Office: Perth
Date: 09 October 2020

To: Aboriginal Heritage Act Review
Department of Planning, Lands and Heritage
Locked Bag 2506
PERTH WA 6001

By Email: AHAreview@dplh.wa.gov.au

Dear Assistant Director General,

REF: Phase three submission on the final consultation of the Aboriginal Heritage Act review

Attached please find YMAC's submission on the Consultation Draft of the Aboriginal Cultural Heritage Bill 2020.

YMAC is the Native Title Representative Body (**NTRB**) for what are described as the Pilbara and Geraldton regions of Western Australia. YMAC is run by an Aboriginal Board of Directors, representing several native title groups (each of whom have their own language, culture, traditions and protocols). YMAC provides a range of services, including native title claim and future act representation, heritage services, community and economic development assistance, and natural resource management support.

In making this submission YMAC expresses its disappointment in the lack of opportunity for Traditional Owners to be involved in consultation, as a result of the short time allowed to consider this vitally important new legislation. There has been additional concern expressed by YMAC members that knowledge holders living remotely who are strong advocates for heritage were not considered in the process, and unaware of what is happening. While the consultation informing the draft may have occurred over the last two years, it was disappointing that Government has only provided just over five (5) weeks for Traditional Owners to absorb its content, discuss and understand implications, attend an information session, and then make a submission.

YMAC therefore submits that voting on this bill should not be rushed, but instead Government should:

1. Extend the time available for Traditional Owners to provide feedback; and
2. Take the necessary time to fully consider and incorporate feedback from consultation into a more refined draft.

It is clear now more than ever, that Aboriginal Heritage in Western Australia needs to be valued, protected, preserved and appropriately managed. Community sentiment appears to support this view.

Continued over…

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YMAC's concerns - in summary - include:

1. Lack of mandating ethnographic and archaeological surveys to fully understand the cultural worth of ACH sites - inclusion of this requirement would support achievement of informed consent.
2. Too little information available to fully assess impact of the Bill, due to much of the mechanics relegated to regulations and guidelines which are not yet written, and which can easily be amended by the government of the day.
3. Continuing concerns about the workability of LACHS without appropriate and ongoing funding and support from the government.
4. Ultimately the Minister will still have the right to approve Aboriginal Cultural Heritage Management Plans (ACHMPs) that include the destruction of ACH against the objections of the people to whom that heritage belongs.
5. A quarter of the new ACHA is dedicated to defining harm to ACH places and providing an approvals pathway so that this harm can be undertaken without breaching the ACHA.
6. Conversely, whilst the promotion and appreciation of ACH is mentioned in the objects of the ACHA it is never mentioned again throughout the entirety of the document.
7. The need for clear processes for Traditional Owners to make both written and oral submissions to the ACH Council and the Minister prior to them making any decision about their cultural heritage, should be included in the Bill.

YMAC considers it is also vital that other legislation - such as WA's Mining Act (1978), the Commonwealth Native Title Act (1993), WA's Local Government Act (1995) and federal heritage and environment legislation - is amended to recognise Aboriginal cultural heritage much earlier in projects. Heritage needs to be considered throughout a project's lifecycle - particularly as new information comes to light – and both before and after agreements (including existing agreements) have been made. This needs to be reflected across the board.

YMAC calls for a significant extension to the consultation period, increased consultation with Aboriginal people, and significant redrafting to align with the aspirations of the bill and to future-proof it so that these protections and rights are enshrined in legislation, rather than left to regulations and guidelines.

Detailed comment on the draft ACHA Bill can be found in the reminder of this submission. YMAC address each part of the ACHA outlining the initiatives we support in principle, our concerns, and provide suggested amendments to improve the bill.

Should this response generate any questions or concerns, please contact Executive Assistant, Dee Way, in our Perth office on 08 9268 7000, or email dway@ymac.org.au.

Yours sincerely,

Simon Hawkins

Chief Executive Officer

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Yamatji Marlpa
ABORIGINAL CORPORATION

Draft Aboriginal Cultural Heritage Bill 2020

YMAC Submission

Submission Date: 9 October 2020

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Executive Summary

YMAC is the Native Title Representative Body (**NTRB**) for what are described as the Pilbara and Geraldton regions of Western Australia. YMAC is run by an Aboriginal Board of Directors, representing several native title groups (each of whom have their own language, culture, traditions and protocols). YMAC provides a range of services, including native title claim and future act representation, heritage services, community and economic development assistance, and natural resource management support.

YMAC's preparation for this submission included consultation with members, Prescribed Bodies Corporate (PBCs), discussion with other NTRBs, meeting with Department of Planning Lands and Heritage (DPLH) staff and contribution from external legal consultants.

With this proposed new Act, YMAC welcomes the improvements regarding the management of Aboriginal ancestral remains, secret and sacred objects, broadened definition of Aboriginal Cultural Heritage (ACH), increased penalties for non-compliance, and the role of Aboriginal Inspectors. However, YMAC believes these represent low hanging fruit and that the majority of the proposed Act in their current form are unworkable at best.

In light of the destruction of the Juukan Gorge in May 2020, it clear now more than ever that Aboriginal Heritage in Western Australia needs to be valued, protected, preserved and appropriately managed. Community sentiment appears to support this view.

It is therefore disappointing that the opportunity to address current shortcomings in the *Aboriginal Heritage Act* (1972) (AHA) by mandating ethnographic and archaeological surveys to fully understand the cultural worth of ACH sites is not included in this new proposed Act. Inclusion of this requirement would support achievement of informed consent.

YMAC is also deeply concerned that the proposed ACHA is not future proofed. The workability of the Local Aboriginal Cultural Heritage Services (LACHS), Aboriginal Cultural Heritage Council (ACH Council), ACH management processes, minimum standards of consultation, management code etc. are all relegated to regulations and guidelines which can easily be amended by the government of the day. YMAC supports that guidelines will have a public review period but given that the Minister can make unilateral changes to the guidelines despite the results of these consultations YMAC is concerned these can easily be modified to negative effect in future.

YMAC is broadly supportive of the concept of the LACHS – and agree that PBCs should be prioritised in the LACHS selection process - but remain concerned about their workability without appropriate and ongoing funding and support from government. Many smaller and less established PBCs do not have offices or staff available to respond to ACH permits and notifications. Given they will not be able to charge the State for undertaking these functions and proponents are unlikely to pay for LACHS to object to their applications, without significant and ongoing investment from the State these PBCs / LACHS will be unable to take advantage of the rights contained in the ACHA.

Yamatji Marlpa
ABORIGINAL CORPORATION

Unfortunately, the ACHA draft bill in its current form does not live up to the worthy aspirations outlined in its Objects (section 8). Under the current AHA 463 section 18 permits have been approved by the Minister in relation to mining activity in the past ten years and none have been rejected. Under the new ACHA LACHS are encouraged to reach negotiated outcomes with proponents but ultimately the Minister will still have the right to approve Aboriginal Cultural Heritage Management Plans (ACHMPs) that include the destruction of ACH against the objections of the people to whom that heritage belongs. YMAC do not see how this draft bill in its current form will lead to less ACH places being destroyed or damaged. YMAC recognises that LACHS will be able to appeal some decisions to the State Administrative Tribunal but, given that the SAT must also consider the economic and social benefits to the State it appears unlikely that these appeals would be successful.

A quarter of the new ACHA is dedicated to defining harm to ACH places and providing an approvals pathway so that this harm can be undertaken without breaching the Act. Conversely, whilst the promotion and appreciation of ACH is mentioned in the objects of the ACHA it is never mentioned again throughout the entirety of the document. There are no provisions for funding to recognise, protect and preserve ACH outside of heritage identified during cultural resource management projects. Even the highest standard of protection available, protected areas, can be amended by the Minister to allow development in excised areas.

YMAC also believes that other legislation - such as WA's *Mining Act* (1978), the Commonwealth *Native Title Act* (1993), WA's *Local Government Act* (1995) and federal heritage and environment legislation - is amended to recognise Aboriginal cultural heritage much earlier in projects. Heritage needs to be considered throughout a project's lifecycle - particularly as new information comes to light – and both before and after agreements (including existing agreements) have been made. This needs to be reflected across the board."

Summary of YMAC submissions

Following is a collation of proposed amendments, inclusions, additions and recommendations made by Yamatji Marlpa Aboriginal Corporation (YMAC) within this submission, referencing the relevant parts of the Bill.

Part 3 – Provisions of General Application

1. Under section 9 the definition of ***knowledge holder*** within the ACHA or at least the Explanatory Memorandum and guidelines be amended to make it clear that different people may hold different aspects of knowledge about the ACH of an area. For example, women and men may hold different knowledge, and references to knowledge holders means all of them.

2. In section 10 (1), reference in the opening lines to “traditional and living” be amended to “traditional or living”.

3. For section 10(1): **Aboriginal Cultural Heritage and related terms** YMAC understands from discussion with Department of Planning, Lands, and Heritage (DPLH) officers that if something relates to a place (i.e. land or waters) or an object, this will be sufficiently tangible. In that case, there is no need to refer in (a) and (b) to “tangible elements” again, as that could suggest something more “tangible” may be required. For clarity of interpretation, amendments such as the following is suggested:
    - (a) an area of land or waters connected with that cultural heritage (an Aboriginal place).
    - (b) an object connected with that cultural heritage (Aboriginal object),
    - (c) a group of areas (cultural landscapes) interconnected through that cultural heritage.

4. That it be expressly stated that some cultural landscapes such as ranges, and rivers can also come within the definition of an ***Aboriginal place*** (section 10 (1) (a)). If not as part of the text of the Act itself, this should at least be in a note in the Bill or - at very least - included in the Explanatory Memorandum.

5. Under section 10(2) ***Aboriginal Tradition*** this definition be improved by the addition of words to say that this includes such traditions, observances etc **that have been adapted or developed**.

6. For section10(1): ***Cultural landscapes*** – that Cultural Landscapes be afforded a level of protection even if they are not part of a protected area (see Part 7). Adding them to the ACHD for consideration is an improvement but there is no incentive for proponents to respect cultural landscapes outside of protected areas beyond considering them, which is unlikely to spark any meaningful engagement.

7. With respect to section 10, a new and explicit inclusion of the requirement that the ACH Council and the responsible Minister must accept the assessment of knowledge holders if they believe that something amounts to Aboriginal Cultural Heritage (ACH).

8. That any breaches of the ACHA by government departments and individuals are made available to the affected LACHS / knowledge holders.

Part 4 – Aboriginal Cultural Heritage Council (ACH Council) and local Aboriginal Cultural Heritage Services (LACHS)

9. For section 17, YMAC submits that at the very least most of the positions on the ACH Council should be reserved for Aboriginal people. This could be achieved through splitting the State into regions (aligned with State Development Regions) with a male and female selected to represent each region and make decisions for that region. These members would be decided upon by a committee of Elders from the region. If these positions cannot be part of the ACH Council itself, then these men and women could form an Aboriginal Advisory Council to the ACH Council (this should not be seen to replace the ongoing need for direct and ongoing engagement with Aboriginal people).

10. That the State allocate funding specifically for the purpose of carrying out function outlined section 18 (a), which requires the ACH Council "to promote public awareness and understanding and appreciation of Aboriginal Cultural heritage in the State."

11. When making critical decisions the ACH Council should always speak directly to the LACHS/knowledge holders. This would be a more truly consultative process rather than that laid out in the bill. YMAC further submits the ACH Council should encourage access to both the ACH Council and the Minister, to ensure heritage protection is not a faceless and nameless process.

12. Under Section 33 it should state explicitly if a LACHS is also required to be a corporation.

13. For section 34, that some flexibility be allowed in the ACHA for the ACH Council to appoint more than one LACHS for an area in exceptional circumstances, and the Act be amended to reflect this.

14. Under section 34(2)(e), the requirement for impartiality should be removed. Or, at minimum, this section should be redrafted so that it is clear what this impartiality applies to. The LACHS are intended to give Aboriginal people a strong voice in the heritage process. It is contradictory to require them to be impartial when they exist to express and promote the Aboriginal viewpoint.

