



20th May 2018

Assistant Director General, Heritage Services
Department of Planning, Lands and Heritage
PO Box 7479
Cloisters Square PO WA 6850

Review of the *Aboriginal Heritage Act 1972* (WA)

Submission by **Robin Stevens**
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Dear Sir / Madam,

Please accept this submission in response to the current review of the *Aboriginal Heritage Act 1972* (WA). I begin with some general comments.

I am a heritage consultant working in Western Australia for the past twenty+ years. I have extensive experience in cultural heritage management, native title and related research projects. I welcome this proposed review of the AHA, and commend the initiative by the Minister and Department (DPLH) in establishing a process of consultation and meaningful input into this review with Aboriginal groups and organisations, with industry and with heritage practitioners.

As a general comment, the AHA is in need of an update. It may be appropriate to write an entirely new Act; but at the very least it is in need of refining, among other things, to remove ambiguity and confusion. The language in the AHA is at times a product of the 1960s and early 1970s, fixated on museum-like cataloguing and acquisition processes. At its inception, the AHA was something of a ground-breaking piece of legislation. But since then, national and international standards in Cultural Heritage Management (CHM), and the development of native title and customary rights in heritage management have advanced considerably. The AHA is now embarrassingly out of kilter with modern standards. As stated above, it may be more practical to write an entirely new Act.

I'd like to offer some points or brief notes on various parts of the AHA and on heritage management generally for your consideration in the redrafting process.

What is heritage? In short, I would suggest it is all that one generation passes down to the next in an ongoing chain of cultural continuance. And it includes, 'sites' and places, and landscapes and objects and songs, poetry and dress and cultural body adornment and the manner in which food is gathered, prepared and distributed, spiritual belief, sporting heroes, mythical heroes,

historic and romantic narratives, rules of marriage and social etiquette, and so on. It is the defining core of a people's identity. It's the whole rich matrix of your (cultural) being, of your very identity.

The current Act is a land management Act revolving around place-based heritage (more or less). I have written my notes around an updated view of place-based heritage; but it should be more than that. Heritage conservation goes a long way towards meeting some of the needs in intangible – value-based or social-based - heritage. Resources into recording language and Aboriginal arts, folklore and knowledge of ecology and landscape resources. Some of this might be captured under other legislation and government policy – Arts and Communities and Housing and so on. But I think a concerted effort to incorporate the values often recognised under native title (use and knowledge of medicines, ochre, secret and public ritual performance, access to land, etc) needs to be built into a new Act.

Aboriginal Heritage outside of legislation and bureaucratic procedure is real. It exists independently of government and industry. It is the heritage of living communities, and NOT some commodification of 'values' to be assessed against other values in society. This heritage is tangible (material) and intangible (non-materials) and exist on country, through country and in traditional practise; and it belongs to Aboriginal groups themselves. *Heritage legislation* on the other hand is mainly concerned with some elements of Aboriginal heritage, namely place-based heritage – 'sites', objects and areas. Heritage legislation does tend to 'balance' heritage values with or against other values (development). Balance of interests in a modern state is that which benefits us all. The United Nations has a 'Declaration of Indigenous Peoples', which in part says,

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

We are a highly developed State, within a modern nation. Meeting the ideals of modern management and according respect to Indigenous peoples should not be beyond us; should be seen as some romantic cause, but should be the standards by which we set societal norms.

*** To be clear, while much talk is made about 'balancing' interests of heritage and development, this is a Heritage Act and not a dual Act for facilitating development and protecting heritage. In managing heritage, such an Act necessitates mechanisms that allow developments to occur, and such mechanisms should not be overly cumbersome or bureaucracy-heavy; but its over-riding aim is Heritage protection and conservation.

In a highly-developed industrialised nation, most particularly in Western Australia, the highest standards should prevail, which – like industry itself – is upgraded to the best in contemporary practise.

