Department of Indigenous Affairs

Review of the *Aboriginal Heritage Act 1972*

Discussion Paper:

Seven proposals to regulate and amend the *Aboriginal Heritage Act 1972* for improved clarity, compliance, effectiveness, efficiency and certainty

April 2012

Invitation to comment

Western Australia can be proud of its record in having had legislation as comprehensive as the *Aboriginal Heritage Act 1972* (the Act) for nearly 40 years.

This was the first law anywhere in Australia to explicitly protect sites of current religious importance to Aboriginal people under their traditions. It is the only legislation in the country that explicitly provides for sacred sites as well as for the preservation of Aboriginal historical and archaeological sites that will continue to be valued by future generations.

Legislation of this scope and importance needs to be managed with the most up to date and effective administrative tools. This is especially necessary to meet the new demands placed on the Act by mining and exploration, rapid State development and to accommodate native title. These are demands for certainty about the scope of the Act and its enforceability.

It is clearly time to improve certainty about the application of the Act and the decisions made under it, to improve compliance and to move to more effective and efficient systems. While improvements are necessary, they must proceed without disruption to the current heritage protection processes.

This paper sets out seven proposals for your consideration and comment. The proposals will supplement and strengthen the administration of the Act for better outcomes under the current scheme. I would appreciate any comments you may have to be made in written submissions within five weeks.

Hon Peter Collier MLC
MINISTER FOR INDIGENOUS AFFAIRS

April 2012

THE CURRENT OPERATION OF THE ACT

The *Aboriginal Heritage Act 1972* (the Act) is the State's principal legislation enabling the protection of Aboriginal cultural heritage. It provides automatic (i.e. "blanket") preservation for several categories of Aboriginal sites and a mechanism under section 18 for persons with certain forms of title to land (landowners) to have land use plans considered for approval.

Under the current scheme:

- Aboriginal sites, whether registered or not, are preserved from adverse impacts as areas of land.
- All Aboriginal sites known to the Department of Indigenous Affairs (the Department) are held on the Register of Places and Objects.
- To avoid breaching the Act, landowners may need to give notice to the Aboriginal Cultural Material Committee (the ACMC) of a requirement to use land.
- Persons other than landowners as defined in the Act may not use this process.
- The Minister makes the decision whether to consent to the landowner using the land after considering advice and recommendations from the ACMC.
- The Minister may decline to consent or give consent with or without conditions.

The process whereby landowners seek Ministerial consent to use land for purposes that could otherwise breach the Act is administered as follows:

- It is expected that landowners lodge consultants' reports detailing site surveys with their notices under subsection 18(2).
- The Department assesses the lodged notice and the report. If incomplete, the Department will ask the applicant to lodge the complete information.
- The Department evaluates the report and the notice to enable the ACMC to make its recommendation to the Minister.
- The ACMC prepares its recommendations to the Minister, identifying any sites and evaluating their importance.
- When the ACMC requires further information or advice, or for other reasons, matters may be deferred until a further meeting.
- The Department briefs the Minister on the matters under consideration and the ACMC recommendation, to assist the Minister to make his decision.

To manage the volume of work, the ACMC now meets monthly and is required to consider a large volume of documents and reports at each meeting.

The Register of Places and Objects includes a collection of approximately 15 000 paper files. The Department is developing an online application tracking system, the Aboriginal Heritage Electronic Lodgements Program, however, the administration of the Act is largely based on paper or text reporting.

IMPROVING THE CURRENT SCHEME

The current scheme is critical to the interests of Aboriginal people in their sites, the heritage of the State for present and future generations and for industry to obtain development approval. Understandably, industry, Aboriginal, expert and other categories of stakeholders want to see the Act improved as long as change does not create uncertainty about the obligations to protect Aboriginal heritage or interrupt normal business under the Act.

The proposals outlined below are modest. They do not change the scope of the Act or alter the fundamentals of the section 18 process. Some amendments to the Act are needed; otherwise use is made of existing powers to make regulations under the Act.