15. For section 41, to ensure that all LACHS will be able to take advantage of the rights afforded to them and the Aboriginal people they represent, some guaranteed source of government funding be set out in the legislation to fund the many functions that will not be paid for by proponents. At very least the LACHS should be able to bill the Department for work done responding to ACH Permits and other notifications.

16. For section 41(4), LACHS should be able to request partial or upfront payment for fee-for-service work related to ACHMP negotiations, heritage surveys etc. For smaller, poorly funded PBCs they may not have the resources to undertake these functions if they do not receive some or all the funding upfront.

17. Under section 41(2), the ACHA should specifically provide that the LACHS may charge proponents for the reasonable costs, including costs of professional assistance and advice in relation to consultations, negotiations, heritage surveys and any other work required to be performed in relation to applications for and work in relation to permits or ACHMPs.

Part 5 – Rights and Duties in relation to Aboriginal Cultural Heritage

18. For section 46, it is vital that sufficient funding and support be made available so that Aboriginal people can be involved in the recognition, protection, preservation and management of their heritage. Without funding and support to ensure that such protection is in fact practicable, these principles will just be hollow statements. Commitment of funding should be embedded within the legislation.

19. Under section 62(3), that the inclusion of oral submissions be extended to **all** forms of evidence being provided by the LACHS and knowledge holders reporting to the DPLH, ACH Council, Minister and SAT.

20. For section 62(2) be redrafted to also include an exemption for non-Aboriginal individuals and organisations when acting under the instruction of an Aboriginal individual who qualifies for exemption under section 62(2)(a).

Part 6 – Protected Areas

21. The declaration of a Protected Area should be able to override existing ACH Permits and / or ACHMPs. It is likely that in areas with mineralisation proponents may seek ACH Permits for future works to prevent the lodgement of Protected Area applications over these areas in future. It will take time and resources for LACHS to reach the point where they are ready to begin lodging Protected Area applications. It is comparatively very easy for landholders to lodge low impact activity permits.

22. If YMAC's preferred position (point 20 above) is not feasible then the alternative would be for the declaration of a Protected Area with those areas subject to AH Permits and ACHMPs excised if the proponents are unwilling to give them up.

23. For section 69(2), like the current ACMC, the ACH Council and Minister are still making decisions concerning the degree of significance of ACH. YMAC submits an inclusion that the ACH Council and Minister must accept the view of the knowledge holders who are the only persons qualified to make a judgement as to whether a place is of outstanding significance to them.

24. Given that the full significance of a place is not known when it is first identified, will the requirement to revisit an ACHMP when new information comes to light provide an opportunity to object to an ACHMP on the grounds that the knowledge holders wish to pursue a Protected Area application? YMAC submits that new information triggering a renegotiation of an ACHMP should allow for the declaration of a Protected Area for places of Outstanding Significance.

25. For section 76, YMAC submits that this clause be redrafted to make it clear that a resolution by both Houses of Parliament is necessary to amend or repeal a Protected area.

26. If the Minister is to be allowed to unilaterally amend Protected Areas, which YMAC strongly objects to, then this decision should be included in the list of decisions that can be reviewed by the State Administrative Tribunal.

Part 7 – Offences about Harming ACH

27. Under section 80, Part 7 should apply to cultural landscapes generally, not only when they are in protected areas.

28. Under section 81, add (1)(b)(iii) - to include actions which are incompatible with or contrary to how the Aboriginal cultural heritage should be treated under Aboriginal tradition or the beliefs of Aboriginal people.

29. An explicit statement needs to be added that the views of the knowledge holders for the relevant area in accordance with Aboriginal tradition are to be accepted as to whether harm to ACH is caused and the whether the harm is material or serious.

Part 8 – Managing Activities that may cause harm to ACH

General

30. For section 90, to future-proof the ACHA and provide certainty to all stakeholders the definitions of Terms used within section 90 should be expanded to contain common examples relevant to recreational and development activities. The guidelines are subject to change at the Minister's discretion meaning that the protections provided by the tiered approvals system could easily be eroded by the reclassification of certain activities. Minimal and low impact activity should be defined to exclude certain activity so that those will automatically be regarded as higher-level impact. For instance, all ground-disturbing activity should be excluded from the definition of minimal or low impact activity. Consultation should also be required for all activities in certain types of ACH to be negotiated between the LACHS and landholders / users. This would provide for the nuances that are not currently captured in the proposed ACHA (examples might be burial grounds, rock art areas, ceremonial sites etc.).

31. YMAC workshopped the definitions of harm with some of our members. They expressed concern that in some places even "minimal" impact activities would constitute serious harm. This extends to keeping the visitors to taboo / unsafe areas safe from spiritual harm. They suggested that LACHS could flag on the ACHD places where specific additional restrictions apply. For example, requirement to consult prior to low or minimal impact activities in areas of outstanding cultural significance or gendered men / women's places. This would allow the LACHS to discharge their duties under their own Lore and custom as well as be compliant with the ACHA. YMAC proposes these provisions be added to the ACHA.

32. Cultural Heritage Impact Assessments must be undertaken by the LACHS and the land holder in collaboration. Only the Aboriginal people to whom the ACH belongs can accurately define what constitutes harm and to what degree for their places. To support this section 93(c) should be expanded to require that the persons identified should be notified and that consultation is required following notification if requested by the LACHS. Without this there is no basis for any person carrying out the due diligence assessment to form any view as to whether harm is caused and the level of impact in sections 93(a) and (b).

33. That a minimum standard for the Due Diligence Assessment and ACH Management Code should be enshrined in the ACHA with supplementary guidelines. This would future proof a minimum standard and provide certainty for stakeholders.

34. For section 100 exempt activities should be removed or at very least there should be a restriction so that an activity in relation to ACH identified on the ACHD cannot be exempt. Even if people do not look up the ACHD, they can be warned about it and stopped if discovered.

35. For section 101 to be amended to state that proponents are required to notify LACHS and knowledge holders of the location and type of upcoming minimal activities on their country, ***before*** the activity can be carried out. This is particularly relevant in relation the nuances discussed in Part 7 above.

36. Under section 104, the CEO is not the appropriate person to issue a minimal activity letter. When it is unclear of the activity constitutes a minimal activity, the proponent should be directed to the LACHS and knowledge holders who are the appropriate people to rule on this matter.

ACH Permits

37. ACH permits should only be permitted with the approval of the LACHS / knowledge holders and if not approved that proponents should be encouraged instead to avoid any harm or reduce harm to a minimal impact only.

38. Time frames are not provided in the proposed ACHA - these will be left to the guidelines and regulations. The ability of LACHS to exercise their rights in relation to ACH Permits will be impacted by these timeframes. It is proposed that the timeframes be enshrined in the ACHA and that a minimum of 90 business days should be considered for ACH Permit responses.

39. Responses to ACH Permits (and ACHMPS and other notifications) should be able to be provided via oral submission or by meeting, not just in writing. The DPLH could transcribe these oral submissions to be added to the applications.

40. Regarding section 108 (Public notice) it is vital that notices also need to be given to all the people listed in section 97 along with full details of the proposed activity and the location of the activity. The ACH Council should also be required to contact those any of those people in section 97 to ascertain whether they wish to respond and give them sufficient time to do so. There should also be the opportunity to those persons to provide submissions orally (e.g. at a meeting) as well as in writing to the ACH Council. This is also relevant to section 114-116 in relation to the application for ACH Permit extensions.

41. For (section 111) the ACH Council's written reasons for the decision should also be required or available on request by the applicant or LACHS / knowledge holders.

42. For sections 117 and section 119 to be amended to require notification to the LACHS / knowledge holders ***before*** the extension or transfer of an ACH Permit. LACHS / knowledge holders should be afforded an opportunity to make oral or written submissions to the ACH Council regarding the extension / transfer.

43. Section 118 be amended to also allow LACHS / knowledge holders to inform the ACH Council of new information that may trigger new / additional conditions on an ACH Permit.

44. That section 121 be amended to afford LACHS / knowledge holders an equivalent right to object to the Minister against the grant of an ACH permit.

45. Further, the grant of an ACH permit or an upholding of the grant by the Minister should be a decision reviewable by the State Administrative Tribunal under s258. The same applies to decisions to allow amendments to ACH permits or any refusal to apply additional conditions if notified under s118 or by LACHS/knowledge holders.

ACHMPs

46. For ethnographic and archaeological surveys to be mandated, so all parties can fully understand the cultural worth of ACH significant sites, to support achievement of informed consent.

47. That the prescribed timeframe for ACHMP consultations should be enshrined in the ACHA to future-proof the bill and provide certainty to stakeholders. To be workable, YMAC proposes the prescribed time period for ACHMP consultation must be at least six months.

48. For section 127 there needs to be a sufficient time prescribed for a proper negotiation and “best endeavours” to be undertaken. This time should run from when the actual negotiations commence and not be sufficient if just carried out within a period. YMAC further submits the requirement that the best endeavours **be in good faith**.

49. Under section 124, it be amended to make it clear that NTA agreements cannot be considered ACHMPs if they were not obtained by full informed consent and if the other section 135 conditions have not been satisfied.

50. For the existing NTA agreements that contain very specific project information be considered under section 124, proponents should be encouraged to engage with the ACHMP process and negotiated outcomes with the LACHS.

51. For where exclusion zones, rights reserved etc. areas exist in current NTA agreements the LACHS could register this on the ACHD should they wish too. This would provide a guide to others of the significance of those areas and might also inhibit any ACH permits from being granted over those areas.

52. With respect to section 126 for native title agreements or previous heritage agreements to be regarded as giving rise to sufficient consultation also requires the consultation to cover the specific harm proposed. General consultation about the larger project should not be sufficient. The proposed Act should be amended to reflect this.

53. A decision by a Minister to not approve an agreed ACHMP (section 139) should be able to be reviewed by SAT under section 258.

54. For sections 140 –141, that there be mechanisms for, in the case of applications for authorisation of ACHMPs for LACHS, native title parties and knowledge holders to make submissions, including oral submissions if they wish, directly to the ACH Council and Minister. The section 140 application information comes from the proponent only and while the ACH Council could ask an Aboriginal Party for information under section 141, there is no entitlement for the Aboriginal Party or other Traditional Owner or knowledge holders with an interest in the matter to make submissions directly to the ACH Council and Minister. Such entitlements to make submissions and objections are important as specific rights so that under section 272 any contracting out or waiver by agreement cannot stand.

55. That section 130(a)(iii) also be amended to expressly add such steps must include full disclosure of all possible options for carrying out the activity in a manner that would minimise or avoid harm, including carrying out the activity in different locations or by different methods.

56. While the role of the ACH Council in assisting the parties to reach agreement is a good one (section 143), it is important that the information obtained in the course of mediation is not able to form part of the deliberations of the ACH Council in making recommendations to the Minister. There needs to be an arrangement whereby the role of the ACH Council in mediation or assisting agreement is carried out by different people from those who will be involved in making decisions on ACHMPs.

57. Section 150(3) to be amended to require the ACH Council and Minister to inquire into and be satisfied with the consultation undertaken between proponents and LACHS in relation to amendments to ACHMPs.

58. Section 156 be amended to require that the LACHS be notified ***before*** the transfer of an ACHMP and that they have a right to make submissions to the ACH Council and / or Minister regarding the transfer, including objecting to it.

Part 9 – Aboriginal Cultural Heritage Directory

59. In the interests of transparency and the creation of a valuable heritage record, the ACHD should also include the records of Aboriginal places that have been destroyed as a result of AHA section 18 permits and future ACHMPs. This will also ensure that sufficient information is available to inform good predictive modelling.

60. For the Due Diligence Guidelines and the ACHD make it clear that the ACHD is not an exhaustive record. Recording the locations and level undertaken of prior heritage surveys would add useful contextual information as to the presence / absence of Aboriginal places. The ACHD and Due Diligence Guidelines should also make it clear that to be thorough in their assessment proponents should contacts the LACHS first and foremost.

61. LACHS and knowledge holders should be able to make oral submissions regarding ACH places to the DPLH for addition to the ACHD.

