



Government of **Western Australia**
Conservation and Parks Commission

Position Statement:

**Protecting and conserving the value of the
land to the culture and heritage of Aboriginal
persons**

August 2019

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The Commission's Position

The Conservation and Parks Commission (Commission) understands that Aboriginal people are the Traditional Owners of the lands and waters vested in it. The Commission recognises that past government policies and practices have limited the traditional rights, interests and access to land that enable Aboriginal people to fully exercise their culture and heritage and that amendments to the *Conservation and Land Management Act 1984* (CALM Act) have sought to address these impacts.

Aboriginal cultural heritage exists throughout the lands and waters of Western Australia. Protection and conservation of cultural and heritage values over land and waters is important in maintaining the identity, health and well-being of Aboriginal people.

The Commission is committed to ensuring that any policies, plans or programs involving land and water vested in, or under the care, control and management of the Commission, whether solely or jointly, protects and conserves the value of the land to the culture and heritage of Aboriginal people.

The Commission will ensure on-going consultation is undertaken to identify, protect and conserve the value of the land and waters to the culture and heritage of Aboriginal persons. All parties concerned with identifying, protecting, conserving and managing this culture and heritage should act on the principles that Aboriginal people:

- managed their land and waters for at least 60,000 years;
- are the primary source of information on the value of their culture and heritage and how this is best protected and conserved;
- must be part of any Aboriginal culture and heritage protection, conservation and management planning process that is undertaken in a planned and timely manner;
- must have input into primary decision-making in relation to Aboriginal culture and heritage to continue to fulfil their cultural obligations; and
- must control intellectual property and other information relating specifically to their culture and heritage, as this may be an integral aspect of its value.

In identifying and managing the culture and heritage value:

- every effort should be made to clarify uncertainty about Aboriginal culture and heritage values at a place;
- all parties having relevant interests should be consulted about Aboriginal culture and heritage matters using appropriate cultural protocols; and
- the process and outcomes of planning for the protection and conservation of Aboriginal culture and heritage values must have regard to customary law, and abide by relevant Commonwealth and State laws, relevant International treaties and covenants and any other legally binding agreements.

Adhering to cultural restrictions on information about an Aboriginal culture and heritage is essential to maintaining its value.

Context and Background

UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Australia is a signatory to the United Nations Declaration on the Rights of Indigenous Peoples. The declaration establishes a universal framework of minimum standards for the survival, dignity and well-being of the indigenous peoples of the world and it elaborates on existing human rights standards and fundamental freedoms as they apply to the specific situation of indigenous peoples.

Article 19 provides that states should consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 31, provides that Indigenous peoples have the right to maintain, control protect and develop their cultural heritage, traditional knowledge and traditional cultures expressions. This article also provides that States should, in conjunction with Indigenous peoples, take effective measures to recognise and protect the exercise of these rights.

UN Declarations are generally not legally binding; however, they represent the dynamic development of international legal norms and reflect the commitment of states to move in certain directions, abiding by certain principles.

LEGISLATION

In Australia, there are federal, state and territory laws that protect Aboriginal heritage.

The Commonwealth *Native Title Act 1993* enshrines the rights of native title holders to protect and maintain places of cultural significance to protect their culture and heritage and to maintain their connection to land and waters.

Under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), the federal government is also responsible for protecting Aboriginal heritage places that are nationally or internationally significant, or that are situated on land that is owned or managed by the Commonwealth.

The EPBC Act establishes the National Heritage List, which includes natural, Aboriginal and historic places that are of outstanding heritage value to Australia. Under the EPBC Act there are penalties for anyone who takes an action that has or will have a significant impact on the Aboriginal heritage values of a place that is recognised in the National Heritage List. The EPBC Act also establishes the Commonwealth Heritage List, which includes places on Commonwealth

lands and waters or under Australian Government control that have Aboriginal heritage significance.

In Western Australia (WA), there are four acts of parliament that deal with protection and conservation of Aboriginal heritage:

1. *Conservation and Land Management Act 1984* (CALM Act);
2. *Aboriginal Heritage Act 1972* (AH Act);
3. *Environmental Protection Act 1986* (EP Act); and
4. *The Biodiversity Conservation Act* (BC Act).

The Commission is established under the CALM Act and the relevant Commission responsibilities under the CALM Act relating to the protection and conservation of Aboriginal heritage are illustrated in Figure 1. The Department of Biodiversity, Conservation and Attractions is the management agency responsible for administering the CALM Act.