There has been an unfortunate and unnecessary oppositional thinking or ethos in this arena, where heritage is often seen to be the bane of development. This is a serious image problem that is not helpful to Western Australia, as well as interfering with rational land management practices. A concerted educational campaign might be useful in which Industry and the public at large might learn to appreciate the extraordinary cultural gift that Aboriginal heritage is to the State of Western Australia. It is in everyone's interest – and industry especially as serious land users – to be part of a regulatory system that celebrates and appropriately manages heritage, while affording abundant opportunities for developing a growing economy. In the modern world, valuing cultural heritage enriches us all.

Finally, it is clear that many industry proponents have come a long way since the 1980s. Many take seriously the importance of appropriately managing cultural heritage. They stand out as leaders in their field. The voices from all sides that speak to the richness of heritage and why it is important to the well-being of Western Australian society as a whole are the voices that most need to be heard in this process.

General Notes

I start by saying that Aboriginal heritage is Aboriginal in the first instance; and their involvement and voice should be the highest priority in heritage management. So, while all West Australians may take pride in it, it is important to point out that Aboriginal heritage belongs to living communities; is dynamic and added to in an ongoing chain of cultural practise and custom. It is their birthright to protect and cherish it. And more than that, it is the heritage of particular Aboriginal territorial groups. E.g. Nyungar heritage is not pan-Aboriginal (or pan-West Australian) but specifically Nyungar; in the same way that megalithic tombs in Scotland are distinct from megalithic tombs in England. Heritage is tied to culture.

I'd like to see the AHA in line with or compatible with other state and federal legislation and heritage protocols and principles; including the *Western Australian Heritage Act 1986*, the *Native Title Act 1994* and the (Australian ICOMOS) *Burra Charter*. The idea is to have modern standards that are already recognised by expert bodies, and recognition of rights of indigenous peoples in managing their own heritage. More than that, it should aim to remove as much as possible contending standards.

I would also like to see the WAHA and AHA combined into a single heritage act, yet I recognise that may be some time away. But even now the rights and standards in one should be equivalent in the other. That is not what we currently have in place (see below).

I believe that 'Heritage' is part of modern land management processes, involving multiple parties. So, while the over-riding aim of such an act should be for the protection and conservation of Aboriginal heritage, it is in effect a management regime in the context of development and other land use processes (mining, exploration, public utilities, national parks, Aboriginal customary practise and so on). For it to be effective it should be pragmatic in nature and relatively easy to understand.

There should be scope for co-management of heritage (which underlies the fact that Aboriginal heritage in WA sits in a matrix of custodial rights). This gets to a central matter in the Act; that Aboriginal Heritage is a living and dynamic thing, not a relic of the past. What is significant to

the State, to the Community as a whole, necessitates recognition local groups and their heritage as a vital element (or representation) of the State's heritage. E.g. Yinhawangka Heritage is important to the State because it is the valued heritage of that group. There is no pan-Aboriginal culture. Rather there are multiple Aboriginal groups who have their own heritage. They may occasionally overlap.

Apart from any review of the AHA, and what ultimately is passed in Parliament, I believe that DPLH should commit itself to a process of internal review – over several years – to develop initiatives and processes in consultation with relevant parties. That is, the Department should commit itself to on-going community participation in the realisation of the management or co-management of WA's Aboriginal heritage.

The review of the Act should be in conjunction with the Regulations that pertain to the Act also. That is, the Regulations also need to be reviewed in an open and transparent manner.

Please use gender-neutral language only. This should not be a contentious issue; it is 2018, after all.

Preamble

I would suggest that the opening preamble start with an acknowledgement of the importance of the heritage of the Aboriginal peoples of Western Australia. And follows with statement that it is an act for the Protection and Conservation of Aboriginal heritage. To be clear, protection is about affording legal status and, where need be, enforceable sanctions in protecting land-based (and water-based) tangible and intangible heritage. Conservation entails on-going management and enhancement, including resourcing, education programs and co-management options. I also recommend that a statement that clearly articulates that heritage is dynamic; that it is 'living' heritage of contemporary Aboriginal communities would be appropriate. And, that the Act aims to redress the low levels of public knowledge and appreciation of Aboriginal heritage, and endeavours to increase public appreciation and enjoyment of this unique heritage.