62. Prior to any information being placed on the ACHD that might be available to others, LACHS and knowledge holders should be given the opportunity to object (orally or in writing) to it and that no information be made available to others when there are such objections. There may be concerns about privacy issues such as the names and contact information of knowledge holders, that should not be made available to other people. Also, this will be a means of the LACHS checking that no cultural information will be made available to potential researchers, proponents, other Aboriginal people or the public.

Part 10 – Stop Activity Orders, Prohibition Orders, and Remediation Orders

63. YMAC supports remediation orders in principle but recommend that remediation should not allow for a person or body corporate to reduce their penalty for harming the ACH under the ACHA. Most harm to ACH can't be remediated in a way that returns that place to the state prior to the harm and this needs to be recognised. Remediation should be an add-on where appropriate and agreed to by the LACHS.

64. YMAC submits that a provision should be added to Part 10, to allow SAO and Prohibition Orders for cultural landscapes (that are not within Protected Areas) under exceptional circumstances.

65. For Section 174: the SAOs, remediation and prohibition orders don't appear to apply to cultural landscapes that are not in protected areas. Given that these are discretionary orders, there should be no harm to allow orders to be made in relation to cultural landscapes generally. It may be in the State's interest for cultural landscapes to be preserved in exceptional circumstances.

66. There should also be provisions for the ACH Council to issue urgent short term SAOs or prohibition orders, until a Minister can consider a recommendation. By comparison, under section 18 of the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984,* authorised officers can make emergency declarations. This lack could be dealt with by delegations in the case of SAOs by reason of section 273. But, it would be useful if the ACHA provides for this specifically so as not to require or wait for delegations.

Part 11 – Securing Compliance

67. Where possible the Minister should confer upon Aboriginal Rangers the status of Aboriginal Inspectors and provide fee for service opportunities for these rangers to undertake this important work.

Part 12 – Legal Proceedings

68. Prosecutions are always hard to establish, especially if there is a criminal standard of proof applied. YMAC submits there should be alternatives such as civil actions for breach of statutory duties that can be taken by the CEO or by LACHS, Traditional Owners or knowledge holders. There should also be specific provisions enabling actions for compensation or other remedies to be brought by LACHS, Traditional Owners or knowledge holders or any other Aboriginal people who have suffered loss from the harm caused. These should be based on a civil balance of probabilities test.

Part 13 – Review by State Administrative Tribunal

69. For section 258 that the decisions reviewable by SAT should be expanded to include decisions to grant and amend ACH permits, or to not approve an agreed ACHMP, or to refuse to declare an area as a protected area.

70. Where there is an application to SAT to review a decision, it is essential that the ACHMP or other decision the subject of a review should automatically be stayed until the SAT concluded its review. This is to prevent ACH from being damaged or destroyed in the meantime.

71. In Part 13 it would be useful also to state expressly that where a person seeks review of decisions not to authorise ACHMPs, or not to issue SAOs, prohibition or remediation orders, that notice is to be given to the Aboriginal party, LACHS and native title party for the area of the review application. And, at the first hearing date, to state that those parties have a right to apply to be joined as a party to review proceedings. This is useful because in the past review applications have been made to SAT against section 18 conditions, but the Minister and the proponent have reached an agreement in SAT mediation to remove such conditions without the involvement or indeed prior knowledge of the Traditional Owners. While Traditional Owners could in theory apply to be joined to such proceedings under section 38 of the *State Administrative Tribunal*

Act, this depends on the relevant body being aware that such a review application has been made and when it is able to be heard so that the joinder can be applied for.

72. For section 259 the decision maker is only required to give short particulars of reasons for decision. It is recommended this be amended to refer to full reasons for decision, including findings of facts. While this can be ordered by the SAT, it would be easier to mandate this at the outset so parties can consider if it appropriate to seek a review. It is particularly important for full reasons to be provided where the Minister has not accepted a recommendation by the ACH Council or by a LACHS.

Part 14 – Miscellaneous

73. For section 268 (consultation on proposed guidelines) that the consultation period be extended from 28 days to 60 days. This is more realistic especially for newly fledged PBCs which are likely to become the LACHS. LACHS and knowledge holders should also be able to make oral submissions directly to the DPLH on proposed guidelines.

74. Regulations should also be notified and have a consultation period of at least 60 days prior to being prescribed.

75. The key areas of consultation, ACHIS, harm impact levels, and prescribed timeframes should be detailed in the legislation to provide certainty and clarity to all stakeholders.

76. For section 272 to be expanded to provide that a contractual term preventing someone from taking lawful action to protect ACH is of no effect. This may then permit approaches to the Minister and the media and making applications to the Federal Minister for protection regardless of "gag clauses".

Part 15 – Repeals and Transitional Matters

77. Given the widely acknowledged inadequacies of the current AHA and in particular section 18 – including by both the present and previous Liberal government – all existing section 18 applications should not carry over to the new Act.

78. YMAC submit that there should also be a halt on accepting new section 18 applications until new laws are passed.

If submissions 77 and 78 are not accepted, YMAC makes the following submissions:

79. YMAC submits that existing section 18 applications should at least trigger a consultation between all parties prior to being recognised as an ACHMP. This will give Traditional Owners an opportunity to object where one may not have existed before and provide an opportunity to review new information that may have come to light during mitigation processes such as excavations.

80. For section 18 permits converted into ACHMPs should not be called "agreed upon" i.e. "approved" ACHMPs, as that was far from the case. YMAC recommends an alternative term such as "Grandfathered s18 consents" to differentiate them from the new ACHMPs with guaranteed consultation and objection rights.

81. For all existing section 18 consents which have been issued five years or more prior to the repeal and replacement date of the Act should be reviewed by the Minister and time limit clauses placed upon them. The Minister must place a renewed focus on section 18 conditions that may prevent further acts of destruction.

82. For section 18 permits issued in the transitional period should be valid for a maximum period of three years, and with the condition that they meet consultation criteria and other requirements of the new Act. This would disincentivise proponents to push through large numbers of section 18 permit applications negating the need to engage with the new process for years to come on their developments.

83. For there to be a statutory requirement for notification of the matters required for informed consent and consultation that should take place between the permit holder and the LACHS or relevant body before a section 18 consent is converted to an ACHMP and that there is scope to object to the ACH Council and Minster to such section18 consents being deemed to be an ACHMP. Any overruling of that objection should be a decision reviewable by SAT under section 258.

84. “Grandfathered” and transitional section 18 permits should not be transferrable between proponents. This will promote early and ongoing consultation when a new proponent takes over a tenement.

Yamatji Marlpa Aboriginal Corporation Detailed Submission

YMAC's submission addresses the Aboriginal Cultural Heritage Bill Consultation Draft (the Bill), by Parts and by Section. The submission takes the form of general commentary sections of the draft bill, followed by proposed amendments and recommendations.

Note: reference to some sections of the Bill are simplified or paraphrased in the interests of keeping this submission brief.

Part 1 – Preliminary

YMAC has no commentary on this section.

Part 2 – Overview of the Act

YMAC has no commentary on this section.

Part 3 – Provisions of General Application

General Commentary

YMAC supports in principle, the provisions covered in sections 8, 9 and 10, which describe:

- Objects of the Act (section8)
- Description of Terms Used, (section9)
- Aboriginal Cultural Heritage and related terms (section10(1))

YMAC considers some amendment could further strengthen this section, as follows.

While supportive of the inclusion of a definition of ***knowledge holder*** within section 9, YMAC considers it important the ACHA (or at least the Explanatory Memorandum and guidelines) make it clear that different people may hold different aspects of knowledge about the Aboriginal Cultural Heritage (ACH) of an area. For example, women and men may hold different knowledge, and references to knowledge holders means all of them.

YMAC welcomes the inclusion of section10(2): ***Aboriginal tradition*** but believes it could be improved by the addition of words to say that this includes such traditions, observances etc that have been adapted or developed.

YMAC also welcomes the recognition of ***Cultural landscapes*** (section10(1)), as they are more reflective of how YMAC clients view their heritage within Country than the current *Aboriginal Heritage Act* (1972) (AHA). However, YMAC notes that only the *tangible* elements within a cultural landscape (that are not also an Aboriginal place) are afforded protection under the draft ACHA. Cultural landscapes will appear as a consideration on the Aboriginal Cultural Heritage Directory (ACHD). Cultural landscapes (that are not also an Aboriginal place) will only be afforded protection if they are within a protected area. YMAC believes this is a missed opportunity and proposes it be reconsidered.

YMAC understand from consultations with DPLH on the draft Bill that if cultural landscapes amount, under Aboriginal tradition, to an Aboriginal place in themselves e.g. a mountain or river or tract of land and the like, then they will still come within the definition of an Aboriginal place and protected as such. YMAC consider it would be helpful if this was stated explicitly within the new Act, to avoid confusion.

With respect to section 10, YMAC considers there should be a requirement that the ACH Council and the responsible Minister must accept the assessment of knowledge holders if they believe that something amounts to Aboriginal Cultural Heritage (ACH). (YMAC notes this is a requirement in the South Australian *Aboriginal Heritage Act* s13(2) to a similar effect.)

Section 14 states that the Act binds the Crown. The State and Crown are immune from prosecution and the penalties outlined in the Bill. YMAC understands that governments do not usually prosecute themselves and that departments and staff may be subject to individual sanctions under the Western Australian Public Sector Code of Ethics 2002 and associated Codes of Conduct. YMAC assumes too that the Crown may be open to civil action. In the interest of transparency YMAC request that any breaches of the ACHA by government departments and individuals are made available to the affected LACHS / knowledge holders.

Part 3 proposed amendments

YMAC submits the following amendments and inclusions:

1. Under section 9 the definition of ***knowledge holder*** within the ACHA or at least the Explanatory Memorandum and guidelines be amended to make it clear that different people may hold different aspects of knowledge about the ACH of an area. For example, women and men may hold different knowledge, and references to knowledge holders means all of them.

2. In section 10 (1), reference in the opening lines to “traditional and living” be amended to “traditional or living”.

3. For section 10(1): **Aboriginal Cultural Heritage and related terms** YMAC understands from discussion with Department of Planning, Lands, and Heritage (DPLH) officers that if something relates to a place (i.e. land or waters) or an object, this will be sufficiently tangible. In that case, there is no need to refer in (a) and (b) to “tangible elements” again, as that could suggest something more “tangible” may be required. For clarity of interpretation, amendments such as the following is suggested:
    a. (a) an area of land or waters connected with that cultural heritage (an Aboriginal place).
    b. (b) an object connected with that cultural heritage (Aboriginal object),
    c. (c) a group of areas (cultural landscapes) interconnected through that cultural heritage.

4. That it be expressly stated that some cultural landscapes such as ranges, and rivers can also come within the definition of an ***Aboriginal place*** (section 10 (1) (a)). If not as part of the text of the Act itself, this should at least be in a note in the Bill or - at very least - included in the Explanatory Memorandum.

5. Under section 10(2) ***Aboriginal Tradition*** this definition be improved by the addition of words to say that this includes such traditions, observances etc **that have been adapted or developed**.

6. For section10(1): ***Cultural landscapes*** – that Cultural Landscapes be afforded a level of protection even if they are not part of a protected area (see Part 7). Adding them to the ACHD for consideration is an improvement but there is no incentive for proponents to respect cultural landscapes outside of protected areas beyond considering them, which is unlikely to spark any meaningful engagement.

7. With respect to section 10, a new and explicit inclusion of the requirement that the ACH Council and the responsible Minister must accept the assessment of knowledge holders if they believe that something amounts to Aboriginal Cultural Heritage (ACH).

8. That any breaches of the ACHA by government departments and individuals are made available to the affected LACHS / knowledge holders.

Part 4 – Aboriginal Cultural Heritage Council (ACH Council) and local Aboriginal Cultural Heritage Services (LACHS)

General Commentary

YMAC agrees that the right people to make decisions about the identification, protection and management of ACH are the Aboriginal people to whom that heritage belongs. The corporation recognises that the creation of the LACHS is intended to give Aboriginal people a greater decision-making role early in the process. However, YMAC has several significant concerns regarding how the LACHS will be funded and supported to discharge their functions under the ACHA, plus do not consider early consultation will be achieved as regularly as would be desired.

