

# Heritage Bill 2016

## EXPLANATORY MEMORANDUM

### Overview of Bill

This Bill will repeal in its entirety the *Heritage of Western Australia Act 1990* (the current Act) and replace it with a modern, clearly-written *Heritage Act 2016* (the new Act) that addresses contemporary needs and reflects best practice in the recognition and management of the state's cultural heritage.

Western Australia was the last Australian state to enact legislation in 1990 to recognise and protect cultural heritage places. The current Act was written at a time when legislators responded to the community's demands for the protection of its heritage places amid the demolition of a significant proportion of Perth's built heritage in the name of progress.

Almost as soon as it came into operation 25 years ago, the current Act was found to have many flaws and shortcomings that created obstacles to its effectiveness: complex and redundant assessment and consultation processes, inflexible development referral requirements, countless ambiguities and arcane language that is hard to comprehend and expensive to administer.

With its origins in the 1970s and 80s, the current Act is notable for the hard-to-interpret phrasing that reflects the statute drafting style of the day and its rigid, adversarial approach to heritage management.

Since the inception of the current Act there has been a very clear shift in attitudes. The broader community is now more engaged and informed about the importance of recognising and preserving its "sense of place" through familiar landmarks, urban spaces and regional areas. These places resonate of past generations and speak to the history and development of the state, its character and cultural identity,

Western Australia has benefited from Government policies strategies to promote long-term sustainability of our significant heritage places through adaptive re-use that meets contemporary needs, while being sympathetic to the heritage values that make these places important to the community. It is apparent now that property developers in particular understand the value of heritage, accepting heritage conservation as an integral part of the process of redeveloping and adapting heritage places. With few exceptions, they recognise the "point of difference" heritage provides and have become cooperative and even eager to work with the Heritage Council and State Heritage Office to develop and refine proposals that involve changes to registered places. In recent years, numerous exemplars of best-practice adaptive re-use throughout the state have been delivered, with no more compelling evidence than the heritage-led transformation of Perth.

This Bill reflects contemporary attitudes to heritage and modern heritage management practice. It anticipates ongoing change and encourages the use of our heritage places as integral vibrant communities. It also brings a new level of efficiency and transparency that has consultation and negotiation at its heart, rather than imposition and heavy-handed regulation, to achieve the goal of identifying, recognising and protecting Western Australia's most precious heritage places for current and future generations.

## **Clause Notes**

### **Part 1 – Preliminary**

This Part contains the title of the new Act and the commencement provision as well as definitions of important terms and expressions used throughout the Bill. This Part also sets out the scope of the new Act to establish boundaries between it and other state legislation regarding other types of heritage.

#### **Clause 1. Short title**

This clause states the short title of the new Act is the *Heritage Act 2016*.

#### **Clause 2. Commencement**

This clause provides that Clauses 1 and 2 come into operation upon Assent and the remaining provisions in the Bill come into operation on a day or days fixed by proclamation. A staged proclamation is necessary to allow time for the drafting and approval of an extensive set of new Regulations required to give effect to many provisions of the new Act, and staff training and IT enhancements will also be required to accommodate the new Act's features.

#### **Clause 3. Terms used**

This clause defines many terms and expressions used throughout the Act to avoid ambiguity and provide clarity in the context of heritage recognition and management. The discourse of "heritage" employs a unique vocabulary comprised of terms such as "conservation", etc.

#### **Clause 4. Term used: cultural heritage significance**

This clause defines "cultural heritage significance" using the Australian standard "Burra Charter" definition. The Burra Charter is a national- recognised statement of principles regarding the identification and management of heritage places.

#### **Clause 5. Term used: owner**

This clause defines the "owner" of land for the purposes of the Bill. Many provisions of the Bill require consultation on various matters with the owners of various estates and interests in land. This definition is comprehensive and also incorporates the Department of Lands' model definition regarding the owners of various estates in Crown land.

#### **Clause 6. Term used: place**

This clause defines "place" to explain the sort of places that may be subject to the Bill. The definition is consistent with the nationally-recognised "Burra Charter" definition as well as internationally recognised best practices.

#### **Clause 7. Term used: satisfies the registration conditions**

This clause provides a single reference to the meaning of a phrase used in multiple locations throughout the Bill.

### **Clause 8. Notices, advertisements, consultation and statutory notification**

This clause allows regulations to prescribe the manner in which individuals and groups are to be given notice of certain matters, public advertisement of certain matters is to be made and stakeholder consultation regarding certain matters is to be conducted. The term “statutory notification” refers to the manner in which memorials are to be lodged with Landgate for placement on affected land titles and similar notices provided to the Department of Mines and Petroleum for inclusion in that department’s mining tenement database.

### **Clause 9. State bound**

This clause declares that the new Act binds the State, which means that all departments and state agencies are subject to the relevant provisions of the new Act.

### **Clause 10. Objectives**

This clause lists the objectives of the Bill. These objectives assist courts and other decision makers to interpret provisions of the new Act.

### **Clause 11. Places to which Act does not apply**

This clause declares that the new Act does not apply to places that comprise only the natural environment or places of purely Aboriginal cultural significance. This establishes clear boundaries between the reach of the new Act and the *Conservation and Land Management Act 1984* and the *Aboriginal Heritage Act 1972*.

### **Clause 12. Other laws not affected**

Consistent with Clause 11, this clause declares that the new Act does not affect the operation of other state heritage or environmental legislation.

## **Part 2 – The Council**

This part contains provisions dealing with the composition, operation, powers, functions, staff and finances of the Heritage Council and the relationship between the Council and the Minister. These provisions are generally similar to the corresponding provisions of the current Act, though revised for clarity.

There are some substantive changes from the current Act to reflect contemporary best practices as recommended by the Public Sector Commission, the Departments of Commerce, Finance and Treasury, and so on.

### **Division 1 – Constitution of the Council**

**Clause 13. Council established**

This clause establishes the Heritage Council of Western Australia, declares the Council to be a corporate body and provides that legal proceedings may be taken by or against the Council in its corporate name.

**Clause 14. Execution of documents by Council**

This clause provides for the use of a common seal under the Council's direction and declares the weight to be given in judicial proceedings to documents that bear the common seal.

**Clause 15. Status**

This clause declares the Council to be an agent of the State, having the status, immunities and privileges of the State, and also describes the Council as the State's expert body regarding places of historic cultural heritage significance.

**Clause 16. Membership and proceedings**

This clause sets out the qualifications required for membership on the Council and the manner of appointment and compensation. It also provides for regulations to establish the manner in which the Council is to conduct meetings, manages conflicts of interest and related matters.

Consistent with contemporary best practice recommended by the Public Sector Commissioner, the Bill will require Council members to possess specific skills, training and/or experience, rather than require members to represent certain interests or groups as does the current Act.

**Division 2 – Functions and Powers of the Council****Clause 17. Functions of the Council**

This clause defines in general terms the functions of the Council. The manner in which many of these functions may be undertaken are detailed elsewhere in the Act.

**Clause 18. Powers of the Council**

This clause defines in general terms the powers of the Council. The manner in which these powers are to be exercised is detailed elsewhere in the Act.

**Clause 19. Delegation by Council and chairperson**

This clause sets out the manner in which the Council and the chairperson, respectively, may delegate their functions and powers to others. Neither may delegate the power to further delegate a power or function.

### **Division 3 – Relationship between Minister and Council**

#### **Clause 20. Administration of this Act**

This clause provides that the Council must advise the Minister who is charged with the administration of the new Act.

