

## ABORIGINAL CULTURAL HERITAGE BILL 2021

### *Introduction and First Reading*

Bill introduced, on motion by **Dr A.D. Buti (Minister for Finance)**, and read a first time.

Explanatory memorandum presented by the minister.

### *Second Reading*

**DR A.D. BUTI (Armadale — Minister for Finance)** [12.26 pm]: I move —

That the bill be now read a second time.

I would like to acknowledge the traditional owners of the lands and waters throughout Western Australia, in particular the Whadjuk Noongar people on whose land we meet. The government pays its respects to their elders past, present and emerging, and takes this opportunity to acknowledge the many Aboriginal nations that have lived on this land for thousands of generations.

Western Australia is establishing a new cultural heritage regime to achieve equity in the protection of Aboriginal cultural heritage by giving Aboriginal people custodianship over their heritage and putting them at the centre of decision-making.

This state has a wealth of both tangible and intangible Aboriginal cultural heritage, tracing back 60 000 years or more; it is the oldest continuous culture in the world. Aboriginal people have deep spiritual connections to their land and this is central to their wellbeing and vitality. As traditional custodians, they share cultural obligations to care for country and pass on their knowledge to future generations. Aboriginal cultural heritage also has broader scientific, educational and historic interest and value.

Although the Aboriginal Heritage Act 1972 was considered progressive for its time, it is now outdated and does not meet the expectations of Aboriginal people or the broader community. It has changed little in the past 49 years, most clearly demonstrated by the devastating loss of the 46 000-year-old Juukan Gorge rock shelters.

In 2017, the McGowan government committed to review the 1972 act. The review process has been comprehensive, comprising a consultation paper in 2018, discussion paper in 2019 and draft consultation bill in September last year. There have been around 150 stakeholder meetings, public information sessions and workshops attended by more than 1 500 people across the state, with a particular focus on the Aboriginal community, and more than 380 submissions, all of which have been instrumental in the final design of the bill. The review process clearly established the need for better protection, for Aboriginal people to be given a voice and for greater efficiencies and certainty for all parties.

The bill will deliver on these objectives. It will establish a contemporary framework to value and protect Aboriginal cultural heritage, and will manage activities that may cause harm so as to provide balanced and beneficial outcomes. Its premise is that Aboriginal cultural heritage is a traditional and living culture that remains fundamental to the lives of Aboriginal people and that Aboriginal people should determine what constitutes their heritage and have an active role in its protection and management, including consultation, negotiation and agreement-making. Its underlying philosophy is avoiding and minimising harm whenever possible.

A key feature of the bill is the establishment of local Aboriginal cultural heritage services, LACHS, which will ensure that local Aboriginal people are involved in decisions affecting their heritage. The McGowan government has committed \$10 million in the 2021–22 state budget to provide capacity-building funding for LACHS to ensure Aboriginal people will be in the position to make decisions about the protection and management of their heritage. The bill will establish an Aboriginal Cultural Heritage Council to provide strategic oversight of the new system. The council will have male and female Aboriginal co-chairs and comprise a majority of Aboriginal people. The council will ensure that the principles of free, prior and informed consent that are enshrined in the bill are upheld in the agreement-making process.

The bill will enable a more efficient, yet robust, activity-based approval process. It will allow for ministerial powers to stop unauthorised activities that impact heritage, significantly increase penalties and the time limit for prosecutions, and expand enforcement powers. It will allow for areas containing outstanding Aboriginal cultural heritage to be declared protected areas, preventing any activity that may harm that heritage. Parliament's approval will be required to repeal a protected area. A balance needs to be achieved between heritage protection and management on the one hand, and realising the economic benefits of our natural resources on the other. These resources generate employment for thousands of Western Australians, including Aboriginal Western Australians, and underpin the prosperity of the state and the nation as a whole. This bill acknowledges and builds on the many strong, collaborative and respectful relationships that already exist, particularly with the resources sector, and will provide opportunities for local Aboriginal people to guide land use activities while respecting and protecting cultural heritage. The government considers that giving one party the unilateral right to say yes or no would undermine the bill's focus on agreement-making for the benefit of all. It would risk jeopardising the essential legislative reform that is required

and the many positive initiatives the bill contains and that all parties endorse. This bill will achieve the right balance between ensuring there is a real and effective Aboriginal voice on Aboriginal heritage matters and representing national best practice in the protection of Aboriginal cultural heritage.