The ACH Council will also have a broad range of proposed functions. YMAC is concerned that if the ACH Council is not adequately funded and supported, and do not meet regularly enough, it will be difficult for them to give proper and due consideration to every application before them. This is especially concerning given that if the prescribed timeframes (to be detailed in associated guidelines and regulations) are not met, then the Minister of the day can step in to expedite a process.

Within section 18, which outlines the functions of the ACH Council, YMAC welcomes the inclusion of "(a) to promote public awareness and understanding and appreciation of Aboriginal Cultural heritage in the State." YMAC considers this function could play a critical role in educating the broader community, which in turn could assist understanding and promote better respect for ACH in the long run. YMAC proposes that specific funding and resources be allocated to achieve this vital function. Funding could be provided both to the ACH Council and to LACHS and other Traditional Owner groups to achieve this goal.

Aboriginal people who are the knowledge holders for the ACH in question are the only people qualified to make decisions about that heritage. The creation of the LACHS is intended to make Aboriginal people the key decision makers in the identification and management of their heritage. However, given that consultation is only required for 'medium' to 'high' impact activities that will require an Aboriginal Cultural Heritage Management Plan (ACHMP) it is unclear to YMAC how this will incentivise early and ongoing consultation.

Additionally, the ACH Council are responsible for identifying ACH of State Significance and assessing Protected Area applications. As well, the Minister can impose an ACHMP against the objections of the LACHS. Again, it is unclear how this will lead to better protection of ACH.

During YMAC's consultation with Traditional Owners on the Bill, concerns were expressed that local people with traditional knowledge - many of whom live remotely and do not necessarily have internet access - will miss out on having their voices heard during this consultation phase. It was further suggested that when making decisions the ACH Council should speak directly to the LACHS/knowledge holders. This would be a more truly consultative process rather than that laid out in the bill. YMAC further submits LACHS/knowledge holders should have access to the ACH Council and the Minister, to ensure heritage protection is not a faceless and nameless process. For example, have meetings in rotating regional locations.

YMAC notes that in the formation of the ACH Council, the Bill allows the Council to delegate and utilise Department staff to ensure they have the resources they need to discharge their functions (sections 20 - 21). The practical workability of the ACH Council will depend on the frequency with which the Council will meet, as well as the level of resourcing.

YMAC notes the Bill outlines a broad range of functions for LACHS. It is unclear how they will be funded to undertake all these administrative and consultative tasks (e.g. responding to low impact ACH Permit notifications within prescribed time frames, identifying and conserving ACH, consulting with native title holders and knowledge holders and other LACHS etc).

Section 17 (1) outlines ACH Council membership. Only one place is guaranteed for an Aboriginal member of the new ACH Council. YMAC considers a mere preference for Aboriginal members is not sufficient to ensure that this occurs, and urge that at very least, most members of the ACH Council should be required to be Aboriginal. YMAC further urges there be a requirement for regional representation on the ACH Council.

Under section 33 a native title party is rightly the first preference for appointment of a LACHS but where native title has not been determined, the native title party is a potentially changing group of individuals. YMAC understands from consultation discussions with DPLH there will be a reluctance to appoint a group of individuals as the LACHS, and that a corporation may be required. Will this be clarified in the ACHA or in guidelines?

Section 34 states that only one LACHS can be appointed for an area. YMAC understands that this will likely be the Prescribed Body Corporate (PBC) and agrees with this approach. However, YMAC notes there may be instances where it may be more appropriate to appoint more than one LACHS. Such examples could include areas of overlap between native title determinations when there are two RNTBCs determined for an area (usually small in size) which cannot agree to form yet another corporation just to manage heritage in that area. It will be common for proponents to need to obtain permits or ACHMPs for projects that extend across the areas of more than one LACHS. There should therefore be no reason why there may not be more than one LACHS for these exceptional areas.

Section 34(2)(e) requires that a LACHS be “impartial”. This is odd and contradictory. The LACHS should represent the Aboriginal perspective and interests. This requirement should be removed. If the impartiality is referring to impartiality as between the Traditional Owners / Native Title Holders, this should be stated expressly, although it is going to be very subjective and hard to ascertain in advance of an appointment.

Under section 41(3), the LACHS cannot charge the Department fees for the discharging of their functions under the ACHA. Whilst proponents may be willing to pay a fee for service for negotiations of ACMHPs, they are unlikely to finance notification reviews, objections etc. Although LACHS will have these rights, it is unclear how smaller, poorly funded LACHS will be able to take full advantage of these opportunities to consult upon the protection and management of their heritage.

Under section 41(4) the LACHS can sue for the fee for service as a debt in court if not paid, but can the LACHS ask for an advance payment of the fee for service before carrying out the required work? It should be made clear that the LACHS are entitled to receive money (partial payment) in advance for work to be done, and in order for the permit to be granted or for an ACHMP to be approved or authorised. This is because LACHS’ may require the pre-payment in order to afford to respond to notifications and carry out the services.

Part 4 proposed amendments

YMAC submits the following amendments and inclusions:

9. For section 17, YMAC submits that at the very least most of the positions on the ACH Council should be reserved for Aboriginal people. This could be achieved through splitting the State into regions (aligned with State Development Regions) with a male and female selected to represent each region and make decisions for that region. These members would be decided upon by a committee of Elders from the region. If these positions cannot be part of the ACH Council itself, then these men and women could form an Aboriginal Advisory Council to the ACH Council (this should not be seen to replace the ongoing need for direct and ongoing engagement with Aboriginal people).

10. That the State allocate funding specifically for the purpose of carrying out function outlined section 18 (a), which requires the ACH Council “to promote public awareness and understanding and appreciation of Aboriginal Cultural heritage in the State.”

11. When making critical decisions the ACH Council should always speak directly to the LACHS/knowledge holders. This would be a more truly consultative process rather than that laid out in the bill. YMAC further submits the ACH Council should encourage access to both the ACH Council and the Minister, to ensure heritage protection is not a faceless and nameless process.

12. Under Section 33 it should state explicitly if a LACHS is also required to be a corporation.

13. For section 34, that some flexibility be allowed in the ACHA for the ACH Council to appoint more than one LACHS for an area in exceptional circumstances, and the Act be amended to reflect this.

14. Under section 34(2)(e), the requirement for impartiality should be removed. Or, at minimum, this section should be redrafted so that it is clear what this impartiality applies to. The LACHS are intended to give Aboriginal people a strong voice in the heritage process. It is contradictory to require them to be impartial when they exist to express and promote the Aboriginal viewpoint.

15. For section 41, to ensure that all LACHS will be able to take advantage of the rights afforded to them and the Aboriginal people they represent, some guaranteed source of government funding be set out in the legislation to fund the many functions that will not be paid for by proponents. At very least the LACHS should be able to bill the Department for work done responding to ACH Permits and other notifications.

16. For section 41(4), LACHS should be able to request partial or upfront payment for fee-for-service work related to ACHMP negotiations, heritage surveys etc. For smaller, poorly funded PBCs they may not have the resources to undertake these functions if they do not receive some or all the funding upfront.

17. Under section 41(2), the ACHA should specifically provide that the LACHS may charge proponents for the reasonable costs, including costs of professional assistance and advice in relation to consultations, negotiations, heritage surveys and any other work required to be performed in relation to applications for and work in relation to permits or ACHMPs.

Part 5 – Rights and Duties in relation to Aboriginal Cultural Heritage

General Commentary

Overall, YMAC considers this section is very positive. It aligns with the objects and principles of the ACHA and the aspirations of Aboriginal people to control, protect, and manage their own cultural heritage.

YMAC supports the following sections, in principle:

- Section 46: Principles relating to custodianship, ownership and possession of Aboriginal cultural heritage. This section clearly articulates that Aboriginal people should, where practicable be involved in the recognition, protection and preservation of ACH and the management of activities that may harm ACH.
- Sections 49 - 50: Rights of Aboriginal people in relation to Aboriginal ancestral remains. YMAC acknowledges that the process outlined regarding the identification and management of ancestral remains aligns with best practise management standards and welcomes the inclusion of these standards within the ACHA.
- Section 51: Organisations that are in possession of Aboriginal ancestral remains must take reasonable steps to return ancestral remains to a custodian of those remains.
- Section 52: An individual in possession of ancestral remains must take reasonable steps to transfer the remains into the custody of the ACH Council as soon as practicable.
- Section 55: A person must not disturb of remove Aboriginal ancestral remains on any land.

- Section 59: Prescribed public authorities that are in possession of a secret of sacred object are to take all reasonable steps to return the objects to a custodian. This does not apply to private collections or individuals.
- Section 61: Prevents the sale, exchange or disposal of secret and sacred objects. They also cannot be removed from the State.
- Section 61(2) permits such objects to be dealt with in accordance with Aboriginal tradition by an Aboriginal person.

With respect to Section 62(3), YMAC supports the inclusion of oral submissions to report ACH places, objects and ancestral remains. This could be extended to all forms of evidence being provided by the LACHS and knowledge holders reporting to the DPLH, ACH Council, Minister and State Administrative Tribunal (SAT). This not only acknowledges and supports oral tradition; it also serves to bridge the gap for linguistically diverse knowledge holders, and recognises that not all Aboriginal people possess writing skills needed to undertake these processes.

YMAC has concerns about two aspects of Part 4, specifically section 62: Duty to report ACH to ACH Council.

Under section 62(1) it states that a person who knows, or becomes aware of ACH including places, objects and ancestral remains must report them to the ACH Council for entry onto the ACHD. Significant penalties apply for non-compliant individuals and body corporates. Section 62(2): Lists the circumstances in which section 62(1) does not apply, this includes that an Aboriginal person acting in accordance with lore and culture can choose not to disclose.

Regarding the two abovementioned clauses, on heritage surveys and other kinds of cultural projects YMAC staff and consultants routinely become aware of ACH that clients do not wish them to disclose. It is important that individuals and body corporates acting as agents for the LACHS / knowledge holders, as well as proponents and other stakeholders, are exempt from disclosing where requested from the relevant knowledge holders. There should be a further exemption provision in section 62(2), for people acting for or under the instructions of or in accordance with the wishes of Aboriginal persons in (a).

Part 5 proposed amendments

YMAC submits the following amendments and inclusions

18. For section 46, it is vital that sufficient funding and support be made available so that Aboriginal people can be involved in the recognition, protection, preservation and management of their heritage. Without funding and support to ensure that such protection is in fact practicable, these principles will just be hollow statements. Commitment of funding should be embedded within the legislation.

19. Under section 62(3), that the inclusion of oral submissions be extended to **all** forms of evidence being provided by the LACHS and knowledge holders reporting to the DPLH, ACH Council, Minister and SAT.

20. For section 62(2) be redrafted to also include an exemption for non-Aboriginal individuals and organisations when acting under the instruction of an Aboriginal individual who qualifies for exemption under section 62(2)(a).

Part 6 – Protected Areas

General Commentary

YMAC strongly supports the declaration of more protected areas. Misalignment of the current AHA with the *Native Title Act 1993* (NTA) has resulted in no new Protected Areas being declared since 1994. However, upon a close reading of this part YMAC is of the opinion that there will be substantive obstacles to the declaration of new Protected Areas. Even if a Protected Area is successfully declared the ACH Council and Minister appear to have the power to amend the Protected Area without the informed consent of the knowledge holders and this is not a decision that can be appealed at the SAT.

Following discussions with DPLH officers, YMAC acknowledges this may be an error of drafting and not the intent. Ultimately, destruction could still occur within a Protected Area against the objections of knowledge holders based on the interest to the State. This is extremely disappointing and does not appear to improve on the degree of protection afforded to Protected Areas under the current ACHA.

Regarding sections 63 and 64, YMAC supports the recognition of ACH of Outstanding Significance being declared as Protected Areas that provide the ACH a higher level of protection under the ACHA. Although, see comments below regarding section 76 - it is unclear if the protections offered will be sufficient to act as a veto in Protected Areas which is the standard that YMAC calls for.