The changes will ensure that existing definitions of Aboriginal sites are accurately and consistently applied when sites are placed on the Register. The Minister already has a power to determine the manner and form of the Register. It is proposed that the manner and form of the Register be prescribed in regulations as a basis for longer term design and operation of the Register. This will enable the Department to move to a more authoritative, secure and efficient Register implemented in modern information technology.

For the same purposes it is proposed to prescribe additional criteria that the ACMC may consider when assessing whether Aboriginal places should be preserved for their importance and significance to the cultural heritage of the State. The proposed criteria are similar to those used for heritage assessment in a range of Commonwealth, State and Territory laws including this State's *Heritage of Western Australia Act 1990.*

A systematic and consistent approach to the Register and other records will also assist prosecuting authorities to enforce the Act when this information is needed as evidence in proceedings. To ensure compliance and enforcement with the Act additional provisions for civil penalties and for courts to order remediation of damaged sites are proposed. Additional powers to issue formal notices of infringement may be added subject to further legal advice.

At present, the Act places the onus on persons accused of breaching the Act to prove that places and objects relating to the proceedings are not Aboriginal sites or objects to which the Act applies, whether they are registered or not. To enhance the authority of the Register, it is proposed to modify this provision so that it only applies to places and objects on the Register. This change is also expected to improve compliance with the Act when the standard of information about sites truly warrants the onus to be placed on an accused person.

Improving the authority, security and effectiveness of the Register and better compliance are also intended to enhance the Department's capacity to administer the Act. It is envisaged that the Department will have a stronger engagement with all stakeholders and be more actively involved in resolving issues. It is proposed that the Department, on delegation from the Minister, have powers to certify activities that will not have a significant impact on the values of sites. The certificates will have similar effect to the Minister's consent under section 18 in indemnifying recipients as long as any conditions that may be specified are observed. The use of certificates will encourage parties to avoid impacts on sites, where possible, and to limit their use of the process for Ministerial consent under section 18.

For the Government to be able to resource the Department's greater involvement in day-to-day matters it is proposed that the Department be able to charge fees and recover reasonable costs for services provided.

The current provisions requiring persons who lodge notices under section 18 for Ministerial consent to be an "owner of any land" as defined in the Act are technical and create uncertainty about the process. It is proposed to remove this source of uncertainty while still maintaining that legal title to use land will continue to be a consideration when these decisions are made.

The decisions about preserving Aboriginal heritage are best made as early as possible when activities are being planned so that impacts on Aboriginal sites can most easily be avoided or minimised. It is proposed to minimise delays and duplication of Aboriginal heritage processes, especially for the issue of the proposed certificates, while environmental matters are considered under the *Environmental Protection Act 1986.*

These priority reforms will take some time to be established administratively within the Department and in the operations of the Aboriginal community, industry, stakeholders and government. Once these improvements are established, consideration may be given to a further tranche of amendments and regulations that may be needed to consolidate these changes and to modernise other parts of the Act.

HOW THESE PROPOSALS WERE DEVELOPED

Dr John Avery, formerly Director of Indigenous Heritage Law Reform at the Commonwealth's Department of Sustainability, Environment, Water, Population and Communities, was appointed as an independent consultant to the State Government to advise on reforming the Act.

Dr Avery has held more than 100 informal discussions with stakeholders since he was appointed. These included officers from Native Title Representative Bodies, members of one such body at two of its meetings; individual Aboriginal people; officers of the Chamber of Minerals and Energy, of the Association of Mining and Exploration Companies and of several major and smaller mining companies and prospectors; officers and members of the National Trust; officers of local governments, statutory authorities and utilities; consultant archaeologists and anthropologists; senior academics and lawyers.

An Inter-Agency Working Group on Aboriginal Heritage Reform was established for internal government consultation for the review. The Group includes senior officials of agencies including the Departments of the Premier and Cabinet, Treasury and Finance, Mines and Petroleum, Environment and Conservation, State Development, Water, Regional Development and Lands and the State Solicitor's Office.

This discussion paper is based on Dr Avery's advice after listening to the views of stakeholders, research on the Act, other Western Australian laws and relevant Commonwealth, State and Territory laws.