I will now provide a detailed explanation of the bill. Part 1 of the bill sets out the commencement of the bill as well as a general overview, and provisions of a general nature, including definitions and the objects and principles of the bill. It sets out principles relating to custodianship, ownership, possession and control of Aboriginal cultural heritage as well as the principles of cooperation and mutual advantage relating to the management of activities that may harm Aboriginal cultural heritage. The bill incorporates a broader definition of Aboriginal cultural heritage. It includes both tangible and intangible elements, recognised through social, spiritual, historical, scientific or aesthetic values, and includes places, objects and cultural landscapes as well as ancestral remains.

Part 2 will establish an Aboriginal Cultural Heritage Council and LACHS. The council's functions will include providing strategic oversight of the new system, promoting public awareness and appreciation, and developing policies and guidelines essential for implementation and best practice. It will have two Aboriginal co-chairs, one female and one male, with members having relevant skills, knowledge and experience, and a requirement for a majority of members to be Aboriginal, as far as practicable. The council may delegate some of its functions to a committee or to the department that is principally assisting in the administration of the new act. The bill places Aboriginal people at the heart of decision-making about their heritage through the requirement for notification and consultation—which is not required under the current act—the creation of LACHS and the focus on agreement-making with land users. LACHS will act as a single point of contact for their geographical area, creating certainty for both Aboriginal people and proponents. They will be responsible for negotiating cultural heritage management plans and undertaking consultation with Aboriginal people, and will be able to charge a fee for service in accordance with a fee structure endorsed by the council.

The bill aligns with the Native Title Act 1993 by prioritising prescribed bodies corporate as LACHS. Other Aboriginal bodies may be appointed if they have the support of the native title parties. Where there is not a LACH service, proponents will need to negotiate with either the native title party or, where none exists, the native title representative body.

Unlike the current act, part 3 of the bill explicitly provides for the appropriate management of Aboriginal ancestral remains and secret or sacred objects. Ancestral remains must be returned to their traditional custodians and any disturbance or dealings with them is prohibited. The return of secret and sacred objects is mandatory for government agencies and encouraged for everyone else, but otherwise those objects cannot be sold or removed from the state. The council will be able to assist in the return of remains and objects and, where necessary, will be able to hold them in safekeeping until a custodian can be identified. Any person who is aware of the existence of an Aboriginal place, object or ancestral remains will be required to report this to the council, other than an Aboriginal person acting in accordance with their traditional rights and responsibilities or someone acting under instruction of such a person. Significantly, it will be up to Aboriginal people to assess the importance and significance of their heritage themselves rather than a body such as the Aboriginal Cultural Material Committee under the current act. Protection will be afforded to Aboriginal cultural heritage regardless of whether it is recorded on the new Aboriginal Cultural Heritage Directory.

Part 4 of the bill will continue the ability for Aboriginal cultural heritage of outstanding significance to be declared a protected area, providing ongoing protection from harm. Unlike the current act, protected areas will not be vested in the minister, thereby minimising future act complications under the Native Title Act and allowing management responsibilities to be given to Aboriginal people. Protected areas may be subject to conditions that determine management and access and any breach of condition will be an offence. The existing 78 protected areas, which all predate the Native Title Act, will carry over and the government will work with the relevant Aboriginal people to ensure that suitable conditions for protection and management are put in place. The bill will also allow for spatial inaccuracies, or other errors caused by outdated mapping or recording methodologies to be corrected.

