



AUSTRALIA ICOMOS
International Council on Monuments and Sites

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14 October 2023

Honourable Roger Cook MLA
Premier
13th Floor
Dumas House
2 Havelock Street
West Perth WA 6005

By email: wa-government@dpc.wa.gov.au

Dear Premier

**Amendment of the *Aboriginal Heritage Act 1972* following repeal of the
Aboriginal Cultural Heritage Act 2021 – Recommended Inclusions**

This letter follows Australia ICOMOS' letter of 27 September 2023 noting our concern with the Western Australian Government's decision to repeal the *Aboriginal Cultural Heritage Act 2021* and reinstate the *Aboriginal Heritage Act 1972* with very limited amendments.

As it appears the Western Australian Government is determined to take this course of action, Australia ICOMOS strongly urges the Government to take the opportunity to ensure that in amending the *Aboriginal Heritage Act 1972*, the amended Act meets current best practice and will ensure effective Aboriginal heritage protection.

It is Australia ICOMOS' view that although the Western Australian Government's proposed key amendments will help do this (primarily those relating directly to Section 18), they do not go far enough. In our view the resultant legislation will not prevent unacceptable and widespread damage and destruction of Aboriginal cultural heritage, and will not guarantee the prevention of another incident such as occurred at Juukan Gorge.

The proposed amendments do not bring the *Aboriginal Heritage Act 1972* up to a similar standard of Aboriginal heritage protection as provided by equivalent Acts in other Australian states, many of which are also considered inadequate. Two key areas where this is the case, and of particular concern to Australia ICOMOS, are:

- in relation to the proposed amended *Aboriginal Heritage Act 1972* not acknowledging Aboriginal ownership of Aboriginal heritage, even through as simple a measure as providing for a fully Aboriginal heritage council or committee, which is now standard practice in many parts of Australia; and
- in continuing to allow 'unknowing' damage to Aboriginal heritage to be a defence under the Act, something that is no longer a defence in most other Australian jurisdictions.

Australia ICOMOS therefore urges the Western Australian Government to provide the following provisions in an amended *Aboriginal Heritage Act 1972*.

1. Definition of Aboriginal heritage

- Broaden the definition of Aboriginal heritage to explicitly allow for areas of land and sea as places, and to include intangible heritage.
- Remove the generalised test of significance for places in s.5 (a & b) (i.e. the terms 'of importance and significance' and 'of importance and special significance') and replace these with a test of significance to the Aboriginal community/community groups, including Traditional Owners and other custodial groups. The current definitions are unclear and open to various interpretations, and have

led in the past to important Aboriginal heritage in Western Australian not being recognised under the *Aboriginal Heritage Act 1972*.

2. The composition of the newly formed Aboriginal Cultural Heritage Council (former Aboriginal Cultural Material Committee)

- Ensure the Aboriginal Cultural Heritage Council is fully comprised of Western Australian Aboriginal people, with the capacity to draw upon other technical advice as it deems necessary (as is the case in most other Australian states), with the composition of the Council to also provide equitable geographic representation across Western Australia.
- For the Aboriginal Cultural Heritage Council to have greater decision-making authority, in particular greater authority to make decisions on Section 18 applications. There are a number of areas in which greater decision making authority should be given to Aboriginal people as the owners and custodians of their heritage – foremost is for Ancestral remains, but also in relation to Section 16 permits, options for impact mitigation and long term management, and for research applications at Aboriginal heritage places or related to Aboriginal heritage objects.
- Provision for the Council to go on Country to discuss proposed Section 18 applications with the relevant Traditional Owners and to see the places proposed for destruction first-hand.

3. Provision in Act for ‘unknowingly’ damaging Aboriginal heritage

- Remove the provision that ‘unknowingly’ damaging Aboriginal heritage is a defence under the amended *Aboriginal Heritage Act 1972*. We understand that this is one of the provisions that is proposed to be reinstated in the amended Act, but we would argue that this is an outdated clause. Indeed, similar provisions have been removed from Aboriginal heritage Acts in most other Australian jurisdictions, including in Tasmania when minor amendments were made to the *Aboriginal Relics Act 1975* in 2016-17. This has been generally achieved by replacing this provision with simple due diligence requirements, augmented by guidelines for different key industry sectors.

4. Appeals process for Aboriginal parties

- The proposed amended *Aboriginal Heritage Act* will allow both proponents and Native Title parties to have the same right of review for Section 18 decisions via the State Administrative Tribunal. Although, this is a move towards giving Western Australian Aboriginal people appeal rights in relation to Aboriginal heritage, it does not go far enough. All Aboriginal Traditional or Custodial Owners should have the right of appeal.
- Australia ICOMOS is also concerned that, while on the surface this is an equal right of appeal, Aboriginal parties do not have the same resources (and often no financial resources) to undertake an appeal. Given this, the amendments need, in our view, to provide for an Aboriginal appeals process separate to the standard State Administrative Tribunal process which can meet Aboriginal community needs and does not incur costs (except possibly where the appeal is frivolous or vexatious, i.e. has no merit); or for the Western Australian Government to provide for financial support for Aboriginal communities to undertake an appeal through the normal channels.

5. Penalties for breaching the Act

- Australia ICOMOS believes that penalties for breaching the Act need to be significantly increased to reflect the costs of the loss of, or damage to, the heritage that has occurred; and to provide a significant deterrent to breaching the Act. For example, the penalty might constitute a fine greater than the financial gain made in utilising the land on which the site/s were located.

6. Special conditions for particular industry sectors

- We understand that some of the changes proposed will affect the various industry sectors differently, including distinct treatment of the mining sector versus the agricultural sector. Australia ICOMOS does not believe that there should be such different approaches, but rather, that all sectors should be equally responsible for Aboriginal heritage protection. As noted above, any differences between the sectors can be dealt with via due diligence guidelines, as occurs elsewhere.

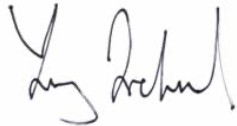
We further note that as part of the proposed changes, the Western Australian Government will undertake, or sponsor, a program of proactive surveys. Australia ICOMOS supports this initiative, but encourages the Government to apply the proposed proactive survey to all of the State. Also, as comprehensive survey at this scale has a number of issues as well as potential benefits, the approach needs to be developed with care

and expert input. Australia ICOMOS would be pleased to provide further advice on best practice methodologies and approaches to this process as the Government moves to develop the survey approach.

Further, Aboriginal heritage legislation must acknowledge Aboriginal people as the Traditional Owners, Custodians and Knowledge Holders of Aboriginal heritage. Together with the rights recognised in the 2007 *United Nations Declaration on the Rights of Indigenous Peoples*, this confers on all governments an **obligation to recognise this in legislation**. It appears that in the current move to repeal the *Aboriginal Cultural Heritage Act 2021* and reinstate an *Aboriginal Heritage Act 1972* with minor amendments, the Western Australian Government has not moved forward in this area. Australia ICOMOS therefore urges the Western Australian Government to increase the role and responsibilities of Aboriginal people in heritage protection in Western Australia in the current legislative change. Guidance on this is provided in the report by the Joint Standing Committee on Northern Australia (2021), *A way forward: final report into the destruction of Indigenous heritage sites at Juukan Gorge and in Dhawura Ngilan: a vision for Aboriginal and Torres Strait Islander heritage in Australia and the best practice standards in Indigenous cultural heritage management and legislation* (HCOANZ 2020).

Australia ICOMOS would be happy to expand upon or further discuss these comments.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Tracy Ireland', written in a cursive style.

**Professor Tracy Ireland M.ICOMOS FSA
President**