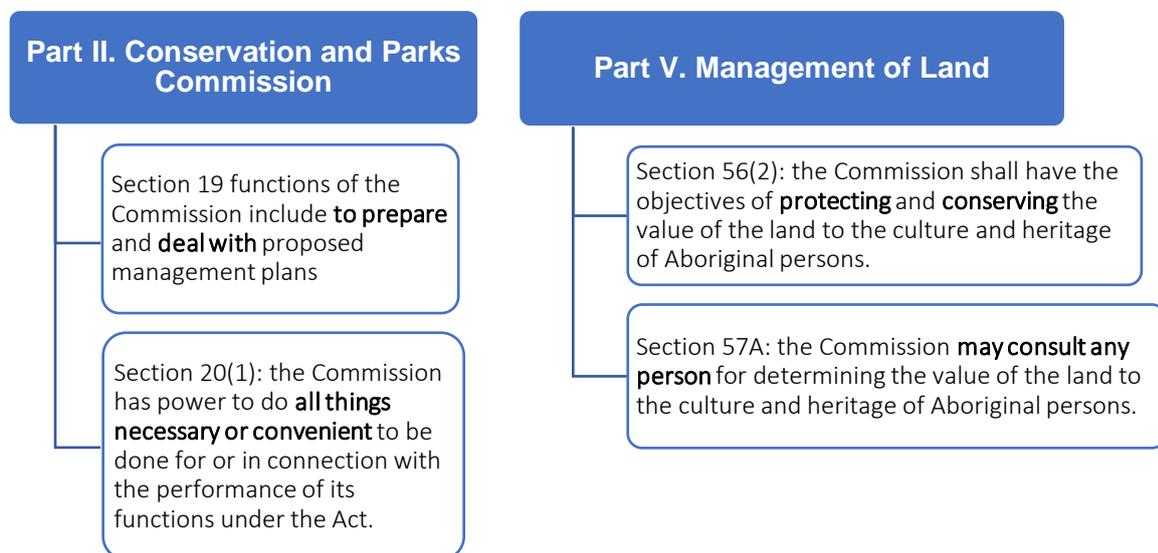


Figure 1: The Commission’s responsibilities in protecting and conserving the value of the land to the culture and heritage of Aboriginal persons under the CALM Act

The AH Act recognises Aboriginal peoples' strong relationships to the land (Department of Aboriginal Affairs WA, 2017). The WA Department of Planning, Lands and Heritage is responsible for administering the *Aboriginal Heritage Act 1972* (AH Act). It is noted that AH Act in WA is currently under review with new proposed legislation under development.

While the focus of the AH Act is the protection of sites with social and heritage significance, a primary focus of the EP Act is to consider proposals with the potential to have a significant effect on the environment. The EP Act can, in some instances, complement the AH Act, for example, in cases where actual physical protection of the environment is required to protect sites of heritage significance (Environmental Protection Authority, 2004). The Department of Water and Environmental Regulation administers the EP Act.

The BC Act includes two objectives from the *International Convention on the Conservation of Biological Diversity* (1993) which are: to conserve and protect biodiversity and biodiversity components in the State; and to promote the ecologically sustainable use of biodiversity components in the State. In pursuing the objectives of the BC Act, decision-makers must take into account the principles of Ecologically Sustainable Development which include the integration of long and short-term economic, environmental, social and equitable considerations.

SUPPORTING POLICIES

The Department of Biodiversity, Conservation and Attractions has the following corporate policy statements that relate to Aboriginal engagement, involvement and joint management:

- Acknowledgment of Aboriginal Traditional Owners (DBCA Policy No. 69);
- Aboriginal customary activities (DBCA Policy No. 86);
- Aboriginal joint management (DBCA Policy No. 87);
- Burial of Aboriginal people on CALM land (DBCA Policy No. 91);
- Aboriginal Outstations, Camps and Settlements on CALM Act Land (DBCA Policy No. 94); and
- Environmental Factor Guideline - Social Surroundings (EPA 2016)

DEFINITIONS

Aboriginal heritage is dynamic. It includes tangible and intangible expressions of culture that link generations of Aboriginal people over time. Aboriginal people express their cultural heritage through ‘the person’, their relationships with country, people, beliefs, knowledge, law, language, symbols, ways of living, sea, land and objects all of which arise from Aboriginal spirituality.

Aboriginal heritage places are landscapes, sites and areas that are particularly important to Aboriginal people as part of their customary law, developing traditions, history and current practices. All Aboriginal heritage places have associated Aboriginal heritage values. Aboriginal people have the right to maintain confidentiality around some physical places.

Aboriginal heritage values include spirituality, law, knowledge, practices, traditional resources or other beliefs and attachments.

Culture means the accepted and traditionally patterned ways of behaving and a set of common understandings shared by members of a group or community; includes land, language, ways of living and working artistic expression, relationships and identity

The precautionary approach is taken where an activity involves a risk of significant irreversible damage to a place. Uncertainty about heritage values at the place should not be used as justification for proceeding with that activity. This approach should be used when there is uncertainty or debate over the significance of a place to ensure that heritage values are not damaged.

Traditional Owners are those people who, through membership in a descent group or clan, have responsibility for caring for particular country. Traditional Owners are authorised to speak for country, culture and its heritage. Authorisation to speak for country and heritage may be as a senior traditional owner, an elder, or as a registered Native Title claimant or holder.

Other Aboriginal people with interests are those people who through their personal or family history of involvement with a particular place have an interest in its culture and heritage values. Such places could include, but are not limited to, mission stations, places of Aboriginal protest, and areas of land where people worked. Sometimes these people are described as custodians. In some areas custodians are responsible for looking after places and sometimes the stories and ceremonies linked to these places. In other areas custodians are Aboriginal people who look after a place on behalf of others.

(Note: Definitions were sourced from: Australian Heritage Commission, 2002; and Great Barrier Reef Marine Park Authority, 2016)

References

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