Part 5 sets out offences in relation to three levels of unauthorised harm to Aboriginal places, objects, ancestral remains and cultural heritage in protected areas—serious, material and general harm. The bill includes significantly higher penalties to reflect the serious impact that harm has for Aboriginal people, with up to \$10 million for a body corporate, and \$1 million or imprisonment for up to five years for an individual. Any penalties will be paid into an Aboriginal cultural heritage compensation fund, with compensation available to an Aboriginal person, group or community with traditional rights and responsibilities in respect of the Aboriginal cultural heritage that has been harmed.

Part 6 deals with the management of activities that may harm Aboriginal cultural heritage. A key feature of the bill is the inclusion of a tiered land-use approval system. A permit will be required for tier 2 activities that involve low ground disturbance. A management plan will be required for tier 3 activities that involve moderate to high ground disturbance. Tier 1 activities that will result in no or minimal ground disturbance will not need an approval, although all reasonable steps will need to be taken to avoid or minimise the risk of harm. A very limited range of activities will be exempt from any kind of process and include travelling on existing roads and tracks, recreational

activities on public land and waters, small-scale residential developments and improvements, and prescribed burns. All proponents are required to undertake a due diligence assessment to understand whether their proposed land use will impact Aboriginal cultural heritage and the likely level of impact. The focus is on engaging with Aboriginal people where an activity may harm heritage or where there is uncertainty about whether harm may be caused. The current act gives no role to Aboriginal people to be consulted or be involved in making decisions about their cultural heritage. Under the new act, proponents will need to provide notice to the relevant Aboriginal people to undertake tier 2 activities and will need to consult for tier 3 activities. This requirement for notification and consultation is a recognition of the fundamental right of Aboriginal people to be included in decisions that may impact their heritage.

For tier 3 activities, proponents will be required to identify the existence and characteristics of the heritage to an appropriate standard prior to entering into negotiations on a management plan with a LACH service or other interested Aboriginal party. An agreed management plan is to be approved by the council, which will need to ensure that the plan meets certain standards and that, critically, the Aboriginal party has given informed consent. This will require the full and proper disclosure by the proponent of the proposed method for the activity as well as any feasible alternative methods that may reduce heritage impacts and the risk of the activity causing harm. It will also require that consent is given without any coercion, intimidation or manipulation. Both parties will be required to use their best endeavours to agree on a plan. Where agreement cannot be reached, the council may assist the parties to reach agreement and act as a mediator. Where agreement still cannot be reached, the council must make a recommendation that the minister authorise a management plan, which may be the proponent's, the Aboriginal party's or the council's, or refuse to authorise a management plan. The minister's decision must be made on the grounds of whether or not he or she is satisfied as to the matters set out in the bill and what is in the interests of the state. It is open to the minister to seek the views of other members of executive government in making his or her decision on what constitutes the interests of the state. If, when considering a management plan, the council forms an opinion that the Aboriginal cultural heritage that may be harmed is of exceptional importance to the cultural identity of the state, the plan will need to be authorised by the minister.

All permits and management plans will need to provide for ways to deal with new information about the existence or characteristics of Aboriginal cultural heritage. Permits, management plans and section 18 consents may be transferred to another person providing it is for the same purpose and within the same footprint. To streamline approvals and ensure the efficient use of resources, it is expected that the council will delegate to the department its powers to consider and grant permits.

Part 7 introduces a new suite of protection mechanisms. The minister will be able to issue stop activity orders and prohibition orders against an unauthorised activity that is causing harm or involves an imminent risk of harm, or if there is new information about Aboriginal cultural heritage. Stop activity orders will be limited to 60 days, during which time the council will be required to make a recommendation on whether a prohibition order is required. Stop activity orders may be extended by the minister for a further 60 days if the minister is satisfied the council needs further time. The minister will also be able to issue remediation orders for a person to remediate unlawfully harmed heritage.

Part 8 encourages landowners and other interested persons to enter into voluntary Aboriginal cultural heritage protection agreements with Aboriginal people to enable the protection, preservation or conservation of Aboriginal cultural heritage. These agreements may be submitted to the council for endorsement and lodgement on the new directory.