For section 76(4)b: Repeal of a Protected Area, YMAC supports that this can only occur via a resolution of both Houses of Parliament.

Under section 71, if the ACH Council forms the preliminary view that the application should not be declared a Protected Area the applicant and all other persons notified under section 68(1) receive written notice of the preliminary view and the reason that view was taken. The applicants will then have the right to request the Minister consider the matter. YMAC are supportive of the right to appeal but see comments below regarding section 69(2).

To gain an ACH Permit a proponent is not required to consult with a LACHS. ACHMPs can be imposed on the LACHS by the ACH Council and / or Minister against their objection. If a Protected Area cannot override these permits, then YMAC foresees it is unlikely any potential Protected Areas will meet these substantial obstacles.

Under section 70, the ACH Council must give public notice of the intention to seek that an area be declared a Protected Area. YMAC understand this allows submissions from LACHS, knowledge holders, land holders, public authorities and anyone else with an interest in the area to make submissions for the ACH Council's consideration. Whilst YMAC supports the right of stakeholders to make submissions, the purpose of Protected Areas is to protect ACH of Outstanding Significance. YMAC queries the purpose of these submissions as they should not have any bearing on the perceived significance of the ACH? The only people qualified to judge if the ACH is of Outstanding Significance is the Aboriginal People to whom the ACH belongs.

For Section 74, the Minister receives a recommendation from the ACH Council. The Minister can choose to declare all or part of the application area a Protected Area or declare none of the application area a Protected Area. The Minister must base their decision on whether they are satisfied that the ACH is of Outstanding Significance and in the interests of the State. YMAC acknowledges that such a decision must be made by the Minister but queries if any Protected Areas would be declared if they covered areas where mining is a key activity. The Minister then makes recommendation to the Governor who declares the Protected Area (section 75).

With reference to the clauses above, to gain an ACH Permit a proponent is not required to negotiate with the LACHS. The LACHS have an opportunity to respond to the ACH permit application if they can do so in the time required. For an ACHMP, this can be authorised despite the objections of the LACHS / knowledge holders for the place. If a proponent has secured an ACH Permit or ACHMP they are unlikely to agree to the application for a Protected Area particularly if it impacts the profitability or viability of their venture.

Will stakeholder (pastoral, proponents etc.) be entitled to compensation from the State for the locking up of areas of land under Protected Areas? Given that most of the State is covered by Mining Tenements and / or Pastoral Leases this is likely to be a significant obstacle to gaining consent from permit holder.

Under Section 69(2) the ACH Council is responsible for forming a preliminary view of if the application area should be declared a protected area. To make this decision the ACH Council must be satisfied that the ACH is of outstanding significance to the knowledge holder for the cultural heritage. The stated aim of the ACH Council was to remove the historic role of the Aboriginal Cultural Material Committee (ACMC) which routinely made decisions about the importance and significance of ACH. The ACH Council will be responsible for identifying and making recommendations to recognise ACH of State Significance and whether Protected Areas meet the criteria of Outstanding Significance to the relevant Knowledge Holders. This is still the same process; the Knowledge Holders make the application and the ACH Council still must decide if they are satisfied that the ACH is of the stated level of significance. YMAC considers there should be a requirement that the ACH Council and the Minister must accept the assessment of knowledge holders if they believe an area is of outstanding significance.

Under section 76 amendments to Protected Areas can only be made by knowledge holders or by persons wanting to carry out activities in the Protected Area. The ACH Council and the Minister are to consider the application and form an opinion as to whether the amendment should be made. A decision is required by both Houses of Parliament to *repeal* a Protected Area but this requirement does not appear to apply to *amendments.* This clause would allow for the amendment of Protected Areas to remove sections such as the excision that allowed the construction of railways within the Woodstock Abydos Protected Reserve. The Protected Area status does not mean much if the Minister can simply amend them to allow for developments to impact them, as is the case with the current AHA section 18 processes.

Further, YMAC notes that under section 258 the decision of the Minister to amend a Protected Area is not one of the decisions that can be appealed at the SAT and the decision to amend does not require the informed consent of the LACHS or knowledge holders.

Part 6 proposed amendments

YMAC submits the following amendments and inclusions:

21. The declaration of a Protected Area should be able to override existing ACH Permits and / or ACHMPs. It is likely that in areas with mineralisation proponents may seek ACH Permits for future works to prevent the lodgement of Protected Area applications over these areas in future. It will take time and resources for LACHS to reach the point where they are ready to begin lodging Protected Area applications. It is comparatively very easy for landholders to lodge low impact activity permits.

22. If YMAC's preferred position (point 20 above) is not feasible then the alternative would be for the declaration of a Protected Area with those areas subject to AH Permits and ACHMPs excised if the proponents are unwilling to give them up.

23. For section 69(2), like the current ACMC, the ACH Council and Minister are still making decisions concerning the degree of significance of ACH. YMAC submits an inclusion that the ACH Council and Minister must accept the view of the knowledge holders who are the only persons qualified to make a judgement as to whether a place is of outstanding significance to them.

24. Given that the full significance of a place is not known when it is first identified, will the requirement to revisit an ACHMP when new information comes to light provide an opportunity to object to an ACHMP on the grounds that the knowledge holders wish to pursue a Protected Area application? YMAC submits that new information triggering a renegotiation of an ACHMP should allow for the declaration of a Protected Area for places of Outstanding Significance.

25. For section 76, YMAC submits that this clause be redrafted to make it clear that a resolution by both Houses of Parliament is necessary to amend or repeal a Protected area.

26. If the Minister is to be allowed to unilaterally amend Protected Areas, which YMAC strongly objects to, then this decision should be included in the list of decisions that can be reviewed by the State Administrative Tribunal.

Part 7 – Offences about Harming ACH

General Commentary

Overall YMAC is supportive of the proposed changes to the definition of harm to ACH and the associated penalties, particularly that the definition has now been extended to include non-physical harm to ACH.

However, YMAC note that while the intent is good, this would likely be very difficult to prove or prosecute. The new penalties are significantly higher, which YMAC believes may act as a better deterrent to non-compliance with the ACHA. Whilst no monetary value can be placed on the loss suffered by Traditional Owners these penalties are a better reflection of the seriousness of the impact of breaches causing harm to ACH.

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YMAC support in principle the description of what constitutes harm and the associated penalties. Section 80(2) states that Aboriginal persons carrying out activities in accordance with Aboriginal tradition are exempt from the harm clauses. This clause allows greater flexibility for Traditional Owners to manage and maintain their cultural heritage according to their own laws and traditions.

The definition of what constitutes harm (section 81[1]) has been extended, as have the penalties for causing harm to ACH been significantly increased (sections 83 - 86) from the provisions of the current AHA.

Part 7 proposed amendments

YMAC submits the following and inclusions:

27. For section 80, as outlined above, Part 7 should apply to cultural landscapes generally, not only when they are in protected areas.
28. Under section 81, add (1)(b)(iii), to include actions which are incompatible with or contrary to how the Aboriginal cultural heritage should be treated under Aboriginal tradition or the beliefs of Aboriginal people.
29. An explicit statement needs to be added that the views of the knowledge holders for the relevant area in accordance with Aboriginal tradition are to be accepted as to whether harm to ACH is caused and the whether the harm is material or serious.

Part 8 – Managing Activities that may cause harm to ACH

General Commentary

YMAC supports the basic principles of consultation outlined within section 92 (Consultation about proposed activities) of the draft bill but notes that most of the detail about consultation will be provided in the Consultation Guidelines which may be subject to change by the government of the day. The effectiveness of these clauses will also depend on what is considered a timely manner.

With respect to section 102 (Low impact activities), a proponent is authorised to carry out the activity if a Due Diligence Assessment has been undertaken and the activity has been determined to be low impact. For low impact activities the proponent must apply for an Aboriginal Cultural Heritage Permit (ACH Permit) from the ACH Council. LACHS must be notified and will have an opportunity to make a submission (e.g. object if they disagree that the activity is low impact). This must occur in a prescribed time frame but without knowing what the time frame will be YMAC considers it difficult to assess if this will enable LACHS to take full advantage of these rights.

While supportive of such a process in principle, subject to the concerns below, YMAC is concerned that as ACH Permits will not require consultation and will be faster and cheaper for proponents, this *may* encourage more proponents to avoid ACH or minimise potential impacts to ACH which would have a positive impact. Conversely, the broad definitions mean that proponents may also be incentivised to classify activities that Traditional Owners would

consider to be of medium to high impact as low impact to expedite the approvals process which is of deep concern to YMAC.

YMAC consider the definitions of ***minimal***, ***low***, and ***medium to high*** impact activity to ACH (within section90) are integral to understanding whether the ACHA will provide a better level of protection for ACH in comparison to the ACHA. The definitions provided in the draft bill are:

- Minimal impact activity means an activity that involves no, or a minimal level of, ground disturbance that is prescribed for the purpose of this definition.
- Low impact activity means an activity that involves low level of ground disturbance that is prescribed for the purpose of this definition.
- Medium to high impact activity means an activity that involves medium to high level ground disturbance that is prescribe for the purpose of this definition.

While these definitions may be expanded upon with examples in the ACH Management Code and Due Diligence Guidelines, these are not available to review at this stage and will be subject to change at the discretion of the Minister.

Traditional Owners and proponents are likely to have very different concepts of what constitutes minimal, low, and medium to high ground disturbance activities. Impact is only addressed in terms of ground disturbance. These definitions make things simpler for persons wanting to conduct activity on Country, but they are not nuanced enough to properly address the varying types of impact. For example, even walking and taking small soil samples from a ceremonial area would be considered high impact and serious harm from the perspective of Traditional Owners but would likely constitute minimal or low impact activity from the point of view of the ACHA.

YMAC recommends that it be made clear that the level of impact on Aboriginal cultural heritage is to be determined by the relevant Aboriginal people whose heritage it is.

Under section 93-95 a Due Diligence Assessment is a preliminary determination about whether ACH may be harmed by an activity and whether that activity is minimal, low, or medium to high impact, and identifies the persons required to be notified / consulted.

The Bill's Due Diligence section requires the persons to be notified to be *identified* but does not actually require them to be *notified* – YMAC considers section 93(c) should be expanded to require such notification and to require consultation if that is requested by the LACHS or knowledge holders. It should also require the notification to include details of the nature of the proposed activity and the precise location of the proposed activity. Without this there is no basis for any person carrying out the due diligence assessment to form any view as to whether harm is caused and the level of impact in sections 93(a) and (b).

As previously mentioned, the most important components that will determine the effectiveness of these processes (Due Diligence Assessment and ACH Management Code) have not yet been drafted and will be subject to change which is of concern.

Under sections 100 - 103, unlike the current AHA, there seems no limit on the types of people who can be authorised to carry out activities, receive ACH permits, or have ACHMPs authorised. YMAC submits that persons who may be authorised (to carry out low and medium to high activities) are limited to people who already have the required tenure and permissions to carry out the relevant activity at that place.

Under section 100, exempt activities do not require any form of notification or reasonable steps being taken to minimise harm. Exempt activities as defined in section 90, such as building a new house on a new development, could be very damaging if it is on a sacred area. Recreational photography, that might even be placed on social media, can be very harmful if it is of a secret sacred ceremony or object. Clearing vegetation could involve substantial harm to ACH.

Under section 101, minimal impact activities do not require an ACH Permit or for the LACHS to be notified so long as a Due Diligence Assessment has been undertaken and the activity is minimal. YMAC does not consider this fosters a heritage management culture of early and ongoing consultation where Traditional Owners are fully informed of the activities being undertaken on their Country.

Section 101 requires that for minimal impact activities, the person has undertaken a due diligence assessment and takes all reasonable steps to ensure that the activity is carried out to avoid or minimise the risk of harm to ACH. However, it is not clear how this is to be assessed and by whom, especially if there is no requirement to contact LACHS or knowledge holders.

If the person has not carried out a due diligence assessment, it is unclear to YMAC if the onus is on the LACHS or knowledge holders to bring or urge the Department to bring prosecutions for harm and to test compliance by way such a hearing. This is an onerous and cumbersome process.