SEVEN PROPOSALS TO IMPROVE OUTCOMES UNDER THE ACT

Proposal 1: Prescribe the manner and form of the Register

The public and administrative bodies such as the National Native Title Tribunal expect the Register to be an authoritative repository of official records.

Industry in particular has sought greater certainty about the Register as a source of information about Aboriginal sites. It is important that the Register meets high public expectations for consistency, quality and efficiency.

It is proposed to use regulations to ensure that the Register meets the required standards of consistency and quality and to enable it to be implemented in modern information technology. An electronic Register would be part of a cost-effective, secure system where appropriate confidentiality can be assured. For example, the Department will be able to provide land users with geographical information about sites in a specified area without disclosing the sensitive cultural information. Using modern information technology, the Department would be able to record who has been provided with information about particular sites, which can aid compliance with the Act.

It is proposed that regulations, supported by any minor amendments that may be necessary to the Act, prescribe:

- standardised forms for records of Aboriginal sites and objects;
- processes for entering and removing information on the Register that are consistent, ensure compliance with statutory definitions and are fair to landowners, Aboriginal informants and others affected; and
- security, confidentiality and conditions of public access to the Register that could give Aboriginal informants sufficient confidence to provide essential site information to the Department and be useful to the public.

Proposal 2: Additional criteria pertaining to the Aboriginal sites of State importance

The Act states that the primary considerations for any evaluation of places as sacred sites are associated sacred beliefs and ritual or ceremonial usage. These considerations enable sacred, ritual and ceremonial sites to be identified.

The ACMC is able to recommend on its own discretion that any place associated with Aboriginal persons that is of historical, archaeological and other scientific interest should be preserved as an Aboriginal site if it is of importance for the cultural heritage of the State. The ACMC is required to consider a number of matters set out in section 39(2) of the Act. However, these do not work as criteria and do not specify threshold of importance.

Prescribed heritage criteria will assist the ACMC identify Aboriginal sites of State heritage importance that should be preserved for the benefit of current and future generations. Explicit criteria will promote consistency and transparency about these decisions and guide consultants and others using the Act on these matters.

The proposed criteria are as follows:

A place associated with Aboriginal persons having historical, anthropological, archaeological or ethnographic interest may be of importance and significance to the cultural heritage of the State if the place:

- marks important events, changes or patterns of Aboriginal prehistory or history;
- possesses uncommon, rare or endangered features of Aboriginal prehistory or history;
- has the potential to yield important information that will contribute to an understanding of Aboriginal prehistory or history;
- demonstrates the principal characteristics of Aboriginal prehistoric and historic places or environments;
- exhibits particular aesthetic characteristics valued by the Aboriginal community;
- demonstrates the creative or technical achievement of a particular period of Aboriginal prehistory or history; or
- has special association with the life or works of an Aboriginal person or persons of historical importance; and
- the preservation of the place would benefit current and future generations of Western Australians.

Proposal 3: Stronger compliance measures including civil penalties and remediation orders and adjustment to the onus of proof provisions

The deterrents and penalties under the Act need to match those of comparable legislation and to take into account the difficulties for enforcing the Act in remote areas.

The current onus on persons accused of breaching the Act to prove that places and objects relating to the proceedings are not Aboriginal sites or objects to which the Act applies would be more effective and fair if confined to places and objects that have been included in the Register under the prescribed process. Prosecutors would have reason to be more confident that the standard of evidence would be in accord with the onus.

It is proposed to amend the Act or use existing power to make regulations to:

- ensure that penalties are effective and in line with comparable legislation;
- enable the courts to order remediation of damaged sites;
- provide for civil penalties;
- enable the court to extend the time limit to initiate proceedings if late discovery, remoteness, inaccessibility or other factors warrant the extension of time;
- provide for infringement notices or similar compliance measures; and
- specify that in proceeding the onus lies with persons accused of breaching the Act to prove that the places and objects that are included in the Register of Places and Objects are not places or objects to which the Act applies.

