



## *Aboriginal Heritage Act 1972*

Discussion paper: Register of places and objects

## Foreword

The Western Australian Government is committed to the protection and preservation of Aboriginal cultural heritage in Western Australia. Many Aboriginal places and objects remain significant in the lives of Aboriginal people today and contribute to an understanding by the whole community of our place and history.

Aboriginal heritage is acknowledged nationally and internationally for its educational, aesthetic, social, historical and scientific value. The preservation of places and objects is therefore of benefit to all Western Australians. Many Aboriginal sites are fragile and can be hard to identify; nevertheless, they have survived for thousands of years. However, once they are damaged or destroyed they are lost forever.

The *Aboriginal Heritage Act 1972* was enacted to ensure that all Aboriginal cultural heritage within Western Australia could be properly protected and preserved. In recent years, Western Australia has experienced strong economic growth, particularly in the resources sector, placing increasing pressure on Aboriginal cultural heritage sites.

The Register of places and objects is a key tool in the protection of Aboriginal heritage sites. It caters for a range of clients, including Aboriginal people and organisations, researchers and development proponents.

This discussion paper outlines the current operation of the Register of places and objects and seeks your comments and ideas to inform the development of a policy on the Register.



A handwritten signature in blue ink, appearing to read 'Kim Hames'.

Hon Dr Kim Hames JP MLA  
**DEPUTY PREMIER**  
**MINISTER FOR INDIGENOUS AFFAIRS**

# Protecting and preserving Aboriginal cultural heritage in Western Australia

## Introduction

The State Government is strongly committed to protecting and preserving Aboriginal cultural heritage in Western Australia. Aboriginal culture is considered one of the oldest in existence, and places and objects that are thousands of years old remain significant in the lives of Aboriginal people today. Aboriginal heritage is acknowledged nationally and internationally for its educational, aesthetic, social, historical and scientific value, and the preservation of places and objects is of benefit to all Western Australians.

Many Aboriginal sites are fragile and can be hard to identify; nevertheless, they have survived for thousands of years. However, if a site is damaged or destroyed it is lost forever and, for this reason, legislation has been enacted at both a State and Federal level to provide for the protection and preservation of Aboriginal cultural heritage.

It is clear that rapid population growth, the need for more and improved infrastructure and the WA economy's dependence on mining royalties means that ongoing reform of the complex development approvals process is imperative. The State Government is consulting widely with stakeholder groups to determine where changes can be made to the process so that decisions on the array of approvals needed for developments are more timely and efficient. This includes assessing the processes and framework for protecting Aboriginal heritage.

Achieving a balance between these outcomes is important for the health of the State's economy and in upholding the social and cultural values of the community.

## Purpose of the discussion paper

This discussion paper seeks to encourage stakeholder comment in order to assess the practical application of the Register of places and objects for users. A Register of places and objects is required by statute in Western Australia. It is a Register of all protected areas and all known Aboriginal cultural material and other places and objects to which the Act applies.

The underlying principle of the Register is to show where known Aboriginal sites are located. This is essential for three reasons as it:

- assists in the preservation and protection of Aboriginal sites;
- aids educational and scientific endeavours related to Aboriginal heritage; and
- helps owners determine whether their land contains sites so as to avoid breaching s. 17 of the *Aboriginal Heritage Act 1972* and accordingly how to manage their liability, for example, by giving notice for s. 18 consent.

It is important that owners are able to make a preliminary assessment as to whether their land contains Aboriginal sites. This helps to minimise the risk that irreplaceable Aboriginal heritage is lost and a landowner liable for prosecution under s. 17. Whilst checking the Register is not a complete defence to a s. 17 offence, it has some relevance to the special defence of lack of knowledge created under s. 62 of the *Aboriginal Heritage Act 1972*. However, it is worth reiterating that all Aboriginal sites, whether on the Register or not, start by being protected.

Consequently, this discussion paper centres on the manner and content of the Register to ensure that people are able to use the Register with a degree of certainty and ease.