#### **Clause 21. Minister's directions**

This clause provides that the Minister may give the Council directions in regard to its functions and the Council must give effect to such directions, other than directions in regard to the Council's assessment of a place's cultural heritage significance or the substance of its advice to the Minister or to a decision-maker in regard to a place, and also provides that directions received from the Minister under this clause are to be reported in the Council's annual report.

#### **Clause 22. Minister to have access to information**

This clause declares that the Minister is to have full access to all information and documents of any kind in the Council's possession, and the Council is to assist the Minister to locate and retrieve such information.

#### **Clause 23. Delegation by Minister**

This clause sets out the manner in which the Minister may delegate to others any function of the Minister under the new Act. The Minister may not delegate to another person the power to further delegate a power or function or any of the specific functions of the Minister listed in this clause.

### **Division 4 – Staff**

#### **Clause 24. CEO to provide assistance, staff and resources**

This clause requires the CEO (defined in Clause 3 as the CEO of the Department assisting the Minister in the administration of the new Act) to provide any assistance, staff or other resources the Council may require to perform its functions.

#### **Clause 25. Use of other government staff and facilities**

This clause allows the Council to arrange to make use of other officers, employees or facilities in the Public Service or a State Agency.

## **Division 5 – Finance**

### **Clause 26. *Financial Management Act 2006 and Auditor General Act 2006* apply**

This clause declares that the Council's finances and operations are subject to these two Acts.

### **Clause 27. Funds of the Council**

This clause sets out the allowable sources of funds available to the Council, being moneys appropriated by Parliament, monies received by the Council in the performance of its functions, money borrowed by the Council and any other monies lawfully received by or payable to the Council

### **Clause 28. Heritage Fund**

This clause establishes an account to be known as the Heritage Fund which is to hold the funds of the Council and declares the expenditures that must be charged to the fund.

### **Clause 29. Borrowing**

This clause allows the Council with the Treasurer's approval to borrow monies for purposes of performing its functions.

### **Clause 30. Guarantee by Treasurer**

This clause authorises the Treasurer on behalf of the State to guarantee payment of any monies owed by the Council, and sets out the requirements for obtaining such guarantees.

### **Clause 31. Effect of guarantee**

This clause sets out the consequences to the Consolidated Account and to the Council of a guarantee given by the Treasurer under Clause 30.

### **Clause 32. Notice of financial difficulty**

This clause requires the Council to notify the Minister if it believes it will be unable to meet any of its financial obligations, and states what actions the Minister must take upon receipt of such notice.

### **Clause 33. Exemption from rates**

This clause declares that any land owned, leased or otherwise controlled by the Council is exempt from local government rates.

### **Part 3 – The State Register of Heritage Places**

The practice of identifying important cultural heritage places and entering them in registers has been common practice globally for many decades. It enables communities to record and recognise those places that contribute to their “sense of place” and understanding of what has come before. Registers are intended to be developed over time in consultation with stakeholders as a collection of places that, taken as a whole, represent the story of the community’s history and development, and are worthy of being protected and handed on to future generations.

Just over 1,350 places have been recorded in detail and entered in the register over the twenty five years of the current Act. Collectively, this represents less than one, one hundredth of one per percent of the State’s land mass.

This Part introduces, for the first time, national standards of criteria for the assessment of heritage places. This will ensure that the threshold for entry in the register is clearly understood by stakeholders, can be applied consistently to maintain the quality of the register, and will promote public confidence and certainty in ongoing planning.

This part defines the register and the processes for adding, amending or removing register entries. It also clarifies the manner by which a property owner may request amendment of a register entry with respect to their land, or removal of their land from the register.

Part 3 also does away with the current Act’s two-stage registration process, which begins with an interim registration of a place followed by permanent registration of the same place. This is duplicative, confusing to owners and others and does not provide any additional heritage protection.

The Bill will replace this two-stage process with a single process of assessment and consultation, and specifically require consultation with the owner before the Heritage Council can recommend to the Minister that a place be entered in the register.

It will also introduce new levels of transparency for stakeholders, with the Heritage Council to publish its advice to the Minister on whether a place should be entered in the register at the time the advice is rendered. In addition, the requirement that a Ministerial direction to remove a place from the register will be subject to the approval of both Houses of Parliament is brought forward from the current Act to ensure such decisions are subject to an appropriate level of public examination.

#### **Division 1 – The Register**

##### **Clause 34. The register**

This clause establishes the register and states the Council’s obligations to maintain the register and make it available for public inspection.

##### **Clause 35. Form and content of register**

This clause provides that a register entry for a place must include a description of the land comprised in the place, a statement of the place’s cultural heritage significance, and any other prescribed information.

## **Division 2 — Entry in the register**

### **Subdivision 1 — Registration conditions**

#### **Clause 36. Conditions for registration**

This clause states that, to be entered in the register, a place must be found by the Council to have cultural heritage significance, and that none of the land comprising the place has been removed from the register within the preceding five years unless the Supreme Court orders that such land be allowed entry in the register.

#### **Clause 37. Factors relevant to cultural heritage significance**

This clause lists the criteria to be considered by the Council to determine whether a place has cultural heritage significance.

### **Subdivision 2 — Process for entry into register**

#### **Clause 38. Nomination for entry in the register**

This clause provides that any person may nominate any place for entry in the register, sets out how the Council is to determine whether a nomination warrants further assessment, and requires the Council to notify the owner and the nominator of its determination.

#### **Clause 39. Review and registration recommendation**

This clause sets out how the Council is to consider in detail whether to recommend a place for entry in the register, including consultation with the owner and the public and assessment of the place against the criteria set out in Clause 37. This clause also spells out how the Council is to recommend registration to the Minister and notify the public of its recommendation.

#### **Clause 40. Direction by Minister**

This clause provides that, upon receipt of a recommendation from the Council to direct the entry of a place in the register, the Minister is to make a decision within a prescribed time and direct the Council to enter the place in the register, or direct the Council not to enter the place, and give reasons for the decision. This clause also requires the Council to notify the property owner of the Minister's direction and also make the direction known to the public along with the reasons given.

#### **Clause 41. Entry in register**

This clause requires the Council, following receipt of a direction from the Minister to enter a place in the register to register the place and publish a notice about it in the *Government Gazette*. This clause also requires the Council, in accordance with the regulations, to notify the property owner and provide "statutory notification": i.e., lodge with Landgate a memorial to be placed on the certificate(s) of title for land included in the register entry (See Clause 8).

### **Division 3 — Amendment of register entries**

#### **Clause 42. Request for amendment of land description in register entry**

This clause provides that an owner of land in a registered place may request the Council to amend the land description with respect to the owner's land, and sets out how the Council is to determine whether the request warrants further consideration. This clause also requires the Council to notify the owner and others of its determination.

#### **Clause 43. Detailed consideration of amendment to land description**

This clause sets out how the Council is to consider in detail whether to recommend that the Minister direct it to amend the land description included in a register entry, including consultation and assessment of the desirability of the amendment in light of the criteria set out in Clause 37. This clause also spells out how the Council is to recommend the amendment to the Minister, including any conditions the owner must satisfy, and notify the public of its recommendation.

#### **Clause 44. Land description amendment direction by Minister**

This clause provides that, following receipt of a recommendation from the Council to direct an amendment to the land description of a register entry, the Minister is to make a decision within a prescribed time and either direct the Council to make the amendment in the register entry, subject to any conditions the Minister may impose, or direct the Council not to make the amendment in the register entry, and give reasons for the decision. This clause also requires the Council to notify the owner of the Minister's direction and also make the direction known to the public along with the reasons given.