A statement that the Act does not over-ride rights, including native title rights, attained elsewhere, and as already recognised in the Act. That is, part of the clause of the current section 7.1.(a) might be included in the preamble.

7.1. ... this Act shall not be construed —

(a) so as to take away or restrict any right or interest held or enjoyed in respect to any area, site or object to which this Act applies, in so far as that right or interest is exercised in a manner that has been approved by the Aboriginal possessor or custodian of that area, site or object and is not contrary to the usage sanctioned by the Aboriginal tradition relevant to that area, site or object;

A statement that it is an Act to protect, conserve and manage sites, objects and areas of heritage significance associated with people of Aboriginal descent. Notwithstanding objects that may be out of place, it is an Act for tangible and intangible place-based heritage; including land, waters, sub-surface and storage facilities (for objects).

Conservation

The Act should be a heritage protection and conservation Act. Conservation is about on-going management and or enhancement of heritage. As stated above, there is a low-level of understanding or appreciation of Aboriginal heritage in Western Australia. Public education programs, joint community programs with local shires and PBCs could be encouraged. Co-management options should be promoted; and financing Ranger programs to facilitate greater involvement in Aboriginal management.

What is Protected?

I would suggest that what is protected under the Act are Heritage Values, which are (mostly) anchored to place. It would include:

- Objects
- Sites
- Areas (Cultural Landscapes, Cultural Precincts or Heritage Zones)
- Heritage Values (non-place based, etc)

These might be tangible (material) or intangible (immaterial), land or water places, surface or sub-surface, historic structures, social places, spiritual places, movable or immovable objects. Cultural heritage is also contextual. So, in the same way that a statue of the Crucifixion is more appropriately set in a church than a museum – because it continues to play a part in the ongoing celebration of culture and traditions of living communities - Aboriginal objects and places are enriched and enlivened within their cultural surroundings. In-situ heritage management should be a priority. I recognise this won't always be possible, but it should always be the first option to be considered in the management process.

Objects would include stone artefacts and grinding implements, wooden implements, ritual shields and dancing masks and so on. It would also include glass tools, tools and toys made from tin and other historic materials.

Sites are discreet places of heritage value that require management. Site boundaries therefore should reflect the area in which management is most concerned. Sites might include, ritual areas or places of known social / cultural gatherings and activities, rockshelters with cultural materials, places of rock art or stone arrangements, burial places, scarred trees, artefact scatters, places associated with mythological or spiritual narratives / potency, places of historic events or association, a women's birthing site or places for accessing cultural resources (e.g. ochre) and so on.

Areas would be (mostly) large areas, often containing multiple cultural associations / heritage values; and often containing multiple sites within them. Such areas might include rivers or part of a range, Dreaming Tracks or an entire island. They might be cultural landscapes or Cultural Precincts or they might be zones that cover portions of a town, lake, range or flood plain. Heritage Areas are large areas or pathways that would normally be too difficult to manage under current 'site' processes, which are cumbersome and expensive for large areas. Rather, they would be managed by Heritage Protocols or Cultural Heritage Management Plans. A

Cultural Heritage Management Plan would need to be drawn up for each area once it is a designated heritage area.