Proposal 4: Site impact avoidance certificates

At present, the only way for the public to be indemnified against prosecution under the Act is to obtain Ministerial consent under section 18. The Department could solve many routine matters if it had the power to certify that proposed activities would not be adverse to the importance and significance of Aboriginal sites and the certificate gave the same indemnity as section 18. The Department would use its best endeavours to issue a certificate, including on conditions, if necessary, to avoid adverse impacts. This could provide a more flexible and cost effective alternative to section 18 consent.

It is proposed to amend the Act to include:

- new provisions enabling the Minister and Departmental delegates to certify that activities on or in the vicinity of Aboriginal sites will not result in significant impact on the importance and significance of any Aboriginal sites and would not constitute an offence under section 17; and
- provisions to ensure appropriate consultation and fair decision-making and to enable the Department to promote agreement between applicants and traditional custodians to enable certificates to be issued, including with conditions.

Proposal 5: Enable the Department to levy fees and recover costs for surveys and other services

In common with other agencies, there should be a power in the Act for the Department to levy fees and charges for services.

It is proposed that the Act be amended to:

- enable the Department to levy fees and charges in relation to section 18 applications, certificates, surveys, consultations, production of information on particular media and related services; and
- ensure fees and charges are independent of any decisions made about the use of land or the preservation of places or objects under the Act.

Proposal 6: Remove risk that section 18 consents may be technically invalid because of the definition of 'the owner of any land'

The application of the definition of "owner of any land" in the Act is critical to the validity of the processes under section 18. Significant resources of the Department and the State Solicitor's Office are applied to determine whether a person giving notice under section 18 is a landowner. This wastes resources and creates delays, uncertainty and complications for persons seeking to use the Act.

Amendment to the Act is required to avoid this uncertainty and complication while maintaining a requirement that persons giving notice provide information about their right to use the land and requirement for the Minister's decision.

It is proposed that the Act be amended to:

- enable any person proposing to enter land and carry out lawful activities to give notice pursuant to section 18 with details of their entitlement and requirement to use the land.

Proposal 7: Investigate options to amend the *Aboriginal Heritage Act* 1974 and the *Environmental Protection Act 1986* to streamline decisions about Aboriginal heritage

The Environmental Protection Authority (EPA) currently assesses and provides advice and a recommendation to the Minister for Environment regarding the extent to which Aboriginal heritage will be impacted by a proposed development. The EPA has recognised that its capacity to provide advice on Aboriginal heritage matters is dependent on information provided by the Department and the ACMC. Arguably, this may represent duplication in the approval process.

It is proposed to investigate options to amend both the EP Act and the Act to streamline and align approval processes by removing the requirement for the EPA to consider Aboriginal heritage in environmental impact assessment when these matters are properly addressed in another process of Government.

Submissions

Submissions may be made in writing and emailed to aha@dia.wa.gov.au

Submissions may also be mailed:

For the attention of:

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Questions and Answers

"Seven proposals to regulate and amend the *Aboriginal Heritage Act 1972* for improved clarity, compliance, effectiveness, efficiency and certainty"

1. Why has the Government proposed these changes?

The Government is proceeding on advice from an independent expert, Dr John Avery. Dr Avery was appointed to provide advice on ways to improve the preservation for Aboriginal sacred sites and other Aboriginal places of heritage value to Western Australians under the *Aboriginal Heritage Act 1972* (the Act).

Based on this advice the measures currently proposed have been identified as likely to result in significant improvements while minimising the risk of uncertainty and disruption. This targeted approach is intended to make changes apace with stakeholders' abilities to absorb and adapt to change and with the Department's ability to implement the reforms.

Stakeholders want the Act to be improved but are wary of wholesale change. They need to be sure that changes will result in improvements. They do not want the current processes to be disturbed or made uncertain by too many changes being made at once.

The Government believes that the community will support this approach and will want the Government to proceed with the proposed changes as a priority.

4. Will the definitions of sites change?

These proposals will not alter the current definition of Aboriginal sites. The regulation of the Register will ensure that the current definitions are applied.

5. Will the protected area provisions change?

These proposals will not alter the protected area provisions.