#### **Clause 45. Amending land description in register entry**

This clause provides that, following receipt of a direction from the Minister to amend the land description of a register entry, the Council is to make the amendment in the register, subject to the satisfaction of any conditions imposed by the Minister, and publish a notice of the amendment in the *Government Gazette*. This clause also requires the Council, in accordance with the regulations, to notify the owner and provide "statutory notification": i.e., lodge with Landgate a memorial to be placed on the certificate(s) of title for land to be added to the register entry, and instruct Landgate to remove such memorials from the certificate(s) of title for land to be removed (See Clause 8).

#### **Clause 46. Other amendments**

This clause explains what clauses of the Bill provide for amendments to elements of a register entry other than the land description, such as the statement of significance or other particulars prescribed by the regulations.

## **Division 4 — Removal of entries from register**

### **Clause 47. Request for removal**

This clause provides that the owners of all the land in a registered place may request the Council to remove the place from the register, sets out how the Council is to determine whether the request warrants further consideration, and requires the Council to notify the owner and others of its determination. This clause also provides that, if the Council decides the request does not warrant further consideration, the owners may request the matter be referred to the Minister, who within the prescribed time is to either confirm the Council's determination or direct the Council to undertake detailed consideration of the proposal per clause 48.

### **Clause 48. Detailed consideration of removal**

This clause sets out how the Council, if directed to do so by the Minister or otherwise, is to consider in detail whether to recommend to the Minister to direct the removal of an entry from the register, including consultation and assessment of the desirability of the amendment in light of the criteria set out in clause 37. It also spells out how the Council is to recommend removal to the Minister, including any conditions the owner must satisfy, and notify the public of its recommendation.

### **Clause 49. Removal direction by Minister**

This clause provides that, following receipt of a recommendation from the Council, the Minister is to make a decision within a prescribed time and direct the Council to remove the register entry, subject to any conditions the Minister may impose, or direct the Council not to remove the register entry, and give reasons for the decision. A direction under this clause to remove an entry from the register does not take effect unless approved by a resolution of both Houses of Parliament.

This clause also requires the Council, in accordance with the regulations, to notify the owner of the Minister's direction and also make the direction known to the public along with the reasons given.

### **Clause 50. Removing entry from register**

This clause provides that, following receipt of a direction from the Minister to remove an entry from the register, the Council is to remove the entry from the register, subject to the satisfaction of any conditions imposed by the Minister, and publish a notice of the removal in the *Government Gazette*. This clause also requires the Council, in accordance with the regulations, to notify the owner of the removal and provide "statutory notification": i.e instruct Landgate to remove memorial from the certificate(s) of title for the land removed from the register (See Clause 8).

## **Division 5 — Statements of cultural heritage significance**

The statement of cultural heritage significance forms an essential part of a register entry. It explains why the place is considered to be of such significance that it is included in the register. A statement of cultural heritage significance is prepared as part of the initial assessment process, but it can also be reviewed from time to time and revised as necessary, whether to correct errors or to recognise new information about a registered place.

### **Clause 51. Adoption of statement of cultural heritage significance**

This clause requires the Heritage Council to adopt a statement of cultural heritage significance in relation to each registered place. This clause also provides that regulations will specify the form and content of such statements.

### **Clause 52. Updating and amending statements of cultural heritage significance**

This clause provides for regulations to prescribe the manner, timing and process by which to amend statements of cultural heritage significance. This clause also provides that, if a substantive amendment is under consideration, the regulations are to require that the owner be consulted and, if the owner objects to the proposed amendment, it may not be made without a direction to amend from the Minister. This clause further requires the Council, in accordance with the regulations, to inform the owner and the general public of any amendment made to a statement of cultural heritage significance.

## **Part 4 — Protection orders and repair orders**

The community expects practical action in response to the risk of loss of heritage places. This part brings forward and clarifies features of the current Act that have proven effective in mitigating loss. It also introduces a new Repair Order feature, common in all Australian jurisdictions and available to all Western Australian local governments via the Model Scheme provisions, but not available to the Minister under the current Act. This will enable the Minister, having satisfied certain pre-conditions including comprehensive consultation with the land owner, to issue an order to undertake repairs to a heritage place. Such orders can be reviewed by the State Administrative Tribunal, and shall go no further than making the place secure, structurally sound and weather tight.

### **Division 1 — Protection orders**

The provisions relating to protection orders are retained from the current Act, where they are known as “conservation orders”. Repair orders are an entirely new feature, similar to provisions found in the heritage legislation of several other states.

**Clause 53. Consent order**

This clause allows the Minister to issue a protection order over a place with the consent of the land owner if the Minister finds it is necessary or desirable to provide special protection and there is a likelihood of imminent damage. The Minister must obtain the advice of the Council in regard to the duration of the order.

**Clause 54. Stop work order**

This clause allows the Minister to issue a 60-day protection order over a place without the consent of the land owner, if the Minister finds it is necessary or desirable to provide special protection and there is a likelihood of imminent damage. This clause also provides that the Minister may not issue a stop work order over a place without leave of the State Administrative Tribunal if the place was subject to a stop work order within the last 12 months or the land was removed from the register within the last five years,

**Clause 55. Continuing protection order**

This clause allows the Minister to issue an indefinite protection order over a place if the Minister finds it is necessary or desirable to provide special protection, but only if the Council has first consulted the owner and the public in regard to the proposed order and advised the Minister on any submissions received. This clause also requires the Council to make public both its advice to the Minister and the Minister's decision.

**Clause 56. Content of protection order**

This clause describes what information must be included in a protection order of any kind and also specifies what type of prohibitions may be included, and allows these prohibitions to be absolute, conditional or subject to the exercise of discretion by a specified person or body.

**Clause 57. Notification of protection order**

This clause requires the Council to serve a copy of the protection order on the owner, lodge a memorial with Landgate (See Clause 8) and publicly advertise the terms of the order and the place to which it applies.

**Clause 58. Coming into effect of protection order**

This clause provides that a stop work order has immediate effect when prominently affixed at the affected place or when served on a person carrying out prohibited works at the place; any other type of protection order takes effect upon publication in the *Government Gazette*.

**Clause 59. Duration of protection order**

This clause provides that a consent order ceases to have effect on the expiry date stated in the order, a stop work order will cease to have effect 60 days from the date it was issued unless extended by the State Administrative Tribunal, and a continuing protection order ceases to have effect on an expiration date stated in the order or when the Minister revokes it by notice in the *Government Gazette*. This clause also provides that, when a protection order ceases to have effect, the Council must withdraw any memorials and notify the owner.

**Clause 60. Tribunal's powers as to protection order**

This clause provides that the owner of a place affected by a protection order other than a consent order may apply to the State Administrative Tribunal for a review of the order and the Tribunal may revoke, confirm or modify the order. This clause also allows the Minister to ask the Tribunal to extend the duration of a stop work order beyond 60 days, and empowers the Tribunal to extend the order for a specified period or make it permanent.

**Division 2 — Repair orders****Clause 61. Terms used**

This clause defines a number of terms used in this Division.

**Clause 62. Repair notice**

This clause allows the Council to notify the owner or occupier of a registered place that specified works must be undertaken to prevent irreversible deterioration of the place and, unless the specified works of completed by a specified date, the Council will advise the Minister to make a repair order.

**Clause 63. Repair order**

This clause allows the Minister to issue an order to the owner or occupier of a registered place to undertake necessary repairs to the place, but only if the Council has first attempted to negotiate a satisfactory arrangement with the owner or occupier, those attempts have not resulted in the necessary repairs being made, and the Minister considers that the repairs are necessary and the cost will not impose an undue hardship on the owner or occupier.

