



**HERITAGE
COUNCIL**
OF WESTERN AUSTRALIA

TITLE

Procedural Fairness – Consideration of Third Party Submissions

DOCUMENT CONTROL

Current from	April 2018
Version	1.0
Replaces	N/A
Next Review Date	April 2019
Officer responsible	Director Heritage Practice

POLICY STATEMENT

The Heritage Council of Western Australia (the Heritage Council) will adhere to the principles of procedural fairness when considering third party submissions in relation to its functions under the *Heritage of Western Australia Act 1990*.

As a general rule, the Heritage Council will not accept third party submissions under section 9 of the *Heritage of Western Australia Act 1990* (the Act), or otherwise, in relation to matters referred under section 11 of the Act. Such submissions will be redirected to the appropriate decision making authority, who in turn will follow their own statutory processes for procedural fairness.

In such cases, third party submissions will be forwarded by the Department of Planning Lands and Heritage directly to the appropriate decision making authority without referral to the Heritage Council. The person making the submission will be informed accordingly.

The Heritage Council is not obliged to receive third party submissions made under section 9 to lift an existing Conservation Order. However, if it sees fit, the Heritage Council will forward third party referrals to the Minister for Heritage and, as appropriate, consider the substance of the submission when providing its advice to the Minister. In such cases the Heritage Council will adhere to the principles of procedural fairness.

This policy does not affect the Heritage Council's statutory responsibility to invite third party submissions in connection with a proposed ongoing Conservation Order.

OBJECTIVE

The objective of this policy is to clearly define those situations in which it is appropriate for the Heritage Council to consider third party submissions and in doing so meet the requirements for procedural fairness.

SCOPE

The policy applies to any matter before the Heritage Council and its Committees that meets the criteria listed herein.

DEFINITION

“Procedural fairness is concerned with the procedures used by a decision-maker or provider of advice that is binding on, or influences a decision maker, rather than the actual outcome reached. It requires a fair and proper procedure be used when making a decision. It is highly likely that those involved in the decision making process who follow a fair procedure will reach a fair and correct decision.”

Ombudsman Western Australia, Guidelines for Procedural Fairness (Natural Justice), May 2009.

RESPONSIBILITY

The Council, its Committees and the Assistant Director General of the Heritage Services Division, Department of Planning, Lands and Heritage (the Department) have the responsibility for ensuring compliance to this Policy.

RELATED DOCUMENTS

Ombudsman Western Australia, Guidelines for Procedural Fairness (Natural Justice), May 2009.

Heritage of Western Australia Act 1990.

Planning and Development Act 2005.

LEGISLATIVE AND REGULATORY CONTEXT

Administrative law regarding procedural fairness entitles a person to be heard (either in writing or orally) before a decision is taken by government that could affect their rights or property. Although the Heritage Council is not a decision making authority, its advice under s.11 *Heritage of Western Australia Act 1990 (the Act)*, is binding on a decision maker unless no feasible or prudent alternative exists for a particular course of action. The principles of procedural fairness therefore apply to the Council and its committees.

The Heritage Council also provides advice to the Minister for Heritage (the decision maker) on Conservation Orders under s.59 of the Act. This advice can affect an interested parties rights and property and therefore fall under the principles of procedural fairness.

The principles of procedural fairness are included in the heritage and planning statutory framework, details of which are provided below.

- **Planning and Development Act 2005**

The principles of procedural fairness are embedded within the *Planning and Development Act 2005* and its deemed provisions, which provides the list of matters that a decision maker should consider in making its determination. The Planning Act requires a decision maker to give regard to third party submissions and make a recommendation on each submission.

The Minister for Planning also has the power under the act to respond to anyone aggrieved by the local government's actions and intervene in the process.

Therefore mechanisms exist to ensure all those impacted by a planning decision are afforded the rules of procedural fairness at the original development approval stage and any subsequent appeal.

- **Heritage of Western Australia Act 1990**

Under section 9 of the *Heritage of Western Australia Act 1990* any person may refer in writing to the Council any act, matter or thing which gives rise to concern as to the conservation of a place that is or maybe of cultural heritage significance. The Council can then make a recommendation to the Minister or decision making authority or otherwise deal with it as *the Council thinks fit*.

The Heritage Council is not obliged to receive third-party submissions made in the form of section 9 referrals that relate to proposals referred for advice under section 11.

Section 9 allows the Heritage Council to accept third party written submissions and, where the Council considers it appropriate, report and make recommendations to any Minister or decision making authority. However, in doing so the Council must adhere to the rules of procedural fairness and allow a fair hearing to anyone impacted by its advice.

The detail of what is required will vary in each situation but in most cases it will require the Heritage Council to:

1. Notify interested parties that it proposes to make a determination or provide advice that will affect that person's rights,
2. Disclose and continue to disclose third party information that comes before it in relation to that advice, and
3. Allow the party to respond to that information and to present its case, either in writing or in person depending on the circumstances of the particular case.

The Heritage Council is not a decision maker, therefore before considering any third party submission, the advice of the decision maker must be sought by the Council to gain a clear understanding on the impact and agreement on any timeframes or commitments for decision making.

Section 59 Conservation Orders

Where, in the opinion of the Minister, it is necessary or desirable to provide special protection in respect of any place, whether or not entered in the Register, the Minister may make a Conservation Order. In these cases, the Minister is the decision maker.

The role of the Heritage Council is to advise the Minister on the duration of a Conservation (Consent) Order or, for an ongoing Conservation Order, invite generally, submissions relating to the proposed Conservation Order, consider those submissions and make its recommendation to the Minister.

Section 59(4) of the Act provides clear guidance on how to invite and consider third party submissions associated with an ongoing Conservation Order.

Any person aggrieved by a Conservation Order (not being a Consent Order) and a Stop Work Order longer than 42 days, can apply to the State Administrative Tribunal (SAT) who may revoke, confirm or in consultation with the Minister vary the Conservation Order. In the case of an appeal, section 60(2)(c) of the Act requires that the SAT take account of any submissions made, and in consultation with the parties to the application or referral and any decision making authority or other person appearing, to SAT, to have an interest.

Section 59(7)(b) of the Act empowers the Minister to terminate a Conservation Order, following consultation with the Heritage Council. In effect, the Council advises the Minister as to the desirability of terminating or retaining a Conservation Order.

In connection with its advice to the Minister, the Heritage Council is not obliged to receive third-party submissions made in the form of section 9 referrals that relate to proposals to terminate Conservation Orders.