YMAC proposes a requirement for prior notification and opportunity for comment. If this is mandated, there can then be a simple opportunity to consider ways of minimising harm. If reasonable steps are then not taken to avoid or minimise risk of harm, then there needs to be a process for LACHS and knowledge holders to lodge objections and complaints to the ACH Council, so the ACH Council can warn the proponent that the activity is not authorised under section 101, and stop work orders can be considered before harm occurs.

Under section 104 a proponent may seek confirmation that an activity is minimal from the CEO. This is something a person may wish to do but is not required to. YMAC believes that the correct persons to seek confirmation from is the Aboriginal people to whom the ACH / area belongs. In most cases this would be the LACHS. The purpose of the new ACHA is to empower Aboriginal people to take a key decision-making role in the identification, protection and management of their heritage. This clause is not in alignment with the stated objects of the ACHA. YMAC recommends that this be changed to seek confirmation that the activity is minimal from the LACHS and remove the CEO's power to issue such a letter.

ACH permits (sections 105-112) general comments:

The ACH Permit process involves the proponent making an application for a permit. This application is reviewed by the ACH Council who can chose to grant the permit or not. If the permit is not granted a proponent can appeal to the Minister for review. Ultimately the Minister can approve a low impact activity against the objections of the Traditional Owners and the recommendation of the ACH Council.

The permit process in section 105 puts the onus on LACHS to respond within a prescribed time. This time to be prescribed needs to be sufficient to enable the LACHS to consult knowledge holders and (if it is not a native title party, then the native tile parties as well.) For those reasons, the time should be at least 90 days or more.

Further, given the oral culture of many knowledge holders, it is important that the statements of views in section 105 should be able to be provided orally or by meeting, and not just in writing.

For section 106, while native title agreements or previous heritage agreements may qualify as notification, this should only be the case if those agreements are accepted by the ACH Council as fully satisfying the requirements of section105. That is, they must give details of the intended activity for which the permit is sought (not just general project activity) and that there is still the opportunity to submit a statement of views on that activity and permit.

For section 107-108 the material is submitted to the ACH Council by the applicant only. The ACH Council is then reliant on the honesty of the applicant to provide information on any matter that may be of concern to the Traditional Owners and any other alternatives that would be less damaging.

There is public notice in section 108, but this currently is just a notice on the ACH Council website (section 260) which Traditional Owners are unlikely to see. The same notification issues outlined apply as well to applications for extensions under section 114-116.

Under section 117 and s119, the process of transfer or amendment of permits to exclude areas, in the absence of regulations, only seem to require notification after the event to the LACHS / knowledge holders. In both cases, there should be a requirement for prior notification and opportunity to make submissions, in writing or orally, to the ACH Council.

For section 118: Conditions, it is positive that there will be a requirement on the permit holder to notify the ACH Council of new information about ACH in the permit area. However, there needs to be provisions to also enable LACHS / knowledge holders to inform the ACH Council of new information, to enable new conditions to be imposed under section 118(3). It is not appropriate to expect permit holders to do so against their own interests.

Under section 121, the applicant for a permit can object to the Minister for a refusal to grant an ACH permit. It is essential in the interests of fairness and non-discrimination that the Traditional Owners also be granted an equivalent right to object to the Minister against the grant of a permit.

Further, the grant of an ACH permit or an upholding of the grant by the Minister should be a decision reviewable by the State Administrative Tribunal under section 258. The same applies to decisions to allow amendments to ACH permits or any refusal to apply additional conditions if notified under s118 or by LACHS/knowledge holders.

ACHMPs (section 122 – section 139) General Comments:

The success of the provisions about the obligation to consult on ACHMPs (section 128) will be reliant on the prescribed time frames being reasonable. Given that these time frames are relegated to guidelines and regulations it is difficult to access the workability of these consultations.

Section 130 outlines the requirement for informed consent. Given that the proponent is required to:

- Provide sufficient information about the proposed activity to enable understanding of their reason and intention.
- Each person consulted must have an opportunity to state and explain their position.
- Each party must disclose all relevant information about their position as reasonably requested.
- The proponent must take reasonable steps to follow up with a person who has been consulted and no response has been received.

YMAC believes this needs clarifying - does this mean that proponents would be required to table all possible alternatives to minimise harm to ACH? For example, alternative roads and mining pit configurations and the associate cost / loss for doing so? If, so, this should be expressly stated in the Act. It is not informed consent if the LACHS are not made aware of these options. If not made clear, then one is relying on the honesty of proponents in situations that may not be in their best interest.

YMAC is disappointed that the opportunity to address current shortcomings in the *Aboriginal Heritage Act* (1972) (AHA) by mandating ethnographic and archaeological surveys to fully understand the cultural worth of ACH sites in not included in this Bill. This inclusion would support achievement of informed consent.

Section 143 outlines the role of the ACH Council to assist parties to reach agreement. YMAC's reading suggests that if the parties cannot reach agreement the ACH Council can mediate between the parties. If the mediation is unsuccessful the ACH Council can impose an ACHMP or make a recommendation to the Minister on which ACHMP should be endorsed. YMAC fail to see how this is substantively different from the current section 18 process under the AHA.

Under section 124, native title agreements should only be able to be incorporated as ACHMPs if they relate specifically to agreements in relation to the authorisation of the relevant harm and limited to what has been authorised. Many native title agreements may relate to consents to the grant of tenements but not consent to the damage of any ACH within those tenements. Such agreements cannot be taken to be ACHMPs. Further, such agreements should not be regarded as ACHMPs if they were not obtained by full informed consent and if the other section 135 conditions have not been satisfied.

Further, some native title agreements or heritage agreements may not authorise damage but achieve the opposite, namely guarantees or conditions that no harm to ACH is permitted. It is somewhat unfortunate that to be an ACHMP under the proposed ACHA that only agreements allowing harm can qualify to be ACHMPs (s135) on the Directory but not agreements that protect areas from harm. It would be useful for agreed "no go" areas to also be listed on the ACHD if the Traditional Owners wish it, which would provide a guide to others of the significance of those areas and might also inhibit any ACH permits from being granted over those areas.

Subdivision 3, sections 140 onwards discusses authorisations of non-agreed ACHMPs, there is general concern that this takes the decision about ACH out of the hands of Traditional Owners and gives the decision-making power over their heritage to the Minister. This runs the risk of political decisions being made or financial benefits trumping heritage protection.

Section 150(3): Amendment of ACHMPs removes requirements for the ACH Council and Minister to inquire into and be satisfied about consultation with Traditional Owners. However, YMAC considers amendments of ACHMPs could be significant and it would be vital for consultation to occur and for the ACH Council and Minister to be satisfied that it was properly conducted.

Under section 155 there are provisions dealing with situations where the ACH Council believes the ACH is of State Significance. However, YMAC considers that the consequences of an area being of State Significance are unclear. It appears that ACHMPs can still be authorised by the Minister over areas of State Significance. If an area is of State Significance, YMAC believes there should be additional protections, such as a requirement that no ACHMPs can be authorised without informed consent of the Aboriginal party or knowledge holders.

For section 156, YMAC is concerned that AHMPs can be transferred between proponents with no requirement for the LACHS to be notified ***before*** the transfer and no right to make submissions in relation to the transfer.

Regarding section 158, YMAC assumes that these offences and lesser penalties for a breach of a condition of an ACH permit or ACHMP are additional offences to the offences and penalties for causing harm to ACH. If this is the case the drafting should be revisited to make sure that this is clear.

Part 8 proposed amendments

YMAC submits the following amendments and inclusions:

General

30. For section 90, to future-proof the ACHA and provide certainty to all stakeholders the definitions of Terms used within section 90 should be expanded to contain common examples relevant to recreational and development activities. The guidelines are subject to change at the Minister's discretion meaning that the protections provided by the tiered approvals system could easily be eroded by the reclassification of certain activities. Minimal and low impact activity should be defined to exclude certain activity so that those will automatically be regarded as

higher-level impact. For instance, all ground-disturbing activity should be excluded from the definition of minimal or low impact activity. Consultation should also be required for all activities in certain types of ACH to be negotiated between the LACHS and landholders / users. This would provide for the nuances that are not currently captured in the proposed ACHA (examples might be burial grounds, rock art areas, ceremonial sites etc.).

31. YMAC workshopped the definitions of harm with some of our members. They expressed concern that in some places even "minimal" impact activities would constitute serious harm. This extends to keeping the visitors to taboo / unsafe areas safe from spiritual harm. They suggested that LACHS could flag on the ACHD places where specific additional restrictions apply. For example, requirement to consult prior to low or minimal impact activities in areas of outstanding cultural significance or gendered men / women's places. This would allow the LACHS to discharge their duties under their own Lore and custom as well as be compliant with the ACHA. YMAC proposes these provisions be added to the ACHA.

32. Cultural Heritage Impact Assessments must be undertaken by the LACHS and the land holder in collaboration. Only the Aboriginal people to whom the ACH belongs can accurately define what constitutes harm and to what degree for their places. To support this section 93(c) should be expanded to require that the persons identified should be notified and that consultation is required following notification if requested by the LACHS. Without this there is no basis for any person carrying out the due diligence assessment to form any view as to whether harm is caused and the level of impact in section 93(a) and (b).

33. That a minimum standard for the Due Diligence Assessment and ACH Management Code should be enshrined in the ACHA with supplementary guidelines. This would future proof a minimum standard and provide certainty for stakeholders.

34. For section 100 exempt activities should be removed or at very least there should be a restriction so that an activity in relation to ACH identified on the ACHD cannot be exempt. Even if people do not look up the ACHD, they can be warned about it and stopped if discovered.

35. For section 101 to be amended to state that proponents are required to notify LACHS and knowledge holders of the location and type of upcoming minimal activities on their country, ***before*** the activity can be carried out. This is particularly relevant in relation the nuances discussed in Part 7 above.

36. Under section 104, the CEO is not the appropriate person to issue a minimal activity letter. When it is unclear of the activity constitutes a minimal activity, the proponent should be directed to the LACHS and knowledge holders who are the appropriate people to rule on this matter.

ACH Permits

37. ACH permits should only be permitted with the approval of the LACHS / knowledge holders and if not approved that proponents should be encouraged instead to avoid any harm or reduce harm to a minimal impact only.

38. Time frames are not provided in the proposed ACHA - these will be left to the guidelines and regulations. The ability of LACHS to exercise their rights in relation to ACH Permits will be impacted by these timeframes. It is proposed that the timeframes be enshrined in the ACHA and that a minimum of 90 business days should be considered for ACH Permit responses.

39. Responses to ACH Permits (and ACHMPS and other notifications) should be able to be provided via oral submission or by meeting, not just in writing. The DPLH could transcribe these oral submissions to be added to the applications.

40. Regarding section 108 (Public notice) it is vital that notices also need to be given to all the people listed in section 97 along with full details of the proposed activity and the location of the activity. The ACH Council should also be required to contact those any of those people in section 97 to ascertain whether they wish to respond and give them sufficient time to do so. There should also be the opportunity to those persons to provide submissions orally (e.g. at a meeting) as well as in writing to the ACH Council. This is also relevant to section 114-116 in relation to the application for ACH Permit extensions.

41. For (section 111) the ACH Council's written reasons for the decision should also be required or available on request by the applicant or LACHS / knowledge holders.

42. For sections 117 and section 119 to be amended to require notification to the LACHS / knowledge holders ***before*** the extension or transfer of an ACH Permit. LACHS / knowledge holders should be afforded an opportunity to make oral or written submissions to the ACH Council regarding the extension / transfer.

43. Section 118 be amended to also allow LACHS / knowledge holders to inform the ACH Council of new information that may trigger new / additional conditions on an ACH Permit.

44. That section 121 be amended to afford LACHS / knowledge holders an equivalent right to object to the Minister against the grant of an ACH permit.

45. Further, the grant of an ACH permit or an upholding of the grant by the Minister should be a decision reviewable by the State Administrative Tribunal under s258. The same applies to decisions to allow amendments to ACH permits or any refusal to apply additional conditions if notified under s118 or by LACHS/knowledge holders.