**Clause 64. Notification of repair order**

This clause requires the Council to serve a copy of the repair order on the person to whom it is directed and lodge a memorial for placement on the affected land title (See Clause 8).

**Clause 65. Standard of works**

This clause requires work undertaken pursuant to a repair order must comply with the *Building Act 2011*, the *Local Government Act 1995*, the *Planning and Development Act 2005* and any other prescribed written law, as well as any other standards and requirements prescribed by the regulations or specified in the order itself.

**Clause 66. Termination of repair order**

This clause provides that a repair order terminates when it is withdrawn by the Minister, when the Council confirms in writing that is satisfied that the works required by the order have been satisfactorily completed or if revoked by the State Administrative Tribunal pursuant to Clause 67. This clause also provides that, upon termination, the Council must withdraw the relevant memorials from the affected land titles.

**Clause 67. Tribunal's powers as to repair order**

This clause allows a person served with a repair order to apply to the State Administrative Tribunal to review the order, and the Tribunal may confirm, revoke or modify the order.

**Clause 68. Exclusion of liability**

This clause excludes the State, the Minister, the Council and its officers or employees from liability for injuries or damages resulting from any person's failure to comply with a repair notice or order.

Local governments have the power under various written laws to order repairs to buildings but many are reluctant to do so due to the widespread belief that if a local government does issue such an order and the property owner does not comply with it, the local government will be held liable for damages or injuries to third parties because of its failure to enforce the order or carry out the necessary repair works at its own expense. This clause protects the State, the Minister, the Council and its staff from any such liability that may arise from a repair notice or repair order.

**Part 5 — Matters affecting places of heritage interest**

When a local government or a state government agency proposes or is considering an application by a third party to undertake works that may affect a registered place and certain other heritage places, Part 5 of the Bill requires referral of the proposal or application to the Council and the Council must, in turn, advise on the heritage and conservation aspects of the proposal or application with a view to protecting the state's cultural heritage.

Part 5 of the Bill corresponds to sections 11 and 78 of the current Act, but goes into more detail to clarify the referral process and eliminate ambiguities. The final decision on the proposal or application is left to the local government or state agency; the Council very rarely issues an "approval" and does so only when a proposal requires no approval or permit from any other public authority. As with the current Act, the Bill is not intended to add another layer of approval to projects.

## **Division 1 — Preliminary**

### **Clause 69. Terms used**

This clause defines a number of terms used in this Part.

## **Division 2 — Proposals affecting places of heritage interest**

### **Subdivision 1 — Proposals which must be referred**

#### **Clause 70. Proposals to which Subdivision applies**

This clause specifies the proposals that are subject to referral to the Council, which are proposals that may affect a registered place, a place that is subject to a heritage agreement (See Part 7) to which the Council is a party, or a place that is subject to a protection order that specifies the Council as the body who may exercise discretion to approve of any works otherwise prohibited by the order.

#### **Clause 71. Referral of certain proposals to Council**

This clause requires decision makers (local governments, the WA Planning Commission, etc.) to refer proposals of the kind described in Clause 70 to the Council for consideration and advice. This clause also provides for regulations to exempt specified places, types of proposals or certain decision-makers from referral, and specifically excludes proposal to alter church structures for purely “liturgical purposes”. This clause goes on to provide that no exemption applies to a proposal that relates to a place that is subject to a protection order that allows Council to approve of any works, because protection orders will often be made under circumstances that preclude the desirability of exempting such proposals from referral.

#### **Clause 72. Advice on referred proposal**

This clause requires the Council to render formal advice to the decision-maker in regard to a referred proposal within the prescribed time period, and that the advice may extend to any matter relevant to the place’s conservation, maintenance, retention, interpretation, meanings, adaptive re-use or other recognised heritage considerations. This clause also provides that the Council may have regard to unrectified errors, omissions, refusals or other failures of the place’s owner, the proposal applicant, or the decision-maker to comply with prior advice or other obligations, and that the Council may also withdraw its advice before it has been acted upon if new information or other matters come to light that materially affect the soundness of that advice.

**Clause 73. Decision on referred proposal**

This clause defines how the decision-maker must take into account the Council's advice when making a final decision on a referred proposal in terms that are nearly identical to section 11 of the current Act: the decision must minimise adverse impacts to the place and be consistent with the Council's advice unless the decision-maker determines there is no feasible and prudent alternative. This clause also provides that, if so advised by the Council, a decision-maker's approval decision must require the owner to enter into a heritage agreement (See Part 7) as a condition of approval. This clause goes on to require the decision maker to notify the Council of its final decision within a prescribed time period.

**Clause 74. Effect on certain proposals and decisions when a place becomes a registered place**

This clause requires a decision maker to cease consideration of a proposal in respect of a place if the place is entered in the register while the proposal is under consideration, and refer the proposal to the Council for advice. This clause also provides that, if the decision maker has recently approved a proposal in respect of a place and the place is entered in the register before the approval has been substantially acted upon, the approval is suspended while the proposal is referred to the Council and the Council renders its advice on it to the decision-maker. This clause goes on to provide that the Council may waive the suspension in writing at any time and allow the approval to be acted upon in such manner and on such conditions as the Council may specify. This retains the effect of section 78(1) and (2) of the current Act.

**Subdivision 2 — Proposals which need not be referred****Clause 75. Decision on certain unrefereed proposals**

This clause requires a decision maker considering a proposal affecting a place that is subject to either a heritage agreement to which the Council is not a party or a protection order that does not permit the Council to approve works (and hence does not require referral to the Council) to make a decision that is consistent with the provisions of the heritage agreement or the protection order, respectively.

**Subdivision 3 — General****Clause 76. Regulations**

This clause allows regulations to provide for a variety of matters associated with referrals under this Part: forms to be used, information to be provided, matters to be considered by the Council, time limits within which to render advice, persons to be notified of advice, how the Council is to handle requests for reconsideration of its advice and fees that may be charged for reconsideration.

### **Division 3 — Works permits**

Some types of proposals to undertake works do not require the approval of any public authority. For example, archaeological excavations on privately-owned registered land rarely require local planning approval, yet such projects have the potential to detrimentally affect a registered place, a place subject to a heritage agreement, etc. For these situations, the Bill will allow the Council to issue a “works permit” in the absence of a referral. This is based on comparable provisions in section 79(2)-(5) of the current Act.

#### **Clause 77. Permit for works affecting registered place**

This clause authorises the Council to issue a permit for works that would contravene the Act but that are not subject to approval by any other public authority and so will not result in a referral, and also allows the Council to impose conditions on the permit that are consistent with the objects of the Act. This clause also provides that, where the Council itself seeks a permit in respect of works to be undertaken at property owned by the Council, which could create a conflict of interest, the Council is to apply to the Minister who will make the decision in accordance with this clause.

#### **Clause 78. Tribunal’s powers as to works permit**

This clause allows an applicant for a works permit aggrieved by the Council’s decision to apply to the State Administrative Tribunal to review the decision, and the Tribunal may confirm, revoke or modify the order.

### **Part 6 — Support for conservation**

Experience has shown that, on balance, good heritage outcomes require offering owners a combination of incentives, such as grants and other assistance, and disincentives, such as penalties. Part 6 makes available to owners a set of deliverable incentives for the recognition and conservation of heritage places.

### **Division 1 — Valuation of land**

Under the current Act, the owner of property that is made subject to a heritage agreement may obtain re-valuation of the property, for land-tax purposes, to take into account any reduction in value caused by the heritage agreement, and thereby reduce the owner’s land tax liability. Under the Bill, this privilege is extended to the owner of any land entered in the register as well as any land subject to a heritage agreement.