To be clear, heritage **areas** are managed in such a way as to retain the heritage values contained within a large area, while permitting (if there is a need) certain developments to proceed. There may be 'protected' zones or sites *within* a designated heritage area but the area as a whole does not necessarily preclude developments, providing such developments do not detract from the heritage values (e.g. permitting a dual railroad to run between two hills connected through a mythological narrative would not necessarily detract from the heritage values of those two hills; but a large stockpile impeding a line-of-sight view would). Or, there may be times in which a proposed development would impact the heritage values of an area, but the Cultural Heritage Management Plan (CHMP) in place would stipulate the nature and level of consultation to take place (e.g. A new bridge is built across the Swan River, with concrete pillars in the waterway. The Heritage protocol or CHMP – provided to the proponent in advance – stipulates the level of consultation, and with whom, to take place. If, on the other hand, it is simply replacing existing infrastructure within the existing footprint a simple letter outlining activities may be all that is required – it will depend on the CHMP in place and the nature of the proposal). In most cases a proponent and Aboriginal group will know in advance how to proceed with a particular proposal within a heritage area without having to await s18 processes (or some equivalent). Because a Cultural Heritage Management Plan or Heritage Protocol is in place, a proponent can have a clear process outlined long before they draw up their plans. Over large areas, this will be a useful tool in saving time and expense while ensuring Aboriginal custodians and heritage practitioners have in place heritage management mechanisms. The aim is to have a pragmatic approach in land management.

Heritage Values that are not necessarily place-based, such as corroborees, language, songs, modern arts, collecting traditional medicines, and so on need to be accommodated within the Act. This area is likely to go beyond the scope of any new Act, any single Act. But a new approach to heritage management must recognise that non-place-based Heritage Values enrich our society, and should therefore set up programs, across departments and agencies, to celebrate, encourage and enhance this area of heritage.

As a side note, **Significance**: the **Register** of sites and places has an annoying way of separating site types / significance. Most sites are deemed 'archaeological' or 'ethnographic' as if those two categories are some over-riding characterisation of a site. We don't see 'Aesthetic' sites or 'Social' sites and rarely 'Historic' sites on the register. And why would say a rock art site be archaeological but not ethnographic or spiritual or aesthetic or social (It's a bit like describing the breaking of bread in Holy Communion as 'a dietary supplement'). Why is a scarred tree 'archaeological' and not 'ethnographic'. Why is a 'men's site' *ethnographic* and not *archaeological* and *spiritual*. And so on. Sites and objects and areas are Aboriginal places and objects of heritage value (often with multiple forms of significance. E.g. a Wadjarri rock art site = an Aboriginal site; listed under 'rock art', and significance: 'archaeological, ethnographic, aesthetic').

The use or misuse of *heritage* terminology in the current Act has only ever added confusion and frustration for all concerned. For example, 'Significance' is said to mean 'importance', but

later it means something a bit different. 'Interest', 'Profoundly significant', 'Special significance' are all poorly defined, if defined at all. I would suggest that the term 'significance' be used when attributing heritage values to an object, site or area, and that it be used in accordance with the *Burra Charter*. The terms 'Profound significance', 'Special significance', 'Importance' and 'interest' should be removed entirely.

*** The Burra Charter is not specifically for Indigenous heritage management. I would simply point out that *ethnographic significance* combines several types of cultural significance, as they might be understood within the Charter (Social, Historic, Aesthetic, Spiritual).

Reporting a Site to the Department

I have never been a fan of giving site information to the Department unless the Traditional Owner (or Custodian) group want me to. **Section 15** is discriminatory towards Aboriginal groups and fails to recognise a process in this country of the past 24 years where Aboriginal people assert – and after a time, recognised by the Federal Court – to manage their heritage places in accord with their own rules and customs. I do not think any person, consultant or other, has an ethical right to report a site to the Department unless the custodians want them to. My own feeling is that this is a *rights* issue; and I start with the recognition of Aboriginal custodianship over *their* heritage, so I have always followed their instructions. In consideration of section 7.1(a), as it currently stands, the Act does not intended to remove or replace existing customary rights to protect and manage heritage, it is important that any person working within the field on behalf of Aboriginal groups must recognise their right to protect their heritage or divulge or not divulge their cultural information in the manner fit for them. This has to be reflected in the Act.