## *Aboriginal Heritage Act 1972 (WA)*

In Western Australia, the *Aboriginal Heritage Act 1972* is the key piece of legislation dealing with Aboriginal heritage. The long title of the *Aboriginal Heritage Act 1972* states that it is “an Act to make provision for the preservation on behalf of the community of places and objects customarily used by or traditional to the original inhabitants of Australia or their descendants, or associated therewith, and for other purposes incidental thereto.”

The *Aboriginal Heritage Act 1972* requires a Register of places and objects to be maintained by the Registrar of Aboriginal Sites. There are two circumstances when the status of a site must be determined:

- When notice is given by an owner of land under s. 18(2) of the *Aboriginal Heritage Act 1972*; and
- When the Registrar is considering placing a site in the Register; for example, in response to a report given under s. 15 of the *Aboriginal Heritage Act 1972*.

The status of a site is determined by the Aboriginal Cultural Material Committee (ACMC) which evaluates places and objects with regard to:

- Any existing use or significance attributed under relevant Aboriginal custom;
- Any former or reputed use or significance which may be attributed upon the basis of tradition, historical association, or Aboriginal sentiment;
- Any potential anthropological, archaeological or ethnographical interest; or
- Aesthetic values.

Section 5 of the *Aboriginal Heritage Act 1972* provides the definition of an Aboriginal site. It is an offence under s. 17 of the Act for anyone to:

- excavate, destroy, damage, conceal or in any way alter any Aboriginal site;
- in any way alter, damage, destroy, conceal or deal with an object on or under an Aboriginal site in a manner not sanctioned by relevant custom; or
- assume the possession, custody or control of any object on or under an Aboriginal site.

## Legislative requirements of the Register of places and objects

A Registrar of Aboriginal Sites is established under s. 37(1) of the *Aboriginal Heritage Act 1972* and given the responsibility for maintaining the Register. The manner and form of the Register is determined by the Minister for Indigenous Affairs.

A Register of places and objects is required to be kept under s. 38 of the *Aboriginal Heritage Act 1972*. The Register is required to contain:

- all protected areas;
- all Aboriginal cultural material; and
- all other places and objects to which the *Aboriginal Heritage Act 1972* applies.

A protected area is an Aboriginal site, site complex or series of sites of outstanding importance which has been declared in accordance with the procedure in section 19. Aboriginal cultural material is an object which has been declared as such pursuant to section 40.

Beyond these requirements, there are no other legal constraints in the *Aboriginal Heritage Act 1972* as to how the Register should be maintained. The Minister is given wide discretion to determine the form of the Register by, for example, issuing a ministerial direction or promulgating regulations.

A ministerial direction is a direction or statement given by the Minister requiring someone or something to act in a certain way. For example, the direction could require the Registrar to only list sites specifically required under the Act (i.e. those sites determined by the ACMC as Permanent sites) and no others. A ministerial direction must be followed unless it is contrary to the law.

Regulations are rules issued pursuant to a primary piece of legislation and operate as a secondary piece of legislation to the primary act. There are limited regulations under the *Aboriginal Heritage Act 1972*: the *Aboriginal Heritage Act Regulations 1974*.

There are no ministerial directions or regulations governing the Register.

There is significant scope for the content of either a ministerial direction or regulations. For example, they could cover:

- Types of sites included in the Register beyond the s. 38 requirements;
- Additional schedules or overlays to the Register detailing other types of sites;
- Procedures for gaining further information about a site (i.e. closed sites); and
- Clarity as to the different types of status given to a site in the Register.

#### Discussion points

- Would ministerial directions or regulations regarding the operation of the Register of places and objects be helpful? Which is preferred?
- What content should the ministerial direction or regulations cover?

### Current operation of the Register of places and objects

The Department of Indigenous Affairs (DIA) uses Site Assessment Groups (SAG) comprising Senior Heritage Officers, Heritage Assessment Officers and the Manager of the Heritage Advice Unit to collate information to assist the ACMC to evaluate the importance of places and objects.

