

26 May 2022

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Aboriginal Heritage Act Co-Design Submissions
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ABORIGINAL CULTURAL HERITAGE ACT 2021 (WA): REGULATIONS CO-DESIGN PHASE 1 SUBMISSION

Banjima Native Title Aboriginal Corporation RNTBC (ICN: 7971) (BNTAC) is the prescribed body corporate for the Banjima People pursuant to the Banjima determination of native title in *Banjima People v State of Western Australia (No 3) [2014] FCA 201*.

It is BNTAC's role to maintain and protect Banjima People's Native Title rights and interests.

It has been published that the Aboriginal Cultural Heritage Act (ACH Act) "puts Traditional Owners at the heart of decision-making". Perhaps to a degree, this statement can be considered correct as many elements of the ACH Act and regulations do depend on Traditional Owners, Knowledge holders, PBCs, LACHs being able to participate in the regime.

If they are not able to participate, due to lack of support and resources, the regime will fail. If this happens then certainty for activities, development and economic outcomes for the State cannot be guaranteed, additionally the State will see significant loss in cultural heritage and destruction like that which occurred in the Pilbara in May 2020.

BNTAC staff, consultants and BNTAC Chairperson attended the ACH codesign workshops held on 29 April and 10 and 11 May 2022.

BNTAC is providing the following feedback:

Fact sheet 1 – Activity categories

- BNTAC acknowledge that Exempt Activities have been legislated and therefore cannot be changed. However, we state that some recreational activities can cause a great deal of harm/disturbance to ACH. For example 'recreational' 4WD, photography, and non-ground disturbing impact – eg if men go to a women's site
- While the State wishes to take a state-wide 'one-size-fits-all' approach, it is BNTAC's position that activities need to be considered specifically according to location and Traditional Owner group, and type of activity
- Impacts that are not 'on ground/land impacts' need to be included and considered, such as dust, emissions, water use or effects on supply, any changes in access to country. Even just walking can have significant impact to some locations/sites.
- Downstream impacts also need to be defined and categorised by Traditional Owners according to their Country and neighbouring Country to consider accumulative impacts on tangible and **intangible cultural heritage** – which is not well considered in the legislation.
- Aboriginal people Must be consulted in very tier of activity. Traditional Owners must be who define what constitutes 'disturbance' for their country and sites. put the management of this definition in the hands of the right people for country.

- LACHs must be empowered to determine what tier an activity is in and inform proponents. This engagement can also be incorporated as part of the due diligence process that must be done at every step of a proposed activity.
- A general Process whereby all activities are presented to LACHs could be articulated and available
- LACHs need to know about all activities so impacts can be properly assessed. LACHs can inform what is cleared to happen and where, particularly for exempt activities.
- BNTAC has concern with the following:

Although a due diligence assessment is not required in relation to an exempt activity [s103], proponents are required to make an assessment about whether the area where it is intended that the exempt activity be carried out includes any area that is part of a protected area. A proponent may request the CEO of the Department of Planning, Lands and Heritage to provide a letter of advice to confirm whether the proposed activity is an exempt activity [s104].

- BNTAC requests that DPLH staff who will be advising the CEO must consult with the relevant LACHs to define whether an activity is appropriate to be considered as 'exempt'. In doing so this can be part of the DPLH's due diligence process and accountability and satisfy necessary steps in the Management Code.

Fact sheet 2 – ACH Management Code

- Steps in the Management Code must vary depending on size, type and location of activity. And Traditional Owners must be the people to inform if an activity will cause harm to ACH.
- Regional differentiation needs to be considered as per activities - what is right for one area is not right for another. Parties must work on the presumption that there will always be ACH present.
- Assessments need to be holistic to include culture, flora, fauna, water, how activities effect an entire landscape and social surroundings / cultural values
- Proponents and the State must fund/resource all steps of the process to ensure proper Traditional Owner participation in negotiation processes.
- 'User pays' must be at a rate above the State's base funding threshold for there to be any chance for LACHs to build to a sustainable functionality. It needs to be noted that 'user requests' will ebb and flow so a consistent resource or funding stream will not be available to LACHs by user payments alone.
- There needs to be clear steps as to how due diligence is measured along with demonstrating proper community engagement. Feedback given must be documented with explanations as to why it wasn't incorporated into plans.
- There must be *Mandatory* consultation triggers for all activities as part of due diligence. Traditional Owners Must be consulted and have direct involvement from the start in all steps.
- LACHs must have sign off/approval authority for due diligence assessments and a right of reply.
- The Code must be the absolute minimum standard.
- The Code must also recognise and support that Traditional Owners have custodial responsibilities to country. It needs to be part of the Management Code that Traditional Owners Must be able to undertake custodial responsibilities.
- Proponents must also have responsibility and accountability to help preserve and rehabilitate country. These responsibilities will contribute to Traditional Owners' cultural responsibilities.
- There are concerns of risk of overloading LACHs – if all proponents want to consult and gain clearances at once.

3 – Consultation Guidelines

- Consultation must be happening early and be ongoing at every due diligence stage, so LACHs and Knowledge Holders can advise the tiers and activities etc.
- Acknowledgement of timeframes the PBCs/LACHs need to meet and their already busy calendars and staff.
- *Guidelines must set a minimum standard for people to follow.*
- Consultation/information taken from TOs must be used and written in to modify plans to demonstrate how information has been incorporated etc. Not just stored as a ‘tick the box’ that consultation was done, but not listened to or reflected in Plans. Excellent – demonstrate how info was incorporated
- While proof of consultation must be provided via or from the LACHs, proper funding and support Must be provided if they are to shoulder the burden of seeking feedback from knowledge holders for proponents.
- BNTAC supports the suggestion that any Statewide process must be measurable and have KPIs built in as part of due diligence. For example
 - Number of people, gender balance, but areas data must be set by LACHs due to variance statewide.
 - Evidence that it’s undertaken and completed to the satisfaction of all parties.
 - Set of obligations on both sides.
 - Needs a statutory process of minutes and outcomes, with an agreed outcome.