ACHMPs

46. For ethnographic and archaeological surveys to be mandated, so all parties can fully understand the cultural worth of ACH significant sites, to support achievement of informed consent.

47. That the prescribed timeframe for ACHMP consultations should be enshrined in the ACHA to future-proof the bill and provide certainty to stakeholders. To be workable, YMAC proposes the prescribed time period for ACHMP consultation must be at least six months.

48. For section 127 there needs to be a sufficient time prescribed for a proper negotiation and "best endeavours" to be undertaken. This time should run from when the actual negotiations commence and not be sufficient if just carried out within a period. YMAC further submits the requirement that the best endeavours **be in good faith**.

49. Under section 124, it be amended to make it clear that NTA agreements cannot be considered ACHMPs if they were not obtained by full informed consent and if the othersection135 conditions have not been satisfied.

50. For the existing NTA agreements that contain very specific project information be considered under section 124, proponents should be encouraged to engage with the ACHMP process and negotiated outcomes with the LACHS.

51. For where exclusion zones, rights reserved etc. areas exist in current NTA agreements the LACHS could register this on the ACHD should they wish too. This would provide a guide to others of the significance of those areas and might also inhibit any ACH permits from being granted over those areas.

52. With respect to section 126 for native title agreements or previous heritage agreements to be regarded as giving rise to sufficient consultation also requires the consultation to cover the specific harm proposed. General consultation about the larger project should not be sufficient. The proposed Act should be amended to reflect this.

53. A decision by a Minister to not approve an agreed ACHMP (section 139) should be able to be reviewed by SAT under section 258.

54. For sections 140 –141, that there be mechanisms for, in the case of applications for authorisation of ACHMPs for LACHS, native title parties and knowledge holders to make submissions, including oral submissions if they wish, directly to the ACH Council and Minister. The section 140 application information comes from the proponent only and while the ACH Council could ask an Aboriginal Party for information under section 141, there is no entitlement for the Aboriginal Party or other Traditional Owner or knowledge holders with an interest in the matter to make submissions directly to the ACH Council and Minister. Such entitlements to make submissions and objections are important as specific rights so that under section 272 any contracting out or waiver by agreement cannot stand.

55. That section 130(a)(iii) also be amended to expressly add such steps must include full disclosure of all possible options for carrying out the activity in a manner that would minimise or avoid harm, including carrying out the activity in different locations or by different methods.

56. While the role of the ACH Council in assisting the parties to reach agreement is a good one (section 143), it is important that the information obtained in the course of mediation is not able to form part of the deliberations of the ACH Council in making recommendations to the Minister. There needs to be an arrangement whereby the role of the ACH Council in mediation or assisting agreement is carried out by different people from those who will be involved in making decisions on ACHMPs.

57. Section 150(3) to be amended to require the ACH Council and Minister to inquire into and be satisfied with the consultation undertaken between proponents and LACHS in relation to amendments to ACHMPs.

58. Section 156 be amended to require that the LACHS be notified ***before*** the transfer of an ACHMP and that they have a right to make submissions to the ACH Council and / or Minister regarding the transfer, including objecting to it.

Part 9 – Aboriginal Cultural Heritage Directory

General Commentary

Overall, the concept of an Aboriginal Cultural Heritage Directory (ACHD) with various levels of access for Aboriginal people, researchers, persons who wish to conduct activity on the land, and the general public is good. It will act as a repository of information for Traditional Owners and support better Due Diligence Assessments by proponents. YMAC would like to know how the varying levels of access will be managed to ensure that culturally sensitive information is protected, and that the location of ACH places can be kept confidential from the public where Traditional Owners wish to protect them from unsolicited visitation or similar risks. It is also important that matters which may not be culturally sensitive, but which are matters relevant to privacy of individuals, should also be able to be withheld.

Given the key role that the ACHD will play in Due Diligence Assessments it is essential that the directory clearly states that it does not contain all the relevant information and that proponents should first contact LACHS. Historically, YMAC has encountered problems when proponents accessed the Aboriginal Heritage Inquiry System (AHIS) and when no sites were in their project area appeared, they believed no sites were present. This was usually because no prior heritage surveys had been undertaken in the area. YMAC requests that the ACHD show prior heritage survey including the type of survey that was undertaken.

LACHS, knowledge holders and anyone else who becomes aware of ACH will be able to add it to report it to the ACH Council for addition to the ACHD. This is much easier than the process of Heritage Information Submission Forms under the current AHA. This also means that ACH places will no longer be assessed by non-Aboriginal people before being endorsed. The Aboriginal people to whom the heritage belongs are the only people who should make decisions on whether the place or object is ACH and the level of importance and significance of the ACH. YMAC does note that this is not the case for sites of State Significance and Protected Areas where the ACH Council and / or the Minister make the decision on significance.

Part 9 proposed amendments

YMAC submits the following amendments and inclusions:

59. In the interests of transparency and the creation of a valuable heritage record, the ACHD should also include the records of Aboriginal places that have been destroyed as a result of AHA section 18 permits and future ACHMPs. This will also ensure that sufficient information is available to inform good predictive modelling.

60. For the Due Diligence Guidelines and the ACHD make it clear that the ACHD is not an exhaustive record. Recording the locations and level undertaken of prior heritage surveys would add useful contextual information as to the presence / absence of Aboriginal places. The ACHD and Due Diligence Guidelines should also make it clear that to be thorough in their assessment proponents should contacts the LACHS first and foremost.

61. LACHS and knowledge holders should be able to make oral submissions regarding ACH places to the DPLH for addition to the ACHD.

62. Prior to any information being placed on the ACHD that might be available to others, LACHS and knowledge holders should be given the opportunity to object (orally or in writing) to it and that no information be made available to others when there are such objections. There may be concerns about privacy issues such as the names and contact information of knowledge holders, that should not be made available to other people. Also, this will be a means of the LACHS checking that no

cultural information will be made available to potential researchers, proponents, other Aboriginal people or the public.

Part 10 – Stop Activity Orders, Prohibition Orders, and Remediation Orders

General Commentary

The Stop Activity Orders (SAO) and Prohibition Orders are a substantial improvement on the current protections of the AHA. The Minister can issue SOA and then Prohibition Orders to prevent / halt non-authorised impacts to ACH, or to prevent the ongoing activity if new ACH or information comes to light.

Remediation orders will allow the ACH Council and Minister to compel the remediation of harm to ACH. YMAC are broadly supportive of this but are concerned that remediation orders may allow breachers to reduce their penalties under Part 7 (Offences about Harming Aboriginal Cultural Heritage).

Part 10 proposed amendments

YMAC submits the following amendments and inclusions:

63. YMAC supports remediation orders in principle but recommend that remediation should not allow for a person or body corporate to reduce their penalty for harming the ACH under the ACHA. Most harm to ACH can't be remediated in a way that returns that place to the state prior to the harm and this needs to be recognised. Remediation should be an add-on where appropriate and agreed to by the LACHS.

64. YMAC submits that a provision should be added to Part 10, to allow SAO and Prohibition Orders for cultural landscapes (that are not within Protected Areas) under exceptional circumstances.

65. For Section 174: the SAOs, remediation and prohibition orders don't appear to apply to cultural landscapes that are not in protected areas. Given that these are discretionary orders, there should be no harm to allow orders to be made in relation to cultural landscapes generally. It may be in the State's interest for cultural landscapes to be preserved in exceptional circumstances.

66. There should also be provisions for the ACH Council to issue urgent short term SAOs or prohibition orders, until a Minister can consider a recommendation. By comparison, under section 18 of the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984,* authorised officers can make emergency declarations. This lack could be dealt with by delegations in the case of SAOs by reason of section 273. But, it would be useful if the ACHA provides for this specifically so as not to require or wait for delegations.

Part 11 – Securing Compliance

General Commentary

The appointment of Aboriginal Inspectors to ensure compliance with the ACHA is one of the most significant and positive proposed changes to Western Australia's ACH regime. YMAC

supports the appointment of Aboriginal Inspectors who will have a broad range of inspection, recording, and seizure powers under the proposed bill (section 209-216 & 218). The limitations on those powers such as the inability to inspect a dwelling without a warrant are fair and balanced (section 223-228).

YMAC notes that Western Australia is large, and many projects are remote. A primary concern is that this excellent mechanism for compliance will only work if there are a significant number of inspectors across the regions of the State who are adequately funded and supported to undertake the work.

Part 11 proposed amendments

YMAC submits the following inclusion:

67. Where possible the Minister should confer upon Aboriginal Rangers the status of Aboriginal Inspectors and provide fee for service opportunities for these rangers to undertake this important work.

Part 12 – Legal Proceedings

General Commentary

Section 240(1) provides that a prosecution of a simple offence under the ACHA can only be brought by the CEO. It is not clear whether this allows people to bring private prosecutions for breach which need to be retained.

YMAC supports in principle:

- The removal of a defence of lack of knowledge of the kind found in the current section 62 of the AHA.
- Section 241: The longer time limits for prosecution are to be supported. It is important that there be a scope to bring a prosecution within two years from when an offence came to the attention of the prosecuting party as damage is often not discovered for some years.
- Sections 244-249, which outlines the liabilities of employers, corporations, partners as well as personal liability of individual officers for offences.
- Section 255, that the onus of proving consultation or reasonable or lawful excuse lies with the person asserting it.

Part 12 proposed amendments

YMAC submits the following:

68. Prosecutions are always hard to establish, especially if there is a criminal standard of proof applied. YMAC submits there should be alternatives such as civil actions for breach of statutory duties that can be taken by the CEO or by LACHS, Traditional Owners or knowledge holders. There should also be specific provisions enabling actions for compensation or other remedies to be brought by LACHS, Traditional Owners or knowledge holders or any other Aboriginal people who have suffered loss from the harm caused. These should be based on a civil balance of probabilities test.

Part 13 – Review by State Administrative Tribunal

General Commentary

YMAC supports in principle, section 258: The ability of Aboriginal parties to seek review by the State Administrative Tribunal of decisions to authorise ACHMPs and to amend them. YMAC understand that by reason of the provisions of the State Administrative Tribunal Act that such decisions are treated as de novo hearings on the merits of the case. It would be useful if this is also repeated in the new ACHA as well.

YMAC also agrees with section 259: The requirement for the Minister to give reasons for decision but see additional comments in proposed amendments below.

Part 13 proposed amendments

YMAC proposes the following amendments and inclusions:

69. For section 258 that the decisions reviewable by SAT should be expanded to include decisions to grant and amend ACH permits, or to not approve an agreed ACHMP, or to refuse to declare an area as a protected area.

70. Where there is an application to SAT to review a decision, it is essential that the ACHMP or other decision the subject of a review should automatically be stayed until the SAT concluded its review. This is to prevent ACH from being damaged or destroyed in the meantime.

71. In Part 13 it would be useful also to state expressly that where a person seeks review of decisions not to authorise ACHMPs, or not to issue SAOs, prohibition or remediation orders, that notice is to be given to the Aboriginal party, LACHS and native title party for the area of the review application. And, at the first hearing date, to state that those parties have a right to apply to be joined as a party to review proceedings. This is useful because in the past review applications have been made to SAT against section 18 conditions, but the Minister and the proponent have reached an agreement in SAT mediation to remove such conditions without the involvement or indeed prior knowledge of the Traditional Owners. While Traditional Owners could in theory apply to be joined to such proceedings under section 38 of the *State Administrative Tribunal Act*, this depends on the relevant

body being aware that such a review application has been made and when it is able to be heard so that the joinder can be applied for.

72. For section 259 the decision maker is only required to give short particulars of reasons for decision. It is recommended this be amended to refer to full reasons for decision, including findings of facts. While this can be ordered by the SAT, it would be easier to mandate this at the outset so parties can consider if it appropriate to seek a review. It is particularly important for full reasons to be provided where the Minister has not accepted a recommendation by the ACH Council or by a LACHS.

Part 14 – Miscellaneous

General Commentary

The Miscellaneous section deals with notification methods, regulations and guidelines.

