

The Director General  
Department of Planning, Lands and Heritage

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Dear Sir/Madam

### **WESTERN AUSTRALIA ENVIRONMENTAL PROTECTION AUTHORITY SUBMISSION TO DEPARTMENT OF PLANNING, LANDS AND HERITAGE – DRAFT ABORIGINAL HERITAGE 1972 SUPPORTING DOCUMENTS**

Thank you for the opportunity to make a submission on the draft regulations, policies and guidelines which have been prepared to support amended Aboriginal heritage laws in WA through the reintroduction of the *Aboriginal Heritage Act 1972*.

The Western Australian (WA) Environmental Protection Authority (EPA) submitted a brief response on 27 September 2023, and below is a more detailed submission for your consideration.

Consistent with its submissions on the co-design of instruments under the *Aboriginal Cultural Heritage Act 2021*, the EPA considers an integrated and comprehensive cultural heritage assessment process would 1) improve the outcomes for preservation of cultural heritage and 2) provide a more efficient process for traditional knowledge holders, government and proponents to engage in. Achievement of this will require clear and consistent consideration of cultural heritage that may be harmed by proponent activities, including from impacts to the physical and biological environment, as early as possible. The EPA's submissions below are aimed at achieving this outcome as far as possible under the amended *Aboriginal Heritage Act 1972*.

1. The EPA considers additional guidance about identifying appropriate traditional knowledge holders for consultation purposes should be provided. The EPA considers that a decision about who is relevant - at the end of the process - by the ACHC or the Minister is not practical for implementation purposes or relationship building in the meantime.
2. The EPA requests reference to the EPA social surroundings assessment process and guidance be included in the consultation and section 18 guidelines. It should be made clear that proponent implementation of the processes for EPA assessment, and *Aboriginal Heritage Act 1972* compliance, are likely to involve proponents speaking to the same traditional knowledge holders, about the same project, on the same country, about protection of the same heritage and values - and so consultation processes could be best done early, together.

3. The EPA requests the guidelines include that the EPA process includes considering whether the *Aboriginal Heritage Act 1972* process will mitigate potential impacts, and so early engagement and consultation under the 1972 Act will provide valuable information for the EPA process. The matters the EPA considers when deciding what other statutory decision-making processes are appropriate to consider for a proposal are set out in the EPA's [Interim\\_Guidance\\_Taking\\_decision\\_making\\_processes\\_into\\_account\\_in\\_EIA.pdf](#) ([epa.wa.gov.au](http://epa.wa.gov.au))
4. The EPA considers additional guidance is needed about a "site" which is subject to section 18, particularly about the scope and nature of intangible ethnographic sites and cultural landscapes. It should also be made clear whether or not the ACHC needs to decide whether something is a site for s 18 to apply (as per s 5 (c) of the *Aboriginal Heritage Act 1972*). Confusion about what is a "site" for section 18 purposes is likely to lead to practical problems for proponents, traditional knowledge holders and the EPA in considering whether the 1972 Act is likely to apply or not.
5. The EPA considers additional guidance is needed about what does or doesn't constitute an impact to which s 17 applies. Recent Court decisions have indicated impacts are confined to physical impacts (so wouldn't include indirect impacts); but the s 17 reference to "alteration" means there remains some ambiguity about the scope of impacts regulated by the *Aboriginal Heritage Act 1972*. Confusion about what impacts are regulated under section 17 is likely to lead to practical problems for proponents, traditional knowledge holders and the EPA in considering whether the 1972 Act is likely to apply or not.
6. The EPA considers additional guidance about what is possible, what is expected, and what is best practise, to avoid and minimise sites should be provided. Guidance on the types of conditions that could be imposed on section 18 consents would also be helpful. This would assist proponents, traditional knowledge holders and the EPA to consider the likely protective nature of the 1972 Act, and whether it is likely to satisfy the EPA's objective for social surroundings on a case by case basis.

The EPA appreciates the opportunity to provide this submission. We would also welcome engagement with you to improve protection of cultural heritage through clear and consistent consideration of cultural heritage that may be harmed from impacts to the physical and biological environment.

Yours sincerely



**Lee McIntosh**

Deputy Chair – Environmental Protection Authority

4 October 2023