4 – Notifying Knowledge Holders

- The *Native Title Act 1993 (Cth)* process currently offers the best guidance for the process of engagement knowledge holders. And must a minimum standard. However, not all knowledge holders are native title holders or members of a PBC, broader community consultation and verification may need consideration.
- Knowledge holders must be recognised and respected for their intellectual property and be remunerated for their time and input accordingly.
- Knowledge holders or LACHs must be notified of any activity in area, this is part of due diligence processes, and must also be included in the Management Code and ‘defensibility’ of undertaken an activity.
- Funding to support a data base to be created and managed by LACHs or other bodies for the process of contacting knowledge holders must be considered but will not necessarily capture all Knowledge holders as some may not want to participate.

5- ACH Management Plan Templates

- Management plan templates need to be specific to each LACH or region. And LACHs must be able to design standard conditions for their area. The State should note that this will require a lot of work requiring funding before the first proponents show up at a LACHs door.
- Any increased workload is going to be almost impossible for Banjima Elders to undertake – LACHs need support and time to design the processes to account for the additional demand that will be placed on Elders.
- Traditional Owners must have input into impact statements. Spiritual and non-physical harm must be included – social, enviro, cumulative impacts and potential future values.

- Templates need to account for variations, or have templates for different activities for example, to cover different stages of a project, not whole of project clearances.
- Contingencies or terms for variations required when additional evidence of ACH is found need to be built in. And included mandatory consultation triggers.
- Consideration must be given to including customary and cultural obligation management plans, or include cultural obligations in the templates, like they should be accounted for in the Management Code.
- Review periods for impact statements and ACHMPs and conditions for unknown heritage need to be considered – this will affect timeframes and fees for hours worked (section 6 and 7).
- Traditional Owners must be involved in the implementation and remunerated for time/resources/knowledge.
- The process needs an accountability mechanism, - For example “generational accountability” - so after closure or end of activity the Traditional Owners can still hold proponents accountable, generations later. This needs to be in the template.

6 - Time frame guidelines.

- The regulations for Timelines need to build in contingencies for exceptional circumstances to extend periods of notifications
- Regional and cultural matters need to be considered, along with resourcing of LACHs and commitments of knowledge holders.
- Additional considerations are –
 - What decisions/notifications and responses need to be seen by the Board or trustees of PBCs (LACHs)?
 - Timelines account for cultural time – sorry and lore business, seasons, wet season, work, family, health, travel, other proponents to manage.
- What happens when a permit isn’t granted? What is the process and timelines?
- Clarification is needed on “Agreeing on terms of an ACHMP”. Does this mean agreeing on final ACHMP or just agreeing to negotiate scope of a plan?
- Clarification is needed on the timelines for when the clock starts ticking for time to respond to a notification, for example is it from when a proponent sends it, or is it from when a LACHs or knowledge holder provides notification they have received the request?
- Guidelines need to be very clear that ACHMP comes After assessments.

7. LACHs Fees –

- A clear definition of what capacity a LACH needs to operate under the Act, is required.
- The State Must provide more than ‘seed funding’ for LACHs to participate to ensure this Act can function for all parties. The State must not be expecting LACHs to do its work for them for free.
- The impact of the demand that Tier one activities, requiring permits, must be discussed and a funding solution provided to support LACHs participating and becoming sustainable in the regime.
- The State should charge a standard fee to the proponent on lodgement of a permit. When the permit is then sent to the LACHS for comment, that communication should be accompanied with a part of the fee from the proponent to cover the LACHS costs for undertaking their own due diligence on the activity(s) that are applied for in the permit.
- Statutory fees may be able to be set but must be allowed a variation for knowledge holders, families represented etc to enable the correct people to be engaged.
- Fees for the regulation process, may require community meetings to pass approvals and consultation etc.

- LACHs being able to charge an hourly rate may be more amenable as how much time it takes to work on different items will vary according to size, activity/tier, number of LACHs staff and their roles, travel. These will all have different charge out rates.
- LACHs who are PBCs will have staff that are already busy in their roles. Recognition needs to be paid for the additional work and likely, the need to employ more staff in order to cater for the additional demands that the State Government regulations are imposing on corporations. As mentioned in section 2 – Management Code, there will be an ebb and flow to workload.
- Ongoing compliance and review of proposals also must be funded and costed.

8. State Significant Guidelines

- Only Traditional Owners can inform what is of State Significance.
- An independent workshop is required to design this section, attendees being Traditional Owners, no industry.
- Additionally anthropological and ethnographic archaeology sites (to include the intangible) need to be discussed and considered It should also be that professional arch can advise about archaeological sites which may be of great State significance.

9. Protected Area Order guidelines

- Only Traditional Owners can inform what ACH is of outstanding significance.
- An independent workshop is required to design this section, attendees being Traditional Owners, no industry.
- Additionally anthropological and ethnographic archaeology sites (to include the intangible) need to be discussed and considered It should also be that professional arch can advise about arch sites

10. Substantially commenced.

- Consideration is needed that the Traditional Owners have been engaged and evidence provided of that nature.
- If the impact that the S18 is for has not yet been triggered, then it should not be considered as substantially commenced.
- S18 should be considered as standalone to the whole project that it is part of.

Yours sincerely,

Johanna Ramsey

CHIEF EXECUTIVE OFFICER

Banjima Native Title Aboriginal Corporation RNTBC