With this in mind, the **Register** must be a reflection of sites and areas and stored objects (or managed materials), CHMPs and Heritage Protocols, but it must also respect the right of Aboriginal groups and those working for them or on their behalf to adhere the intent of s7.1(a).

If the DPLH can work with Aboriginal groups, develop co-management regimes, then there is every reason to believe that the Register will more heavily relied upon.

The ACMC / Heritage Assessing Committee

The Aboriginal Cultural Materials Committee (ACMC) should be scrapped. To point out the obvious, heritage extends a long way beyond *material culture*. This is a relic of museum acquisition thinking. And, currently the ACMC is little more than a s18 site impact - approvals committee.

A new Heritage Assessing Committee or Heritage Advisory Committee (Council / Board) should be formed, which has one *primary* function; to assess the heritage significance of objects, sites and areas. Its related duties would include giving advice on cultural heritage management, reviewing Cultural Heritage Management Plans and so on.

I would suggest that this assessing / advisory committee be made up of professional anthropologists and archaeologists (say, two or three of each) and Aboriginal representatives (say, six). The Aboriginal representatives might be selected from native title representative

bodies and PBCs; and there might be scope to have a rotation system in place for different regions. The new Heritage Assessing / Advisory Committee should be able to co-opt members for a time or a single sitting to assist with assessments. For example, a rock art specialist might be asked to sit in for particular matters.

Significant regard should go to the perspectives of native title holders in the determination of a site or object or Area of heritage value. Evaluation of significance should draw on the *Burra Charter*.

Given the huge backlog of places to be assessed and the likelihood of thousands of new places to be identified in coming years, I would suggest the new Heritage Assessing Body meet at least once a week; or possibly have a permanent ongoing assessing process, with the Committee members being paid a salary (or equivalent).

Development, 'Approvals' and Site Impact

As much as I hope to see a new Act emerge that is more in keeping with modern standards in Cultural Heritage Management (and there's no reason why that cannot be achieved), I understand that the Act is – more or less – a land management Act that will be used by, and that applies to, multiple users and multiple interests. Out of necessity, this entails processes in which developments of various forms of land use and water use can be appropriately managed. It entails also a recognition of varied interests that the government must pay heed to; and therefore, processes of consent must also be available to permit impact upon heritage objects, sites, areas and values. Sometimes referred to as the 'approvals process'.

Such processes need to be efficient and transparent. Its functions and decisions need to be procedurally fair; and generally in line with the sort of processes and rights of appeal contained within the *WA Heritage Act 1986*. I would suggest that substantially increasing the resourcing of the Department is critical.

Separate to the functions of a new Heritage Advisory Committee (above), I would suggest that a new (land-use) Committee (Land Access Committee ??) be formed to assess heritage impact notices (i.e. approvals). This Committee would seek the written advice / assessment of Heritage Advisory Committee, and review the impact notice. This Committee should be well-resourced, and meet regularly. Perhaps once a week or as for the Heritage Assessing / Advisory Committee (i.e. on-going).

A Heritage Appeals Tribunal should be established to mediate matters where heritage values, impacts and management decisions require arbitration.

Penalties

A heritage protection Act need to be legally enforceable. The current state of play is that there are no effective sanctions in place. Very few prosecutions proceed (where they do, they are inadequate). The central issues are not so much the amount of the fine that might (rarely) be imposed, but rather 1), ensuring prosecution takes place, and removing ignorance as a defense; and 2) sanctions that are not solely monetary but able to retract approvals for use of the land and so on. Some parity with the *WA Heritage Act 1986* might be useful.

Unfortunately, I have not had time to review every part of the AHA in the way I would like. I have done these notes between field work, but I hope they are helpful to you and will be given some consideration when drafting the forthcoming Discussion Paper.

Yours sincerely

A handwritten signature in blue ink that reads "Robin Stevens". The signature is written in a cursive style with a horizontal line above the first name.

Robin Stevens
Stevens Heritage Services