#### **Clause 79. Application of this Division**

This clause provides that this Division applies to any registered land or land that is subject to a heritage agreement.

**Clause 80. Valuation of land**

This clause requires the Valuer-General when valuing land to which this Division applies to take into account any restrictions imposed on the land by virtue of entry in the register or being made subject to a heritage agreement.

**Clause 81. Request for interim valuation**

This clause allows the owner of land subject to this Division to request the Valuer General for an interim valuation of that land pursuant to section 23 of the *Valuation of Land Act 1978*.

**Division 2 — Conservation assistance****Clause 82. Provision of financial, technical and professional assistance**

This clause allows the Council to provide grants, loans and other forms of financial assistance and also to provide technical and professional assistance towards the identification, documentation and conservation of places of cultural heritage significance, as well as for education, research and publications that further the objects of the new Act. This clause also allows regulations to specify the types of assistance that may be provided, eligible places and projects, persons who may receive assistance, terms and conditions upon which assistance may be granted, forms and procedures for assistance applications, and any other matters associated with the provision of assistance.

This clause corresponds to section 33 of the current Act, and clarifies the extent of the Council's power to provide financial and other assistance to owners of heritage places.

**Division 3 — Modification of written laws**

This Division retains a feature of the current Act known as a "Section 38 Order". This feature allows the Minister, on the advice of the Council, to order that a provision or provisions of a specific written law (other than the *Building Act 2011*), including a local planning scheme, are either suspended or modified in respect of a particular registered place if the Minister forms the opinion that the provision or provisions effectively prohibit or impede the conservation of that place. This is a severe power that, appropriately, is very seldom invoked. In the Bill, it is changed very little and only to the extent necessary to clarify and simplify the scope of this power and how it is to be exercised.

Although issuing a modification order may appear to be a drastic measure, it is retained from the current Act because unforeseen situations can arise in which modification orders, if used carefully and with discretion, are often the only viable solution.

**Clause 83. Terms used**

This clause defines terms and phrases used in this Division. In particular, “written law” is defined as excluding the *Building Act 2011* and any subsidiary legislation arising from that Act.

**Clause 84. Council may recommend modification order**

This clause allows the Council, at the request of the owner of a registered place or on its own motion, to recommend that the Minister make an order to modify the application of any written law (other than the *Building Act 2011*) that, in the Council’s opinion, effectively prohibits or impedes the conservation of the place. This clause also provides that the Council may so recommend only after public consultation and consideration of any submissions received, as well as the likely effect of the order upon the public interest, health and safety.

**Clause 85. Minister may modify written law**

This clause allows the Minister, upon receipt of a recommendation from the Council, to issue an order by publication in the *Government Gazette* to modify a written law, subject to the written consent of any Minister responsible for the administration of any written law affected by the order. This clause also requires the Council to make public its advice and the Minister’s decision.

**Clause 86. Modification order subject to disallowance**

This clause requires that a modification order may be disallowed by either house of Parliament in accordance with section 42 of the *Interpretation Act 1984*.

**Clause 87. Powers of the Tribunal in relation to modification order**

This clause allows a person aggrieved by the issuance of a modification order to apply to the State Administrative Tribunal for a review the order, and provides that, if the Tribunal is satisfied that any requirement of the Bill relating to the order has not been met with the result that the interests of the applicant have been substantially prejudiced, the Tribunal may set aside or modify the order as it thinks fit.

**Part 7 — Heritage agreements**

A “heritage agreement” is a contract entered into between a land owner and the Heritage Council or other public authority on behalf of the State, under which the owner, in exchange for an incentive such as planning approval or a grant, commits to various undertakings intended to preserve and enhance the cultural heritage significance of the place. These undertakings might include: specified conservation works, routine maintenance, installation and maintenance of heritage interpretation features, insuring the property, design guidelines for new development, and so on.

Unlike many Australian jurisdictions, the entry of a place in the register does not impose maintenance standards on land owners. Rather, it is understood that most owners want to look after their property. Western Australia uses heritage agreements to achieve heritage conservation outcomes through negotiation with owners.

Part 7 of the Bill is retained from sections 29-32 of the current Act. Although Part 7 substantially rewords and reorganises the comparable provisions of the current Act, in substance it remains largely unchanged from the current Act. The main difference is that Part 7 explains more clearly the matters that may be addressed in a heritage agreement and allows regulations to prescribe implied provisions in heritage agreements and also specify model provisions that may be used in any heritage agreement. Regulations may also specify provisions that may not be included in a heritage agreement to protect property owners from excessively burdensome provisions.

A new feature is a provision allowing the State Administrative Tribunal jurisdiction to enforce heritage agreements, in addition to the courts.

**Clause 88. Terms used**

This clause defines terms and phrases used in this Part.

**Clause 89. Heritage agreement**

This clause allows the Council or any other public authority on behalf of the State to enter into a heritage agreement with an owner of certain types of land under which the owner, to the extent of the owner's legal interest in the land (e.g., freehold, leasehold, etc.), commits to various undertakings in furtherance of the Bill

**Clause 90. Land to which a heritage agreement may relate**

This clause defines the type of land that may be made subject to a heritage agreement: land entered in the register or land that the Council has recommended to the Minister for entry in the register; land that is subject to a protection order; land that is included in a heritage list or heritage area under a local planning scheme; or any other land which the Council considers appropriate to be made subject to a heritage agreement.

**Clause 91. Form and content of heritage agreement**

This clause details the general form and structure of a heritage agreement and essential provisions, and also provides that it may address any matter that furthers the objects of the Bill, subject to regulations.

**Clause 92. Prescribed provisions for heritage agreement**

This clause allows regulations to prescribe provisions of heritage agreements in relation to certain matters, and provides that any such provisions be designated as being implied in all heritage agreements or as a model provision that may be included in any heritage agreement.

**Clause 93. Operation of heritage agreement**

This clause sets out what must occur for a heritage agreement to take effect and how it may be varied, and also provides that a heritage agreement or variation to a heritage agreement does not become operational until certified by the Minister that the agreement is necessary for the purposes of the new Act and complies with the requirements of the new Act.

**Clause 94. Record of heritage agreements**

This clause requires the Council to maintain a record of every heritage agreement, and to make available for public inspection every heritage agreement currently in effect, redacted as required by the regulations to remove information deemed confidential.

**Clause 95. Statutory notification**

This clause allows the Council to provide statutory notification (see Clause 8) to give notice of the heritage agreement to prospective purchasers of the land, and also provides that, where such notification occurs, the obligations of each party to the heritage agreement are made binding on that party's successors in title.

**Clause 96. Enforcement of heritage agreement by Council**

This clause authorises the Council to institute legal proceedings on behalf of the State to enforce a heritage agreement to which it is a party, and also provides that the Council may not participate in legal proceedings arising out of a heritage agreement to which it is not a party without the consent of the public authority who entered into the agreement, or with the approval of the Minister.

**Clause 97. Powers of the Tribunal in relation to heritage agreement**

This clause provides that, where an owner and the Council cannot agree on the terms of a heritage agreement, the owner may apply to the State Administrative Tribunal to resolve the impasse. This clause also empowers the Tribunal to enforce any provision of a heritage agreement and make such order as it considers appropriate to secure performance of the agreement.

**Part 8 — Local heritage surveys**

The provisions for inventories established under section 45 of the current Act, commonly known as Municipal Heritage Inventories, were poorly articulated leading to widespread misunderstanding among local governments, and confusion and concern in communities.

