



Our Ref: Simon Hawkins
Your Ref:
Office:
Date: 31 March 2022

To: The Hon Dr Tony Buti MLA,
Minister for Aboriginal Affairs,
Level 5, Dumas House,
2 Havelock Street,
West Perth WA 6005

Dear Dr Buti,

RE: ABORIGINAL CULTURAL HERITAGE ACT SECTION 300

I wish to draw to your attention a concern that has been identified about an apparently unintended consequence of s300 of the Aboriginal Cultural Heritage Act 2021 (ACHA) and respectfully request that you and the government consider an amendment to rectify this.

Section 300

s300 reads as follows:

s300 No circumventing or contracting out

(1) For the purposes of this Act, a term of a contract or other agreement that purports to do, or has the effect of doing, any of the following is of no effect

- (a) exclude, limit or modify the operation of this Act;
- (b) exclude, limit or modify any duty owed under this Act;
- (c) transfer to another person any duty owed under this Act.

Note for this subsection:

The transfer of an ACH permit by the holder of the permit person referred to in section 127, or a change to a party approved or authorised ACH management plan referred to in section 171 is not the transfer to another person of a duty this act as described in subsection (1) (c).

(2) a purported waiver, limitation or modification of a right, remedy or benefit conferred on a person under this Act is of no effect.

The intent of the section as set out in the Explanatory Memorandum was to benefit Aboriginal people. The Explanatory Memorandum says:

PERTH

Level 8,
12 The Esplanade
Perth WA 6000

PO Box 3072
249 Hay Street
Perth WA 6892

Freecall: 1800 270 709

T (08) 9268 7000
F (08) 9225 4633

GERALDTON

171 Marine Terrace
Geraldton WA 6530

PO Box 2119
Geraldton WA 6531

T (08) 9965 6222
F (08) 9964 5646

HEDLAND

8 Manganese Street
Wedgefield WA 6721

PO Box 2252
South Hedland
WA 6722

T (08) 9160 3800
F (08) 9140 1277

BROOME

Shop 2/24
Clementson Street,
Broome WA 6725

PO Box 2059
Broome WA 6725

T 1800 270 709

“This clause aims to limit the circumventing or contracting out of various provisions of the proposed Act by contractual terms in private agreements, which are sometimes referred to as “gag clauses”. Such gag clauses may contractually prohibit relevant Aboriginal persons and entities from making complaints or reporting alleged offences to regulators, prohibit providing information requested by a public official, prohibit seeking a stop, prohibition or remediation order or prohibit initiating proceedings for injunctive relief or legal actions against the proponent in relation to heritage matters.

This clause aims to limit the effect of such gag clauses by providing - that any contractual term that purports to or has the effect of excluding, limiting or modifying the operation of the Act or any duty owed under the Act, or otherwise transferring such duty to another person, is of no effect. Further any purported waiver, limitation or modification of a right, remedy or benefit conferred on a person under this Act, is also of no effect.”

The intent of the section has always been stated as one that is to benefit Aboriginal people who enter into contractual arrangements which prevent them from exercising their rights under the ACHA.

The problem – using s300 against Aboriginal groups

The problem that has occurred is with proponents who wish to use s300 to avoid contractual agreements which are sought by Aboriginal groups or Registered Native Title Bodies Corporate (RNTBCs) to protect their areas of cultural significance, such as clauses which prohibit proponents from making applications under the ACHA for permits or authorisations of plans which may damage Aboriginal objects or areas without the consent of the relevant Aboriginal group or RNTBC or without following certain specified processes. It is also common in agreements to have areas designated as exclusion zones which are not to be the subject of project activities or applications. These are usually areas of high cultural sensitivity and have at the time of the contracts been accepted as exclusion areas.

YMAC is aware of proponents now citing s300 to refuse such clauses or to argue that even if they were in the agreements, they would be of no effect in preventing applications for permits and management plans that may damage such areas of cultural significance.

The result is that a clause said to be intended to benefit Aboriginal people and to enable them to better protect their important cultural areas is being used against them to override contractual protections.

YMAC has drawn this concern to the attention of DPLH staff who confirmed that the use of s300 by proponents was not intended and suggested that we send a proposal of what amendments we would like to see.

Possible amendment

One simple possible amendment is to specifically exclude s300 from being used by proponents to overcome contractual protections. The amendment could be to add a sub-section (3) as follows:

- (3) *Subsections (1) and (2) do not apply to or in respect of a term of a contract or other agreement that purports to, or has the effect to, exclude, limit or modify the right of a proponent to make:*
 - (a) *an application under section 115 or s122 for an ACH permit or extension of an ACH permit; or*
 - (b) *an application under section 157 or section 170 for authorisation of an ACH management plan.*

Another alternative would be to list the types of matters that cannot be contracted out of, such as by amending s300(1) as follows:

s300. No circumventing or contracting out

- (1) For the purposes of this Act, a term of a contract or other agreement that purports to, or has the effect of prohibiting, restricting, modifying, limiting, or transferring to another person any of the rights and duties of Aboriginal persons and entities to take lawful action to protect Aboriginal Cultural Heritage including -
- (a) making complaints or reporting alleged offences to regulators;
 - (b) providing information requested by a public official;
 - (c) seeking a stop, prohibition or remediation order; or
 - (d) initiating proceedings for injunctive relief or any other legal actions against the proponent in relation to heritage matters;
- is of no effect.

We would be happy to discuss with you or DPLH staff any other alternative forms of words to achieve the same effect.

As the relevant section of the ACHA has not yet come into force, we would be grateful if such an amendment could be made before it does take effect.

Yours sincerely,



Simon Hawkins

CHIEF EXECUTIVE OFFICER

Copy to: Mr Ben Harvey and Mr Cesar Rodriguez,

ACH Act Implementation Team

ben.harvey@dplh.wa.gov.au and cesar.rodriguez@dplh.wa.gov.au