6. Will the process for Ministerial consent under section 18 change?

The process under section 18 will remain the same, except that the risk of invalidity of Ministerial consent due to technical requirements of the definition of the landowners will be removed.

7. Will the role of the Aboriginal Cultural Material Committee (ACMC) change?

These proposals will not alter the constitution and functions of the ACMC.

8. Will the statutory role of the Registrar change?

These proposals will not alter the statutory duties of the Registrar. The Registrar will continue to be responsible for the maintenance of the Register of Places and Objects. There will be new regulations relating to the Register.

9. Will the role of the Department change?

Yes. Departmental officers will be able to issue site impact avoidance certificates as delegates of the Minister. The Department's role as custodian of the Register through the statutory role of Registrar will be enhanced. The Department will have a stronger engagement with the Aboriginal community, industry and the general public, stronger capacity to provide services and a power to recover costs for services provided.

10. Will the changes improve the involvement of Aboriginal people in the process?

Yes. It will be much clearer that the primary source of information about the traditions and customs that constitute sacred, ritual and ceremonial sites lies in senior traditional owners or custodians of land and sites and that they must be consulted. Aboriginal people will continue to be consulted to ensure decisions are fully informed and fair.

11. Will the changes strengthen protection of Aboriginal heritage?

Yes. The Department will apply consistent methods for identifying Aboriginal sites using the same kind of information that would be used as evidence in court proceedings to enforce the Act. Also, there will be more effective measures available to deter people from breaching the Act, including new provisions for civil penalties and remediation orders.

Regulating the Register

12. Why regulate the Register?

This will promote the efficient and effective use of information about Aboriginal sites and objects.

The current administration of the Register is based on paper records compiled over forty years. As the Register has grown, it has become more challenging to manage. The paper-based methods are out of step with the current expectations and increased demand for efficient and secure information systems.

Regulating the Register will promote consistency and provide authority for an electronic form of the Register. Third parties, such as Aboriginal organisations and heritage consultants eventually will be able align their information systems and methods to the requirements of the Act and the Register.

13. How will regulation enhance the authority of the Register?

The regulations and related amendments to the Act are intended to establish the Register as the authoritative source of information about Aboriginal sites in Western Australia. Records entered under the prescribed process will have met high standards of integrity and accuracy. Parties affected, including landowners, will be able to have their say in accordance with the requirements of natural justice.

14. Will information about the importance and significance of Aboriginal sites be shown on the regulated Register?

There will be a summary of the reasons why the place is an Aboriginal site under the Act. This will include the parts of the Act under which a place is deemed an Aboriginal site and summary of the importance and significance of the site. This summary will explain why particular sites merit the protection of the Act.

15 Will confidential cultural information be public in the regulated Register?

No. Information that should not be public in accordance with the requirements of Aboriginal traditional laws and customs, if provided, will be held securely and confidentially and not shown on the regulated Register.

The regulated Register will be the only repository of cultural information about Aboriginal sites that can guarantee Aboriginal people long term security and required confidentiality of cultural information.

16. Who will have access to the information in the regulated Register?

The public will be entitled to view non-confidential information on the regulated Register. This may be done by visiting the Department or, when an electronic system is implemented with the required capability, by accessing the Register through a secure website as a registered user.

Whichever method is used, the Department will be required to record who has viewed information and what information has been viewed.

When persons have viewed the records of sites on the Register they will be more strongly bound to avoid damaging those sites.

17 Will site locations be shown to known accuracy when accessing the regulated Register?

Yes. The accuracy of site locations on the regulated Register will be improved. Site locations accessed by registered users through a secure internet site will be shown to the standard of accuracy as recorded.

Presently, the Department shows only approximate locations of Aboriginal sites on its open-access website to prevent persons accessing and potentially interfering with Aboriginal sites. The Department will continue to make this website available while the secure on-line system is being developed.

18. What will happen to the sites on the current Register?

Aboriginal sites on the current Register will have the same level of protection as at present. This is because registration does not affect the application of the offences relating to protection. The records of these sites will continue to be used for information and, where it is sufficient, as evidence that can be used to enforce the Act in the courts.