Part 8 retains the substance of section 45, which requires each local government to compile and periodically review and update an inventory of places within its district that are or may become of heritage significance to the district.

Unlike the current Act, however, Part 8 will clear up ambiguities about the scope of such inventories, which are renamed “surveys” in the Bill, to reflect their true purpose as a body of information to assist local governments in decision-making on heritage matters.

Part 8 will not impose a requirement on local governments or expense associated with the wholesale review of existing inventories, which will be transitioned under the Bill.

**Clause 98. Term used: local heritage survey**

This clause defines terms and phrases used in this Part.

**Clause 99. Local heritage survey**

This clause requires every local government to compile a survey of places within its district that are or may become of local cultural heritage significance, and in doing so have regard to guidelines to be prepared by the Council.

**Clause 100. Purposes of local heritage survey**

This clause sets out the uses to which a local heritage survey should be put: providing a publicly accessible cultural and historical record of the district; aiding the local government to make decisions that respect local heritage; and assisting the local government to prepare a heritage list and define heritage areas under the local planning scheme.

**Clause 101. Guidelines for local heritage surveys**

This clause requires the Council to prepare and publish voluntary guidelines to assist local governments with the preparation, review and updating of local heritage surveys including guidelines on: criteria for inclusion in the survey; processes for assessment and public consultation; processes for reviewing and updating surveys and how often; the manner by which surveys are to be made publicly available; and any other matters the Council deems appropriate.

**Part 9 — State Government heritage**

Part 9 is intended to encourage – not require – each state government agency to compile an inventory of its “heritage assets”: properties owned or controlled by the agency that have or may have cultural heritage significance to the State. Part 9 requires the Heritage Council to assist this effort by issuing voluntary guidelines regarding the criteria by which to identify such places. Part 9 will also require the Heritage Council to issue voluntary guidelines to assist other state agencies with the management and conservation of their heritage assets.

Part 9 also will bring into regulations a long-standing Government policy that promotes the orderly transition of state-owned heritage places into private ownership. In addition to providing comfort to the community that the heritage values of places will be maintained into the future, it ensures that those considering taking an interest in the property through purchase or long-term lease are fully informed of its heritage status and can make informed decisions about possible future uses. These regulations will not impose any new obligations on disposing agencies that are not contemplated by the current heritage property disposal policy.

**Clause 102. Terms used**

This clause defines terms and phrases used in this Part, such as *heritage asset*.

**Clause 103. Guidelines concerning State Government heritage**

This clause requires the Council to prepare and publish voluntary guidelines to assist other state government agencies on the preparation, review and updating of inventories of heritage places they own, occupy or control, including guidelines on: criteria for inclusion; processes for assessment and public consultation; frequency of review and any other matters the Council deems appropriate, and also prepare and publish voluntary guidelines to assist State agencies on the management of heritage properties they own, occupy or control.

**Clause 104. Disposal of heritage assets**

This clause allows regulations to provide for the manner in which state-owned heritage assets may be disposed of.

These regulations are to be consistent with the current Government heritage property disposal policy. Under the policy, a “disposal” means a sale, a lease of at least 10 years, or demolition of a heritage asset, which is defined under the policy as a place that is entered in the register, a place of recognised local heritage significance, or a place that is at least 60 years old and displays other evidence of potential historic, aesthetic or social significance.

For disposal of an unregistered place, the policy provides that the Council is to have the opportunity to assess the place for inclusion in the register prior to disposal and may require the preparation of appropriate assessment or conservation documentation of the place.

If a registered place is to be sold out of state government ownership or leased for a period of at least 10 years, the policy provides that the disposing agency is to consult with the Council as to whether any archival or conservation documentation should be prepared and whether the place should be made subject to a heritage agreement as a condition of sale or lease.

## **Part 10 — Acquisitions and compensation**

The provisions of Part 10 retain the intent and scope of similar provisions in the current Act, but clarified and simplified, where possible. In particular, the provisions relating to compulsory acquisition have been refined for consistency with the relevant provisions of the *Land Administration Act 1997*.

### **Clause 105. Compulsory acquisition**

This clause allows the Minister on the advice of the Council, having first consulted with the owner, to commence compulsory acquisition of a registered place under Parts 9 and 10 of the *Land Administration Act 1997* if a person has been convicted of failure to comply with a repair order made in respect of the place, if the Minister is of the opinion that the owner of a registered place has failed to comply with a repair order, or if the Council advises the Minister that the place is at risk of irreversible deterioration.

### **Clause 106. Compensation for compulsory acquisition**

This clause provides that, in respect of a compulsory acquisition, if the owner has been convicted of failure to comply with a repair order or if the Minister has reasonable cause to believe that the owner of a registered place has deliberately allowed the place to deteriorate or has acquired the property with the intention of demolishing it, the compensation payable is significantly reduced by various factors set out in this clause.

This clause, like its counterpart in the current Act, prevents “rewarding” the owner for the conduct that led to the commencement of compulsory acquisition.

### **Clause 107. Tribunal’s powers as to acquisition and compensation decision**

This clause allows a person aggrieved by a decision of the Minister under Clauses 105 or 106 to apply to the State Administrative Tribunal for a review of the decision.

### **Clause 108. Acquisition by consent**

This clause allows the Council or any public authority to acquire by purchase or consent any property or interest in property in furtherance of the objects of the new Act, with the Minister’s approval.

### **Clause 109. Request for acquisition**

This clause allows an owner of land who claims to be denied all economically viable use of the land by operation of the new Act to request the Council to acquire the land under Clause 108 and further provides that, if the Council refuses the request or the owner is not satisfied with the terms under which the Council offers to acquire the land, the owner may apply to the State Administrative Tribunal to determine whether the owner is in fact denied all economically viable use of the land and, if so, whether it is appropriate to require the Council to acquire the land, either on terms agreed to under Clause 108 or compulsorily under Clause 105.

## **Part 11 — Enforcement**

Part 11 of the Bill retains many enforcement features of the current Act, such as the appointment of inspectors (See Divisions 1 and 2, below), and the use of special penalties for offences such as restoration orders and prohibition orders (See Division 4). These retained features have been substantially revised for clarity, while retaining the essential substance of the original provisions. In particular, the penalties for offences (Clause 122 and Division 3) remain unchanged because the current Act's penalty provisions were brought up to date by amendments enacted in 2011.

### **Division 1 – Inspectors**

#### **Clause 110. Terms used: inspector**

This clause defines an “inspector” as a person appointed to that role pursuant to Clause 111(1) and also includes a police officer.

#### **Clause 111. Appointment of inspectors**

This clause provides that the Minister may appoint a person to be an inspector, and sets out various requirements for making such appointments.

#### **Clause 112. Police officers to have power of inspectors**

This clause declares that police officers have the powers of inspectors.

#### **Clause 113. Impersonation**

This clause makes it an offence to falsely represent oneself to be an inspector or to be a member, employee or agent of the Council, and establishes the penalty for each offence.

### **Division 2 – Entry and investigation**

#### **Clause 114. Terms used: investigate**

This clause defines an “investigate” to include various activities an inspector would normally do to acquire evidence of an offence or a breach of a heritage agreement: inspection, observation, inquiry, take photographs, seize evidence, and so on.

#### **Clause 115. Powers of entry and investigation**

This clause allows an inspector to enter any land with the consent of the owner to conduct an investigation.

#### **Clause 116. Application for entry warrant**

This clause allows an inspector to apply to a judge or magistrate for an entry warrant authorising entry to property to carry out an investigation, and sets out the requirements for making such an application. This clause also declares that section 13 of the *Criminal Investigation Act 2006* applies to such applications and any warrant issued.