The current electronic Register of objects and places is located on DIA's website and is called the Aboriginal Heritage Inquiry System. Users are able to locate specific areas in the Register using several methods such as 'drag and zoom', or search by street address, mining tenement, native title determination or coordinates.

Once the user has specified a search area, a list of possible sites is displayed. Each site is accompanied by a document outlining basic known information about it. The document outlines the 'status' of the site of which there are seven types: Lodged (L), Recommended Insufficient Information (IR), Recommended Permanent (PR), Recommended Stored Data (SR), Insufficient Information (I), Permanent (P) and Stored Data (S).

The document also outlines the gender restrictions on the site and whether the exact coordinates are closed due to its culturally sensitive nature.

It is imperative to note that the *Aboriginal Heritage Act 1972* applies to any site that meets the criteria under s. 5, regardless of the status of a site listed in the Register. To this end, the Register ultimately serves as a helpful tool for people interested in Aboriginal heritage and those wishing to avoid prosecution under s. 17 of the *Aboriginal Heritage Act 1972*.

### Discussion points

- Is the Register maintained in a helpful and useful manner? What particular aspects should be addressed?
- Are there any practices or processes that should be altered to make the Register more useful or more relevant to owners of land?

### Status of sites

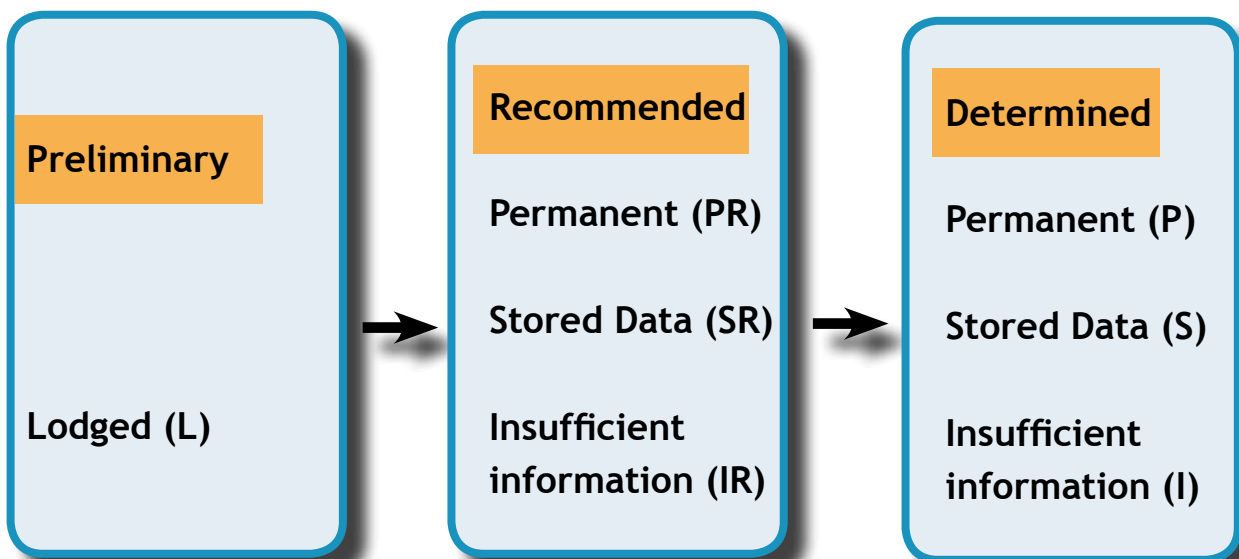
Current practice is to assign a 'status' to each site on the Register. Any site which is to be recorded under s. 38(c) of the *Aboriginal Heritage Act 1972* is assigned one of seven statuses (see Figure 1 below). These statuses are organised into three tiers:

- Preliminary assessment – sites are lodged but have not been subjected to any investigation;
- Recommended – sites which a SAG has investigated but the ACMC has not assessed; and
- Determined – sites which the ACMC has assessed.

