guidelines to determine if they think a survey is necessary. The benchmark is very high and if used as a risk management tool may lead proponents at an early stage to avoid proposals in areas where sites are likely to be damaged.
  - Agreements are the main reason Proponent’s undertake surveys.
  - However, there are dangers in using predictive modelling which may well be inapplicable to particular places. Instead of relying on such models which may be misleading, people should just ask the relevant LAHS.
  - Predictive modelling can be problematic, because it is always going to be based on an incomplete data set. The majority of the information on the AHR comes from developments which tend to target specific areas and land forms. In some areas no heritage surveys have previously been undertaken or they may have been undertaken to a low level (such as fly over only, or a driving survey). Predictive modelling may be useful in early consultation stages, BUT it should be undertaken by the LAHS as a planning tool, not by Proponents or the Government.

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

With respect to this proposal, YMAC provides the following feedback.

**Key Point 1** - Provide for a formal referral mechanism to both a government and Local Aboriginal Heritage Services for land use proposals for advice on the Aboriginal heritage implications of the proposal and appropriate level of assessment (where a land user does not voluntarily adopt the highest level).

- YMAC has some concerns that provision of conflicting advice may be problematic. The referral on Aboriginal heritage implications should be to the LAHS only.

**Key Point 2** - Provide for a tiered assessment of land use proposals that is dependent upon the known or predicted Aboriginal heritage values of the land and the nature of the proposed land use (e.g. the degree of impact to the land that the proposal is likely to cause).

- Where tiered assessment dependent on known Aboriginal heritage values, YMAC believes that it can't be assumed that what was known or disclosed is accurate or complete.
- Nor can it be assumed that where there has been past damage that there is no need to be concerned about further damage.

**Key Point 3** - Consents to undertake an activity or range of activities will run with the land provided 'new' land users propose the same activity or range of activities.

- YMAC believes this would be acceptable in principle the consent had done properly; **BUT** DPLH will need to make sure of the nature and date of the consent and what was actually consented to and limit it to the particular area the subject of the survey clearance and the activity described in that survey. If it wasn't so limited, then it should not apply.
- For example, if only a small area was surveyed and cleared for particular activities then a blanket consent to a whole project or a larger area should not be accepted.
- Again, the best source of this information would be the LAHs rather than the DPLH. Furthermore, consultation with local AHS and TOs should be encouraged without fears that someone may be asked to pay lots of money.
- Replacing the current Regulation 10 under the Act a low impact activity would be good. It can also be useful for things like road / bridge maintenance and repairs. In general though, if any sites are going to be impacted at all then it's not low impact by definition.

**Key Point 4** - Provide a 'call in' power for proposals that ought to have been referred but were not.

- YMAC agrees.

**Key Point 5** - Provide that a land user may voluntarily adopt the highest tier of assessment, particularly where this reflects agreements made with the relevant Local Aboriginal Heritage Service (s) or other relevant Aboriginal party.

- YMAC agrees.



**Key Point 6** - Set and enforce the standards for research, consultation and reporting to be undertaken for each level of assessment.

- YMAC agrees.

**Key Point 7** - Provide that reasons for decisions on the acceptability of land use proposals are given by the relevant decision maker.

- YMAC agrees.

**Key Point 8** - Provide that all parties to a decision regarding the acceptability of land use proposals that impact on Aboriginal heritage values have the right to appeal.

- YMAC agrees, noting that this will make the system more equitable, as Traditional Owners do not currently have this opportunity.
- See also comments in Proposal 7 below.

### **Proposal 6: Encourage and recognise agreement making**

YMAC agrees with all the Key Points 1, 2, 3, 4, and 5 for this Proposal, as outlined below.

YMAC strongly welcomes having past, present and future agreements ratified, as there are some old agreements that likely fall below the standards proposed for the new AHA.

**Key Point 1** - The Aboriginal Heritage Council will not ratify an agreement if they consider the process by which it was negotiated was inequitable.

**Key Point 2** - To be ratified, an agreement must not authorise the destruction of Aboriginal heritage without the need for formal approvals under the new legislation. Parties will not be able to entirely contract out of the new Act.