**Clause 117. Issue of entry warrant**

This clause allows a judge or magistrate to issue an entry warrant upon the application by an inspector if satisfied that there are reasonable grounds for believing that entry to the property is necessary for making an investigation. This clause also sets out the information that must be included in the warrant: a description of the premises to be entered; a description of the purposes for which entry is required; the time period not exceeding 30 days in which the warrant is to be executed; the name of the issuing judge or magistrate; and the date and time the warrant is issued.

**Clause 118. Duration of entry warrant**

This clause declares that an entry warrant is valid for the time period stated in the warrant or, if no period is stated, for 30 days from the date of issue. This clause also provides that the entry warrant ceases to be in force once it is executed.

**Clause 119. Effect of entry warrant**

This clause declares that an entry warrant has effect according to its content; that it comes into force when issued; and that it authorises the inspector who executes the warrant to enter the premises described in the warrant within the stated time period to make an investigation.

**Clause 120. Execution of entry warrant**

This clause declares that an entry warrant may be executed by the inspector to whom it is issued or by any other inspector, and the inspector executing the warrant must produce the warrant at the request of a person apparently in charge of the premises.

**Clause 121. Powers to obtain information**

This clause sets out various powers of an inspector to obtain information from an owner, occupier or other person apparently in charge of premises under investigation and requires such persons to provide certain types of information when requested to do so by an inspector.

**Clause 122. Obstructing execution of the Act**

This clause declares that it is an offence to wilfully obstruct or delay a person acting in the execution of any function of the Council, or to not comply with any reasonable request made by such person, or to knowingly provide false or misleading information to such person, and specifies the penalty for this offence.

**Division 3 – Offences****Clause 123. Damaging registered place**

This clause declares that it is an offence to demolish, damage or despoil a registered place, or alter the fabric of a registered place or remove any thing from the place to the detriment of the place's cultural heritage significance without prior approval under the relevant provisions of Part 5, and specifies the penalty for this offence.

This clause retains the penalty provision found in section 79(1) of the current Act, but expands the offence definition to include the unauthorised alteration of a registered place.

**Clause 124. Contravention of protection order**

This clause declares that it is an offence to contravene a prohibition specified in a protection order to the detriment of the cultural heritage significance of the place to which the order applies, and specifies the penalty for this offence.

**Clause 125. Charge under section 123 or 124: defences of necessity**

This clause provides that it is a defence to a charge under Clause 123 or 124 to show that the offending works were required by law or were urgently necessary to prevent an immediate danger to life or health or to prevent damage to property, provided that the Council is given written notice of these works as soon as practicable.

**Clause 126. Onus of proof in demolition offences**

This clause provides that, in a prosecution of an owner under Clause 123 or 124 for the substantial demolition of a building or structure, the owner will be required to prove that the owner was not responsible if it appears that the owner has not suffered a significant financial loss as a result of the demolition.

**Clause 127. Contravention of repair order**

This clause declares that it is an offence to fail to comply with a repair order issued under Part 4 Division 2 within the time limit specified in the order, and specifies the penalty for this offence.

**Division 4 – Orders following offences**

**Clause 128. Restoration order**

This clause provides that, if a person is convicted of any offence arising from the unauthorised alteration, demolition, damage or despoliation of a place or the removal of any thing from a place, in addition to or instead of any other penalty that may be imposed, the court may, having regard to the recommendation of the Council, order that person to restore the place to its condition prior to the offending works or make any other restitution determined by the court. This clause also declares it an offence to fail to comply with such an order, and specifies the penalties for this offence.

**Clause 129. Prohibition order**

This clause provides that, if a person is convicted of any offence in relation to a place, with the court's approval the Governor may by order published in the *Government Gazette* order that, for a period not to exceed 10 years, no development may occur or be approved at that place or only such development as may be specified in the order may occur or be approved. This clause also declares it an offence to carry out works contrary to the order, and specifies the penalty for this offence.

## **Division 5 – Miscellaneous provisions regarding offences**

### **Clause 130. Time limit for commencing criminal proceedings**

This clause provides that criminal proceedings must be commenced within three years of the date the alleged offence was committed.

### **Clause 131. Institution and conduct of criminal proceedings**

This clause states that criminal proceedings may be instituted in the name of the Council and conducted by any officer of the Council authorised by the Council to do so.

### **Clause 132. Compensation order**

This clause provides that, in a criminal proceeding taken against an accused person for an offence, if the court is satisfied that some other person has suffered or will suffer loss or damage by reason of the offence, the court may make such order as it thinks appropriate against the accused person to compensate the other person for the loss or damage.

### **Clause 133. Evidentiary provisions**

This clause provides that, in proceedings taken under this Division, a finding of fact by a court made in proceedings against an accused person for an offence is evidence of that fact and the finding may be proved by production of a document under the seal of the court from which the finding appears.

### **Clause 134. Enforcement of requirement to pay money**

This clause provides that a court that has convicted a person of an offence and required payment of money, if the convicted person defaults on that requirement the same court may exercise any other power it has apart from this clause or order the unpaid amount recoverable as a judgment debt.

### **Clause 135. Continuing offence**

This clause sets out the process by which a court may determine the appropriate daily penalty for a continuing offence, if no daily penalty is specified for that offence.

### **Clause 136. Liability of successors in title**

This clause sets how to determine, as between the owner of a place and a subsequent owner of the place, who is responsible for complying with an order or notice made and who is liable for an offence arising from failure to comply.

### **Clause 137. Liability of officers for offences by body corporate**

This clause declares that section 44C of *The Criminal Code* (regarding criminal liability of corporate officers) applies to certain offences.

**Clause 138. Offences by agents, principals, employees and employers**

This clause sets out how the court is to determine the culpability of agents, principals, employees and employers in respect of offences.

**Clause 139. Imputation of conduct and state of mind**

This clause sets out how the court in criminal proceedings is to impute to a body corporate or other employer the conduct and state of mind of its directors, employees, agents and other persons.

**Clause 140. Defences**

This clause sets out defences available in criminal proceedings to a corporate director or employer from liability established under Clauses 136, 137, 138 and 129.

**Clause 141. Offence that is also breach of heritage agreement**

This clause provides that, where conduct is both an offence and a breach of a heritage agreement, the Council has the option to pursue either prosecution for the offence or an action for breach of the heritage agreement, pursue both the prosecution and the action for breach in separate proceedings, or pursue both the prosecution and the action for breach in a combined proceeding.

**Division 6 – Miscellaneous provisions regarding civil proceedings**

**Clause 142. Action for damages**

This clause allows a person who suffers loss or damage as a result of a contravention to commence civil action to recover the amount of the loss within three years against the person convicted of the offence.

**Clause 143. Securing compliance with Act**

This clause allows the Supreme Court, the District Court or the State Administrative Tribunal, on the application of the Minister or the Council, to issue an injunction to prevent an offence from occurring.

**Part 12 — Miscellaneous**

Part 12 contains a variety of provisions addressed to several different issues, such as compensation, restrictions on lawsuits in respect of actions taken by the Council or by its members or staff, and removing a number of ambiguities to clear up popular misconceptions about the Council and its

## **Division 1 – Compensation**

Division 1 retains the substance of section 75 of the current Act, which allows a person to seek compensation for losses resulting from the termination or delay of works to a place that are halted or suspended as a result of a stop work order (See Clause 54) or by the entry of the place in the register (See Clause 74).