Within the 'Recommended' and 'Determined' tiers there are three further categories:

- Permanent – found to be a site;
- Stored data – found not to be a site; and
- Insufficient information – assessed but there was insufficient information to make a determination.

Figure 1



There is no legislative requirement for a site to be given a status. The *Aboriginal Heritage Act 1972* requires that only protected areas, Aboriginal cultural material and places and objects to which the Act applies (as defined in s. 5) be recorded in the Register. Accordingly, this means that only sites with a 'Permanent' status are required by legislation to be recorded on the Register. All other statuses seek to assist users.

It has been suggested that the introduction of seven different statuses has made it difficult for people using the Register to have any level of certainty as to whether a site exists. It is unclear whether people using the Register require this level of information.

One option is for the Register to contain only those sites which are required under s. 38 of the *Aboriginal Heritage Act 1972*. These are sites which have been evaluated by the ACMC and the Registrar has subsequently recorded them (i.e. they have 'Permanent' status). Any other site could be recorded in a separate schedule or database to the Register. This would create a clear delineation between determined permanent Aboriginal sites and those that have not yet been assessed or those for which insufficient information exists. Again, it is worth reiterating that all Aboriginal sites, whether on the Register or not, start by being protected.

Ultimately, it is important to note that the Register of places and objects is intended to be a key tool in helping protect Aboriginal heritage. A balance needs to be struck between the level of detail required by users and the detail needed to fulfil the purpose of the *Aboriginal Heritage Act 1972*. For example, whilst it may be useful to some users to only include information about permanent sites, it could put at risk places and objects yet to be assessed by the ACMC. It could also be misleading to development proponents who may take it to mean that no site exists on their land, thus making them vulnerable to prosecution under s. 17.

#### **Discussion points**

- Are the statuses assigned to sites in the Register helpful?
- Would it be preferable to only list sites which have been definitively determined to be Aboriginal sites?
- Would a separate schedule or database of non-definitive sites be useful?
- Are there any other ways in which sites could be delineated?

## Other Jurisdictions

Each state in Australia has enacted its own distinct legislation dealing with the protection of Aboriginal heritage. State Acts operate in parallel with the Commonwealth Act.

### Queensland

Queensland produces an Aboriginal Cultural Heritage Database to which access is limited and a separate public Aboriginal Cultural Heritage Register which is available to the public pursuant to the *Aboriginal Cultural Heritage Act 2003 (Qld)*.

The database is used as a research and planning tool and is not considered to be conclusive, up-to-date or comprehensive. Information may be placed on the Database where the chief executive considers it appropriate. Access is only available to land users where it is relevant for that particular person in discharging their cultural heritage duty of care.

The Register contains information from cultural heritage studies, management plans and cultural heritage bodies. The purpose of the Register is to aid land use and land use planning. The Register is available to the public.

Neither is available to search online and both require a form to be completed by the interested party for a search to occur.

### New South Wales

NSW Aboriginal heritage legislation operates similarly to WA's in that it is an offence to destroy or damage a site regardless of whether it is on the Aboriginal Heritage Information Management System (AHIMS).

New South Wales maintains an AHIMS pursuant to the *National Parks and Wildlife Act 1974 (NSW)*. AHIMS cannot be searched online and requires a form to be completed as well as attracting a fee.

A search of AHIMS will result in a standard report outlining the recorded places and objects within the nominated area.

AHIMS is accompanied by a disclaimer that the information provided is not comprehensive and further Aboriginal heritage surveys may be required.

### Northern Territory

The Northern Territory protects Aboriginal heritage through two different pieces of legislation.

The *Heritage Conservation Act 1991 (NT)* provides for the protection of archaeological places and objects which relate to Aboriginal people. The *Heritage Conservation Act 1991*

(NT) applies to heritage more generally and makes any archaeological place or object automatically protected until the Minister decides otherwise.

The *Sacred Sites Act 2004 (NT)* provides for the protection and regulation of sites which are sacred or significant to Aboriginal people. All sacred sites are protected regardless of whether they have been placed in the Register. The *Sacred Sites Act 2004 (NT)* requires a Register of Sacred Sites and Register of Authority Certificates to be kept. The Register of Sacred Sites lists all known sacred sites; however, a site can only be placed in the Register at the request of the site's custodian.