19. What effect will the change in the onus of proof provision have on the Register?

The change to the onus of proof provision will enhance the authority of the Register as the unique repository of information about Aboriginal sites and objects in the State.

20. Won't limiting the current onus of proof on accused persons to prove that the Act does not apply to places and objects to Registered sites and objects weaken protection of Aboriginal sites not on the regulated Register?

There have been very few proceedings under the Act while the current provision has been in effect. The proposed change will not prevent the Department prosecuting offences when it has evidence that a place is an Aboriginal site. It should become easier for prosecutors to commence proceedings in relation to sites registered under the regulated Register process than it is in relation to places on the current Register.

21. Will a person accused of breaching the Act still have a defence if he or she can prove that he or she did not or could not reasonably have known that a place or object subject to proceedings was a place or object to which the Act applies?

Yes. This defence is distinct from the onus of proof provision.

Prescribing additional criteria for assessing State cultural heritage value

22. How were these criteria developed?

The proposed criteria use heritage values acknowledged in a range of Commonwealth, State and Territory laws, including this State's *Heritage of Western Australia Act 1990.* These are adapted for use under subsection 5(c) which makes the Act apply to:

> any place which, in the opinion of the Committee, is or was associated with the Aboriginal people and which is of historical, anthropological, archaeological or ethnographical interest and should be preserved because of its importance and significance to the cultural heritage of the State.

The appropriate threshold of importance for the purposes of State heritage is the benefit of preserving a place for current and future generations of Western Australians.

23. Will these criteria apply to sacred, ritual and ceremonial sites of importance and special significance to persons of Aboriginal descent?

Not necessarily. Sacred, ritual and ceremonial sites of importance and special significance to persons of Aboriginal descent are protected Aboriginal sites irrespective of any other criterion.

The Act places the highest priority on preserving these sacred sites; however it possible that some sacred, ritual and ceremonial sites will be places of State importance and significance as well. If so, these additional values may be assessed with regard to the proposed criteria.

24. Will other sites still be protected by the Act?

Yes. Any places that meet the current definitions under the Act will be preserved under section 17 of the Act.

Site Impact Avoidance Certificates

25. What will be the difference between the proposed certificate and consent under section 18?

The proposed certificate will be issued when it appears that specified activities proposed to be carried out on an area will not cause a significant impact on the values of any Aboriginal site. The values are the features and aspects of a site that make it important and significant.

This result can be achieved under section 18, for example if the Minister consents to the use of land on conditions designed to avoid adverse impacts. However, section 18 can also be used to make decisions in the interests of the general community to allow significant impacts on Aboriginal sites.

The proposed certificate would enable the Department to work with stakeholders to resolve many issues by agreeing to avoid or minimise impacts. The agreed measures would be set out in the certificate and would be enforced. There would be no need to refer the activities covered by the certificate to the Minister under section 18.

Section 18 would then become an avenue of last resort or appeal when agreement on site avoidance cannot be reached.

26. Who will be able to apply for a certificate?

Any person who could give notice under section 18 would be able to apply for a certificate. Applicants will need to agree to pay any fees and charges required. The Department will be obliged to inform applicants of its assessment based on current information of the chances of their applications succeeding and of the alternative process under section 18.

27. How will decisions be made about issuing certificates?

The Minister will have the power to issue certificates. Under the Act at present the Minister can delegate all of his duties and powers to Departmental officers. As this will not change, the Minister will be able to delegate his powers to issue certificates to Departmental officers.

The decision about issuing a certificate will be made on consideration of:

- the area over to which the certificate will apply;
- the activities that are proposed; and
- whether the activities could proceed without the likelihood of significant impact on the values of any sites (i.e. the particular fabric, features and aspects that make sites important and significant).

Certificates could be issued with conditions needed to avoid the likelihood of significant impact on the values of any sites.

28. Will surveys be required?

The Department may decide to issue or decline to issue a certificate on existing information. Surveys will be done if additional information is needed. The required methods, extent and intensity of surveys will depend on the circumstances. As with

section 18 decisions, applicants will bear the cost of professional surveys that are required.