### **Clause 144. Terms used**

This clause defines various terms used in this Division.

### **Clause 145. Work prohibition: application for compensation**

This clause allows a person to apply to the Minister for compensation for a “compensable loss” (as defined in Clause 144).

### **Clause 146. Work prohibition: recommendation for compensation**

This clause sets out the considerations and process by which the Minister is to make a recommendation to the Treasurer in regard to an application for compensation made under Clause 145.

### **Clause 147. Work prohibition: no recommendation for compensation**

This clause sets out the process by which the Treasurer is to determine whether to compensate a person for a compensable loss in the absence of a recommendation made by the Minister within the prescribed time period.

### **Clause 148. Restriction on claim for compensation**

This clause declares that, except as provided in this Division or Part 10, neither the entry of land in the register nor the operation of the new Act in any other respect gives rise to any action or claim for compensation.

## **Division 2 – Other matters**

### **Clause 149. No private cause of action**

This clause declares that, except for the remedy for damages provided by Clause 142, there is no private cause of action for any offence or for a breach of a heritage agreement by a person who is not a party to the agreement.

### **Clause 150. Limited effect of processes under the Act**

This clause declares that, except as expressly provided under the new Act, no action taken gives the State, the Minister, or the Council any interest in, claim to, responsibility for or obligation in respect of any land, nor does such action affect the rights or obligations of any owner of the land or of any other person having an interest in or claim to the land.

This clause is intended to clear up the widespread misconception that the State assumes various responsibilities for properties that are entered in the register.

**Clause 151. Confidentiality**

This clause declares that any oral, written, electronic or other communication with an owner or occupier of any land is to be maintained in confidence, and may be disclosed only with the written consent of the owner or occupier or in the course of performing any duty or the exercise of any power or as required or allowed under the new Act or any written law, or for the purposes of investigating a suspected offence.

Under the current Act, whether or not such information is to be held in confidence is ambiguous.

**Clause 152. Challenge to entry in register**

This clause declares that no action may be commenced to review an action taken by the Council or the Minister under Part 3 if three years have elapsed from the date of the action concerned.

This clause was considered necessary to set an absolute limit on the length of time within which a register entry may be challenged.

**Clause 153. Protection from personal liability**

This clause declares that no action in tort may be commenced against a person for anything that person has done in good faith in performing a function of the Council.

This clause was considered necessary to prevent harassment suits from being filed against Council members and staff. This has happened in the past. Many other Acts have similar provisions.

**Clause 154. Recovery of costs by Council**

This clause provides that the Council may by regulation recover certain costs and disbursements incurred in carrying out specific functions, but no costs or disbursements may be recovered that arise from the entry of a place in the register under Part 3 Division 2, or advising on a referral under Part 5 Division 2, except as permitted by regulations pursuant to Clause 76(g) (which allows for recovery of costs arising from the Council reconsidering advice already provided at the request of an applicant or decision-maker).

The Council provides many voluntary services to assist owners and others but, under the current Act, has no power to recover costs or disbursements associated with such services.

**Clause 155. Regulations**

This is a standard clause that allows the Governor to make regulations prescribing all matters that are required or permitted under the new Act to be prescribed, or that are necessary or convenient to be prescribed for giving effect to the new Act.

**Clause 156. Review of Act**

This is a standard clause that requires the Minister to carry out a review of the new Act as soon as practicable after the 10<sup>th</sup> anniversary of its coming into operation, and table in each House of Parliament a report based on the review.

## **Part 13 — Repeal, transitional and consequential provisions**

### **Division 1 – Repeal**

#### **Clause 157. *Heritage of Western Australia Act 1990* repealed**

This clause expressly repeals the *Heritage of Western Australia Act 1990*.

### **Division 2 – Transitional provisions**

#### **Clause 158. Terms used**

This clause defines various terms used in this Division, such as “commencement day”, being the day on which the former Act is repealed, and “interim period” is defined as a period of two years from commencement day.

#### **Clause 159. Council a continuation of former Council**

This clause provides that the Council to be created under the new Act is a continuation of the Council created under the repealed Act.

#### **Clause 160. Members of former Council continue in office**

This clause provides that members of the Council immediately before the new Act commences continue in office.

#### **Clause 161. Unfinished proceedings: Council**

This clause provides that proceedings commenced by or against the former Council are to continue as if the proceedings had been commenced by or against the new Council.

#### **Clause 162. Completion of things commenced**

This clause provides that anything commenced to be done by the former Council may be continued by the new Council after commencement of the new Act.

#### **Clause 163. Continuing effect of things done**

This clause provides that any act, matter or thing done by, to or in respect of the former Council is taken to have been done or omitted by, to or in respect of the new Council.

#### **Clause 164. First annual report of Council**

This clause provides that the first annual report of the new Council is also to report on proceedings of the former Council from 1 July of the preceding year up to the date the new Act commences.

**Clause 165. Heritage Fund a continuation of former Heritage Fund**

This clause provides that the Heritage Fund is to be a continuation of the Heritage Account established and operated under section 14 of the repealed Act.

**Clause 166. Register**

This clause provides that the former register as it exists immediately before commencement continues under the new Act as the new register. This clause also provides that no objection to anything done in relation to the former register may be raised or determined in any proceedings commenced after the end of the interim period, which is two years from the date of commencement.

The time limit was considered necessary, along with Clause 152, to set an absolute limit on “collateral”, or indirect, court challenges to the validity of register entries made under the repealed Act.

**Clause 167. Interim registration**

This clause provides that places that are interim-registered under the repealed Act are taken to be temporarily registered for the purposes of the new Act, but if not registered under Part 3 Division 2 within two years of commencement these places will no longer be considered registered places.

It is anticipated that, at the commencement of the new Act, a number of places may still be interim-registered. Because the new Act will have no provision corresponding to “interim registration”, this clause is necessary to allow a “grace period” within which the Heritage Council may seek to have the places entered under Part 3 of the new Act.

**Clause 168. Conservation orders**

This clause provides that conservation orders made under the repealed Act that are still in effect at commencement are deemed to be protection orders under Part 4 Division 1.

**Clause 169. Local heritage survey**

This clause provides that an inventory prepared by a local government under section 45 of the repealed Act is taken to be a survey prepared under Clause 99(1).

This clause is necessary to preserve the time and effort that local governments have put into compiling and maintaining their current “inventories” under section 45 of the current Act.

**Division 3 – Consequential amendments**

**Clause 170. *Building Act 2011* amended**

This clause amends the *Building Act 2011* by replacing references in that Act to the repealed Act with references to the new Act.

**Clause 171. *Constitution Acts Amendment Act 1899* amended**

This clause amends the *Constitution Acts Amendment Act 1899* by replacing a reference in that Act to the repealed Act with a reference to the new Act.

**Clause 172. *Liquor Control Act 1988* amended**

This clause amends the *Liquor Control Act 1988* by replacing a reference in that Act to the repealed Act with a reference to the new Act.

**Clause 173. *Planning and Development Act 2005* amended**

This clause amends the *Planning and Development Act 2005* by replacing references in that Act to particular provisions of the repealed Act with references to the corresponding provisions of the new Act and also deleting references that are no longer meaningful.

**Clause 174. *Strata Titles Act 1985* amended**

This clause amends the *Strata Titles Act 1985* by replacing references in that Act to particular provisions of the repealed Act with references to the corresponding provisions of the new Act.

**Clause 175. *Swan Valley Planning Act 1995* amended**

This clause amends the *Swan Valley Planning Act 1995* by replacing a reference in that Act to a provision of the repealed Act with a reference to the corresponding provision of the new Act.