**Key Point 3** - If a proponent presents an agreement for ratification that pre-dates the establishment of the relevant Local Aboriginal Heritage Service(s), the Aboriginal Heritage Council may (at its discretion) seek advice from any Local Aboriginal Heritage Service(s) covering the agreement area as to its current suitability.

**Key Point 4** - Proponents may also make agreements with Local Aboriginal Heritage Services regarding various matters under the new Act (costs, timeframes etc).

**Key Point 5** - The Aboriginal Heritage Council will not be empowered to impose its view on the commercial terms of agreements negotiated in good faith by the respective parties.

## Proposal 7: Transparency and Appeals

YMAC agrees *in principle* with Key Points 1, 2, 3, 4, and 5, as outlined below, BUT please refer issues raised under relevant Key Points and additional questions:

**Key Point 1** - Reasons for decisions by the relevant decision-maker will be published at key decision-making stages (referral/standards setting and land use proposal assessment), enabling affected parties to seek review of these decisions.

- YMAC agrees *in principle*.

**Key Point 2** - Aboriginal people and land users whose legal rights and interests are affected by the decision-maker's actions will have the same rights of review and appeal if they are aggrieved by a decision on a proposed land use, or other administrative decisions.

- YMAC agrees *in principle*.

**Key Point 3** - Review mechanisms will be subject to statutory timeframes and available to those who are the acknowledged knowledge holders, native title holders or claimants, or have any other legal interest in the relevant land.

- This is agreed *in principle* but may depend on the tightness of the time frames (see below).

**Key Point 4** - Participants in the consultation process on a land use proposal will be notified of the recommendations to be considered by the AHC and may lodge a written objection to the recommendation within 21 days of receiving notice of the recommendation. The department will be required to ensure procedural fairness is afforded to all parties and provide details of objections to the AHC, which must be considered by the AHC before making a recommendation to the Minister on a land use proposal. The Minister will be provided with details of stakeholder consultation processes and copies of submissions but will not hear appeals directly.

- Please see notes under additional questions raised under Key Point 5, below.

**Key Point 5** - The State Administrative Tribunal will be retained as the primary review body for any person whose legal rights and interests are negatively affected by a decision by the Minister.

- YMAC agrees in principle, but also raises the following **additional** questions that require addressing under the review.
  - **Notification of Appeals** - It is good that the discriminatory provisions are removed to give TOs the right to appeal decisions as well, but it is necessary to ensure TOs will have a role in relation to any appeals by proponents.
  - YMAC recommends that the LAHs and/or TOs should automatically have the right to be a party to an appeal by a proponent and should be served with all the relevant documents and required as a party to consent to any settlement or mediated resolution of the appeal.
  - YMAC recognises this could go both ways, but strongly believes it is important for TOs to know what agreements have been made on their land, particularly if this

agreement is overriding an objection to the land use proposal or conditions placed on such a proposal.

- **Reconsideration of Timeframes.** - Current procedural fairness timeframes are about 14 days. YMAC recommends these should ideally be around 30 days. The transition to LAHS is going to have some teething problems as capacity is built. If timeframes are too tight then in some instances the NTG's will lose their opportunity to dissent.

## **Proposal 8: A modernised enforcement regime**

YMAC agrees with majority of this proposed Key Points, as outlined below.

**Key Point 1** - Maintain the current range of offences.

- YMAC agrees but proposes consideration be given to whether there are other regulatory statutes that provide for additional offences that might be applicable to the AHA.

**Key Point 2** - Limit the current 'ignorance' defence to circumstances in which the land use proponent has done everything 'reasonably practicable' to make themselves informed.

- YMAC agrees – the onus of proof to establish the defence must lie with the proponent seeking to rely on it.

**Key Point 3** - Increase the limitation period to five years.

- YMAC agrees that introducing a 5-year limitation period is an improvement.
- However, given the remoteness of some of these places the NTG and the difficulty in accessing areas under development means that even 5 years is not appropriate.
- Given the very high level of proof needed for a prosecution, YMAC would prefer to see no time limitation on prosecution or that the limitation period should run from the date when the damage was discovered.