Part 9 of the bill establishes the new Aboriginal Cultural Heritage Directory. The directory will be a planning and research tool to assist in the consideration of Aboriginal cultural heritage and in decision-making, and will replace the current Register of Places and Objects. Minimum standards will establish the information required in relation to heritage that is recorded on the directory, and the council will have a duty to ensure that culturally sensitive information is secure.

Part 9 also includes a definition of "intangible Aboriginal cultural heritage". To be kept alive, intangible Aboriginal cultural heritage must be continuously recreated and passed on from one generation to another. As such, intangible Aboriginal cultural heritage could be recorded on the directory to support Aboriginal people to preserve and pass it on to future generations.

The bill will ensure proactive compliance through the appointment of inspectors under part 10, including powers of entry and inspection for the purposes of investigating possible breaches. The bill provides that Aboriginal inspectors may also be appointed—for example, members of a LACH service or Aboriginal rangers—with powers determined by the department's CEO.

Part 11 outlines general provisions relating to legal proceedings and includes powers of the court, liability of employers and evidentiary provisions. A key feature is the increase from 12 months under the current act to six years in which prosecutions for simple offences can be commenced.

Part 12 outlines the role of the State Administrative Tribunal, including the process to seek a review by SAT, the decisions that may be reviewed and who the affected parties are.

Part 13 covers miscellaneous matters, including how notices are to be given and the development of statutory guidelines by the council to support the operation of the new act. The requirement for notices for council or ministerial decisions will improve transparency. There will be a consultation process on the guidelines before they are endorsed by the council. Part 13 also provides a regulation-making power, including for fees to be charged for services provided under the bill and the recovery of costs and expenses incurred in its administration. The minister and CEO can also delegate certain powers.

Part 14 sets out the transitional provisions that will assist with the smooth transition from the current act to the new act. Approvals issued under the current act will continue to have effect in accordance with their terms and will be taken to be either permits or authorised management plans for the purpose of various parts of the bill. Historical section 18 consents, being those applied for under the current act prior to the bill receiving royal assent, will expire in 10 years from when the current act ceases to have effect where the purpose has not substantially commenced. Once the bill receives royal assent, there will be a transitional period of 12 to 18 months during which the current act will remain in force. Any section 18 consents applied for and issued during this transitional period will be limited to five years. The existing Aboriginal Cultural Material Committee will continue operating until six months after the new act comes into effect to deal with any remaining section 18 applications. Transitional section 18 consents can be extended by the minister for a further five years for state-significant projects only. Part 14 also provides for the repeal of the Aboriginal Heritage (Marandoo) Act 1992, a historic addressing of past wrongs suffered by Aboriginal people. The bill will provide for the ongoing operation of existing mine activities as well as management of future impacts.

Part 15 sets out consequential amendments to the current act and part 16 sets out amendments to other acts. This includes to the Environmental Protection Act 1986 so that the Minister for Aboriginal Affairs is not constrained from authorising a management plan when the project in question is also being considered by the Minister for Environment.

In relation to state agreements, provisions that state that the proponent, in respect of the agreement, is taken to be a landowner for the purposes of the current act will cease to have effect when the new act is proclaimed. The government's intention is to migrate state agreements to the new act rather than listing all the relevant clauses to be amended.

The bill will deliver much-needed reforms to the Aboriginal cultural heritage management system in Western Australia. It is a highly significant and demanded reform in the Aboriginal affairs portfolio that aligns with the McGowan government's commitment to support the pursuit of self-determination by traditional owners across the state. During the transition period, the government will be developing statutory guidelines, operational policies and regulations required to support the new act. Given the importance of these documents, the government is committed to a co-design process, overseen by a regulatory working group comprising traditional owners, industry and government.

I would like to take this opportunity to thank everyone for their engagement in the review process and development of the bill. In particular, I would like to thank many hundreds of Aboriginal people for their time and commitment to this process. I would also like to thank other stakeholders, particularly the resources industry, who have taken a constructive approach. Finally, I would like to acknowledge the role of the former Minister for Aboriginal Affairs Hon Ben Wyatt for initiating and driving the review process during the McGowan government's first term.

I commend the bill to the house.

Debate adjourned, on motion by **Mr R.S. Love**.

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