The Register of Authority Certificates lists all applications made and Authority Certificate issued under the *Sacred Sites Act 2004 (NT)*. An Authority Certificate is a defence to using land which contains sacred sites, so long as the prescribed conditions are followed.

Any person can search either Register so long as allowing the search will not disclose sensitive commercial matters or secrets kept in accordance with Aboriginal tradition. A site that is in the Register is prima facie considered a sacred site for all court proceedings.

## South Australia

The Minister for Aboriginal Affairs and Reconciliation in South Australia is responsible for maintaining an Aboriginal Register of Sites and Objects under the *Aboriginal Heritage Act 1988 (SA)*. The Minister is given the power to determine whether sites or objects are or are not Aboriginal heritage that should be protected by the Act.

The Register is not publicly available and can only be searched by the Minister upon application by someone. If the Minister has determined that a site or object should be entered in the Register, it is conclusively held to be a site for all legal proceedings. Conversely, if they have previously determined that a site or object should not be entered on to the Register it is conclusively held not to be a site for all legal proceedings. Whilst there is significant scope for how the Register is formulated under the *Aboriginal Heritage Act 1988* in Western Australia, it is not possible to model this aspect of the South Australian Register without legislative change. This is because the *Aboriginal Heritage Act 1988* applies to any Aboriginal site regardless of whether or not it is on the Register.

## Relevance to Western Australia

Each jurisdiction's register contains its own distinct characteristics; however, there are also some common themes. Many of the requirements placed upon the Registers in other jurisdictions are mandated by legislation. Western Australia does not have such strong legislative requirements of the Register. This allows scope to assess some ideas from other jurisdictions and adapt them to Western Australia.

### Discussion Points

- Are there any aspects of Aboriginal heritage registers in other jurisdictions which would be relevant and useful in Western Australia?

## Way forward

The discussion paper aims to facilitate comment from interested parties to generate ideas and provide options for creating more clarity and certainty to users of the Register of places and objects in Western Australia.

If you would like to provide comments on this paper please do so via:

Email: [register.submissions@dia.wa.gov.au](mailto:register.submissions@dia.wa.gov.au)

Or

Post: The Registrar  
PO Box 7770  
Cloisters Square  
PERTH WA 6850

## The deadline for submissions is Friday, 26 March 2010.

Late submissions will not be considered. Individual submissions will not be responded to but will be used to inform options for improving the functionality of the electronic Register.

# Appendix 1

## **Commonwealth Legislation - *Aboriginal and Torres Strait Islander Heritage Protection Act 1984***

The Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act) runs parallel to the *Aboriginal Heritage Act 1972*. It does not alter the provisions of the *Aboriginal Heritage Act 1972* to the extent that provisions may be inconsistent.

The principle method established under the ATSIHP Act for protecting Aboriginal heritage is the power given to the Minister for the Environment, Heritage and the Arts to make declarations for the protection of Aboriginal areas or objects.

The Minister may make a declaration if he has received an application from an Aboriginal or Torres Strait Islander person requesting the protection or preservation of an area or object. If the Minister is satisfied the area or object is significant and under threat of injury or desecration he may issue a declaration. It is also possible for the Minister to make an emergency declaration if he believes a significant site is under serious and immediate threat from injury or desecration.

Before making a declaration regarding an area or object in a State or Territory, the Minister for the Environment, Heritage and the Arts must consult with the relevant Minister in that jurisdiction.

In August the Minister for the Environment, Heritage and the Arts, Hon. Peter Garrett, released a discussion paper on proposed amendments to the ATSIHP Act and its interaction with State and Territory legislation. One proposal is for State and Territory legislation to be accredited, and one matter for accreditation is access to government records of the locations of Aboriginal areas. The Register of places and objects fulfils the requirement for an accessible Government record. The State Government presented a submission to the Commonwealth in November 2009.