29. Will relevant Aboriginal people be consulted?

Yes. Traditional owners and others who know the relevant Aboriginal traditions will be consulted as the source of information about the importance and significance of sites.

All parties affected will be afforded the opportunity to comment in accordance with the requirements for procedural fairness or natural justice. Relevant Aboriginal people would include, depending on the land affected, native title holders through their organisations, individuals and organisations that are recognised under State agreements, other persons who may be traditional owners or who may have relevant information.

30. What if the Department declines to issue a certificate?

The Department may decline to issue a certificate if it cannot be satisfied that the activities could proceed without the likelihood of significant impact on the values of sites. If a certificate cannot be issued, the applicant may decide not to proceed further or to lodge a notice for Ministerial consent under section 18.

31. What will be the effect of a certificate?

The certificate will set out any conditions that may be required to protect the values of Aboriginal sites from specified activities in a specified area. The certificate will ensure that the activities on the land may be carried out lawfully in accordance with the terms of the certificate. The certificate will give indemnity from legal action equivalent to that provided by the Minister's consent under section 18.

Interested persons, including traditional owners, will be able to view certificates to ascertain the scope of activities included and any conditions required to be observed.

Ensuring compliance

32. Why are civil proceedings and penalties proposed?

A provision for civil proceedings and penalties will enable breaches of the Act to be tried in accordance with civil standards of proof ("the balance of probabilities") and for penalties on similar considerations as apply to awards for damages. Having this alternative to criminal proceedings will help make the Act more enforceable and deter individuals and corporations from breaching the Act.

33. What is envisaged by remediation orders?

It is proposed to enable courts to order persons found to have breached the Act to repair or restore damage to sites. Having this power available will dissuade persons from breaching the Act as they may be ordered to restore the affected land.

34. Why might it be reasonable to extend time limits for prosecuting breaches under the Act?

Generally, prosecutions should proceed as soon as possible. Sometimes the Act may be breached in remote or otherwise inaccessible places. The breach may go unnoticed for some time. Also, investigating possible breaches in remote areas can

be delayed by the season and difficulty gathering evidence from witnesses. The courts should have the discretion to proceed despite the normal period for commencing proceedings when proceedings are delayed for reasons like these.

Landowners and the right to lodge notices under section 18

35. Why change the existing requirements?

The current definition of 'the owner of any land' is complicated and technical. Many legal resources have been spent to clarify the application of the Act, often without resolving legal uncertainty. There is a risk that some Ministerial consent decisions could be invalid for unexpected technical reasons. The current definitions do not cover all persons or bodies who use or manage land and need to clarify their obligations to protect Aboriginal sites under the Act.

36. Does this mean that title to land will be irrelevant?

The legitimate right, or the prospect of it, to use land for specified purpose will continue to be a relevant consideration for the Minister's decision. Persons lacking any positive right and requirement to use land for a specified purpose cannot expect to have any significant impact on an Aboriginal site approved.

Fees and Charges

37. Why should the Department levy fees and charges for its services?

The Government will need to be able to recover costs for services provided if the Department is to be more directly involved in resolving problems under the Act. This will enable Departmental resources to be applied flexibly in response to the demand for services. Also, it would be unfair to private consultants who charge for services if the government were to offer services without charge. Levying fees and charges is an effective way to prevent people using the Act for frivolous purposes.

38. How would charging for services work with the Department's decision-making role?

These provisions will be drafted to avoid any perception of conflict of interests and duties.

39. Why might the proposed Site Impact Avoidance Act Certificates be exempted from the provisions of the *Environmental Protection Act 1986* that apply to approvals?

The proposed Site Impact Avoidance Certificate would enable decisions about protecting Aboriginal sites to be made as early as possible when activities are being planned so that impacts on Aboriginal sites can most easily be avoided or minimised. As the Certificate could only be issued when no significant impact on Aboriginal sites would be likely to result from specified activities it should not be regarded as an approval. Any Certificates issued could be provided to assist the Environmental Protection Authority prepare advice and recommendations to the Minister.