**Key Point 4** - Reinforce (for the avoidance of doubt) that a place need not be on the Aboriginal Heritage Register for the offences to apply

- YMAC agrees.

**Key Point 5** - Increase penalties to match those provided for in the Heritage Act 2018, which empower a court to:

- a. impose a fine of up to \$1 million, with a daily penalty of \$50,000, on a person found guilty of an offence;
- b. impose a fine of up to \$1 million and imprisonment for one year, with a daily penalty of \$50,000, on a person found guilty of contravening a stop work order made by the Minister for Aboriginal Affairs;
- c. order a person to take specific measures to restore a place, or any specified land, feature, building or structure, or to return anything to the place, so that the place is restored to the state in which it was before the offence occurred;
- d. order compensation for the damage or loss of heritage, wholly or in part.

- YMAC strongly supports increasing penalties as it reflects the importance of Aboriginal heritage and brings it in line with penalties for impacting European heritage. This also brings the new AHA in line with some aspects of the RDA.

**Key Point 6** - If a person is convicted of an offence the Governor may order that, during a period of not more than 10 years, the subject land must not be developed or used, or may be used only for the purposes specified in the order.

- YMAC agrees.

**Key Point 7** - Not carry forward Honorary Wardens in the new legislation.

- YMAC recommends that LAHS be provided with the roles previously undertaken by Honorary Wardens. If it is decided that the DPLH will undertake this role, it will need to be properly funded and resourced to undertake the tasks required (recognising that this role is currently undertaken by DPLH already).
- Alternately, DPLH should have power to delegate duties and functions to particular TO groups or LAHSs.

**YMAC proposes the following additional queries and concerns for consideration.**

- **Burden of Proof of damage to a place of significance.** There are always difficulties for TOs to prove breaches of the AHA and the occurrence of offences, especially where work has proceeded, and the area is now so disturbed that its significance or the person who carried out the damage cannot be proven. It would defeat the purpose of the AHA if people can escape sanction completely because of the difficulties of proof. YMAC recommends at the minimum that some form of sanction or penalty should apply as a disincentive, for example the publication of photographs and information of the damage and the owner of the relevant tenement.
- **Consider introducing Enforcement Rights.** YMAC recommends consideration of a provision for Rangers associated with NTGs or LAHS to be able to hand out small, on the spot fines. This would be more aimed towards tourists and other visitors to land who impact Aboriginal heritage sites by unauthorised camping, littering, graffiti etc.

## **Proposal 9: Protected Areas**

YMAC agrees with the two Key Points but proposes the following for further consideration.

**Key Point 1**- Existing Protected Areas will continue.

- YMAC agrees but proposes that the regulations for management activities must also be retrospective, extending to existing Protected Areas without them requiring new applications and/or declarations.

**Key Point 2** - If an application is made to declare a new Protected Area, provision will be made in the new legislation for regulations capable of authorising specific management activities by the relevant Aboriginal people.

- YMAC agrees. YMAC will always support reforms and initiatives that recognise the necessity of Traditional Owners being directly involved in determining what happens

to their Country and cultural sites; this includes the management thereof, as well as actual on-the-ground activities.

- However, for some groups to do this effectively, adequate resourcing may be an issue. YMAC holds concerns that this may lead to Traditional Owner groups being responsible and held accountable for carrying out management activities that they don't have the necessary resources (e.g. manpower, transport, equipment, etc.) to do so.

### **Improving Provisions**

- Currently, Protected Areas can be excised, removed or reduced without the consent of the relevant Traditional Owners. For example, this occurred in Woodstock-Abydos to enable the FMG railway to go through the area. Such excisions can have significant impacts on the integrity of site complexes and songlines, even when they are justified as having avoided individually registered sites (or at least those deemed to be of higher importance).
- Therefore, YMAC strongly recommends that provisions be made to give further protections against such decisions, especially those based on the grounds of economic expediency. YMAC proposes that native title groups be afforded greater power in this process, ideally through a legislated veto and/or appeals process.
- Whilst YMAC strongly agrees that it is important to ensure Traditional Owners have suitable access to Protected Areas for management purposes, access must also be afforded to those who wish to visit these areas and the sites within for cultural purposes.