YMAC is very concerned that most of the content that will determine the workability of the new ACHA – and therefore the level of protection provided - is based on these regulations and guidelines which are not available for consideration. These include the: Consultation Guidelines, Due Diligence Guidelines which will set out the definitions of minimal, low, and medium to high impact activities in detail, the process for identifying knowledge holders for areas, and the criteria for assessing ACH places of potential State Significance.

With section 268, YMAC notes that the ACH Council must give public notice of proposed guidelines they have prepared. Respondents will have 28 days to provide feedback for consideration by the ACH Council and Minister. YMAC are concerned that too much is being left to guidelines that can easily be changed, providing no certainty for stakeholders. Minor changes to the guidelines could significantly impact Traditional Owner opportunities to take advantage of their rights under the ACHB (e.g. prescribed time frames, Consultation Guidelines) and the level of impact that requires consultation (Due Diligence Guidelines). It is vital that DPLH undertake sufficient consultation on the guidelines which will have a significant impact on the workability of the ACHA from an operational perspective, and on the level of protection afforded by the ACHA particularly in relation to the processes that govern harm to ACH. YMAC would prefer these elements essential to properly understanding the ACHA should be included within the bill to future proof the ACHB and provide certainty to stakeholders. For example, the Native Title Act is very clear on time periods for objections and negotiation periods and none of this is left to regulations or guidelines.

For section 272: No contracting out and inability to waive a right under the ACHA. YMAC assumes this will cover such matters as overriding clauses that might seek to prevent objections to the ACH Council pursuant to notifications, making review applications, applying for protected area declarations etc. If this is not the case, YMAC submits that it should be made clear perhaps in the Explanatory Memorandum that such matters are examples of matters that cannot be contracted out of. However, there are further matters that “gag clauses” deal with and we suggest below as to further matters that could be covered.

Under section 280, the ACHA has an inbuilt review clause every five years. The review is to include a report prepared by the Minister and tabled to both Houses of Parliament. This report will be publicly available. YMAC support this transparency in reporting and recommend that stakeholders have an opportunity to provide comment on this report.

Under section 266 the Governor is responsible for making regulations in relation to the AHCA. This is standard practice. YMAC notes that the Governor will in effect carry out the requests of the government of the day so this will be a political decision.

Under section 267, the ACH Council is responsible for guidelines including the Consultation Guidelines, the process for identifying knowledge holders for an area / place, Due Diligence Guidelines, and criteria for State Significance. YMAC support that the ACH Council are the correct body to draft guidelines and that a mechanism is in place for these to be subject to consultation with relevant stakeholders. However, YMAC believes that the processes relegated to these guidelines mean that the ACHA is not future-proofed and does not provide certainty to stakeholders. Particularly as they relate to consultation, ACHIS, harm impact levels, and prescribed timeframes.

Under section 269, the Minister may approve guidelines from the ACH Council with or without modifications. YMAC are concerned that this means the Minister could make substantive changes to proposed guidelines without consultation. Given the importance of the guidelines to the operation of the ACHA and the protection / management of ACH it is deeply concerning that a change in Minister could result in substantive changes that could severely impact the ability of LACHS and knowledge holders to protect an damage their ACH. Additionally, (section 271) the Minister has the power to amend or repeal the guidelines at any time. This also relates to YMAC's concerns about the lack of future proofing in the legislation.

Regarding section 272, while this is a good provision to preventing contracting out of duties and rights or benefits owed or conferred under this Act, it would be better to expand that to cover the types of matters that cannot be contracted out of. As outlined previously, it is not clear as to whether objections or submissions which are not specifically provided for in the ACHA are matters "conferred on a person under the Act" that cannot be contracted out of. Section 272 could be expanded to provide that a contractual term preventing someone from taking lawful action to protect ACH is of no effect. This may then permit approaches to the Minister or ACH Council where there is no specific right in the Act to do so and also to the media, and making applications to the Federal Minister for protection regardless of "gag or no objection clauses".

Section 277 covers confidentiality. Most of this is not controversial except that it may be interpreted as preventing LACHS or LACHS employees or agents from disclosing information, e.g. passing on cultural knowledge to others etc, about the importance of ACH or the need to protect ACH if they gained it in the course of their work as LACHS. These should be provided for in the exceptions by providing at very least that subsection (1) does not apply to any LACHS or Aboriginal persons, their employees, consultants or agents, disclosing information about ACH where it is in accordance with Aboriginal tradition to do so.

Part 14 proposed amendments

YMAC submits the following amendments and inclusions:

73. For section 268 (consultation on proposed guidelines) that the consultation period be extended from 28 days to 60 days. This is more realistic especially for newly fledged PBCs which are likely to become the LACHS. LACHS and knowledge holders should also be able to make oral submissions directly to the DPLH on proposed guidelines.

74. Regulations should also be notified and have a consultation period of at least 60 days prior to being prescribed.

75. The key areas of consultation, ACHIS, harm impact levels, and prescribed timeframes should be detailed in the legislation to provide certainty and clarity to all stakeholders.

76. For section 272 to be expanded to provide that a contractual term preventing someone from taking lawful action to protect ACH is of no effect. This may then permit approaches to the Minister and the media and making applications to the Federal Minister for protection regardless of "gag clauses".

Part 15 – Repeals and Transitional Matters

General Commentary

YMAC understands there need to be transitional processes to deal with matters outstanding from the prior AHA.

YMAC is concerned, however, about the proposal for existing section18 consents be carried over to the new Act as ACHMPs. Our concerns arise from the recognised inadequacies of the AHA and the lack of protections under which section18s were granted. There are no set minimum standard for consultation leading to a section 18 consent application, and there is no mechanism for Traditional Owners to appeal to the SAT and once granted there is no clause that requires review if new information comes to light.

Given that section18 consents are rarely granted with the informed consent of Traditional Owners, it is deeply disturbing that these historical section 18 consents will be considered agreed upon ACHMPs in some instances.

It is therefore inappropriate that these section 18 consents be given equal status and protection to ACHMPs. For this reason, they should not be transferred over to the new Act.

In addition, we have concerns that existing section 18 consent permits (section 18 consents) rarely have a set duration and there will likely be a slew of applications for section 18 consents between now and the commencement date, to take advantage of the weaknesses of the current regime. There should therefore be a halt on accepting new section 18 consent applications under the AHA,

If our concerns above are disregarded and the government is insistent on carrying section18 consents over to the new Act, we make the following submissions.

For the reasons outlined above, there should be a review of section 18 consents before they are given a status equivalent to an ACHMP. The review should seek to identify any significant sites at risk. This should enable the Minister to place a renewed focus on section 18 conditions that may prevent further acts of destruction of highly significant sites.

Further, at a minimum, any section 18 permits granted between now and the commencement date should have a maximum time limit of three years and should not be transferrable between proponents. This will encourage proponents to adopt the new system and meaningfully negotiate with Traditional Owners about their ACH.

YMAC supports in principle section 281 the repeal and replacement of the AHA with modernised legislation, and section 282: the repeal of the AHA regulations 1974.

Section 284 states that AHA section 18 consent and AHA Act approval continues in force (with exceptions).

Under section 285 (3) the Minister can decide that a section 18 consent is no longer in force. In the drafting there does not appear to be any caveats on that decision. YMAC recommends it be made clear if this is purely at the Ministers discretion or if certain criteria need to be met (these criteria should be listed in the ACHA if any apply). If the Minister can terminate a section 18 consents, this will allow for more flexibility if new information comes to light, or if the Traditional Owners raise an objection that was previously not subject to appeals.

Under section 289 existing Protected Areas will immediately become Protected Areas under the operation of the ACHA. YMAC notes that these will also be subject to the amendment and appeal clauses of Protected Areas under the ACHA.

For section 290, YMAC supports the transfer of all information on the current AHIS being transferred to the ACHD upon commencement of the ACHA. However, there needs to be an effective and secure system in place to ensure that any culturally sensitive material is not made available to persons who are not authorised to see it.

Under section 292: any business begun under the AHA that is not complete on repeal and commencement dates will be progressed under the old AHA – this is standard. However, this may mean a slew of last-minute section 18 applications before commencement date. These may not have been subject to fulsome consultation and may have been applied for against the objections of Traditional Owners who may not be able to object.

Section 287 explains that on and after the commencement date of the ACHA existing section 18 consents can be taken as an agreed upon ACHMP for certain purposes only including:

- In relation to protected areas.
- In relation to providing a defence to a charge of harm.
- In relation to the ACHD.
- In relation to securing compliance with the ACHB.

Given that section 18 applications only require a minimal level of consultation and are not subject to appeal by the Traditional Owners, YMAC do not support that they constitute an ***agreed*** upon ACHMP formed under informed consent. Most section 18s have not been the subject of agreement nor of informed consent.

Under section 287(2), the owner of the AHA section 18 consent is taken to be the proponent for the ACHMP. Given that the ACHA contains provisions that allow ACHMP permits to be

transferrable between proponents. YMAC are concerned this will also apply to section 18 consents which have been taken as an agreed upon ACHMP.

Section 299 allows section 18 consents to continue to be granted even after the commencement of the ACHA. While these section 18s are limited to 5 years in duration, this period should be reduced to 3 years. In practice, YMAC greatly prefers a moratorium on new section 18 consents from the commencement of the ACHA.

Part 10 proposed amendments

YMAC submits the following amendments and inclusions:

85. Given the widely acknowledged inadequacies of the current AHA and in particular section 18 – including by both the present and previous Liberal government – all existing section 18 applications should not carry over to the new Act.

86. Submit that there should also be a halt on accepting new section 18 applications until new laws are passed.

If submissions 79 and 80 are not accepted, YMAC makes the following submissions:

87. YMAC submits that existing section 18 applications should at least trigger a consultation between all parties prior to being recognised as an ACHMP. This will give Traditional Owners an opportunity to object where one may not have existed before and provide an opportunity to review new information that may have come to light during mitigation processes such as excavations.

88. For section 18 permits converted into ACHMPs should not be called "agreed upon" i.e. "approved" ACHMPs, as that was far from the case. YMAC recommends an alternative term such as "Grandfathered s18 consents" to differentiate them from the new ACHMPs with guaranteed consultation and objection rights.

89. For all existing section 18 consents which have been issued five years or more prior to the repeal and replacement date of the Act should be reviewed by the Minister and time limit clauses placed upon them. The Minister must place a renewed focus on section 18 conditions that may prevent further acts of destruction.

90. For section 18 permits issued in the transitional period should be valid for a maximum period of three years, and with the condition that they meet consultation criteria and other requirements of the new Act. This would disincentivise proponents to push through large numbers of section 18 permit applications negating the need to engage with the new process for years to come on their developments.

91. For there to be a statutory requirement for notification of the matters required for informed consent and consultation that should take place between the permit holder and the LACHS or relevant body before a section 18 consent is converted to an ACHMP and that there is scope to object to the ACH Council and Minster to such section18 consents being deemed to be an ACHMP. Any overruling of that objection should be a decision reviewable by SAT under section 258.

92. "Grandfathered" and transitional section 18 permits should not be transferrable between proponents. This will promote early and ongoing consultation when a new proponent takes over a tenement.

Part 16 – Amendments to Other Acts

YMAC has no commentary on this section.

Definitions and Acronyms

ACHA -	*Aboriginal Cultural Heritage Act*
ACH -	Aboriginal Cultural Heritage
ACHD -	Aboriginal Cultural Heritage Directory
LACHS -	Local Aboriginal Cultural Heritage Service provider
ACHMP -	Aboriginal Cultural Heritage Management Plan
ACH Council -	Aboriginal Cultural Heritage Council
ACMA -	Aboriginal Cultural Materials Committee (under the current AHA)
AHA -	*Aboriginal Heritage Act* (1972)
CEO -	Chief Executive Office
DPLH -	Department of Planning, Lands and Heritage
NTA -	*Native Title Act* (993) Commonwealth
NTRB	Native Title Representative Body
SAT -	State Administrative Tribunal
YMAC -	Yamatji Marlpa Aboriginal Corporation

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