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Submitted to **Review of the Aboriginal Heritage Act 1972**
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About You

Are you submitting a response as an individual, or on behalf of your organisation?

Individual

Individual details

Are you of Aboriginal or Torres Strait Islander descent?

No

What is your name?

Optional:
Gavin Jackson

Do you give permission for your name to be published with your feedback?

No

Purpose of the Act

Question 1

No

If not, what changes should be made?:
The Act is a Heritage Act and so it's primary concern should be the preservation of Heritage Values. But it needs to do more than this. It also needs to be concerned with Conservation. And not only of places and objects, but also of Heritage Areas or Precincts (Landscapes).

Heritage does of course have both tangible and intangible aspects and so the Act, and it's title, should acknowledge this.

In practical terms the Act also has to cope with competing interests concerned with development and therefore has to cope with land access and competing priorities. The title should therefore also refer to Cultural Heritage Management.

Roles under the Act

Question 2

2 - who should be consulted?:
The Act needs to explicitly recognise Native Title rights - in particular custodial rights of Aboriginal people, as they pertain to Heritage sites, areas objects and values. Aboriginal Heritage specifically belongs to Aboriginal people and so Aboriginal people must be consulted about their Heritage and their pre-eminent position must be enshrined in the Act. Aboriginal involvement and voice must be given the highest priority in an Aboriginal Heritage management decisions.

Aboriginal people must also be afforded decision making powers with regard to Aboriginal Heritage. The ACMC as it currently stands is outdated and inappropriate and should be entirely replaced. The functions of the current ACMC should be split between at least two different advisory boards or committees because it is unnacceptable that the same committe has responsibility both for assessing Heritage significance and for deciding whether sites can be sacrificed for development purposes as is currently the case.

A new Heritage Assessment Committee needs to be created, for the primary purpose of assessing the heritage significance of objects, sites, areas and values. It may also be responsible for advising on, and assessing, cultural heritage management practices and reviewing Cultural Heritage Management Plans. This Heritage Assessment Committee should consist of Aboriginal people, preferably from the Group who has custodial rights for the Heritage values under consideration and, if possible, those individuals from the community with recognised and appropriate authority. It could also contain one or two professional anthropologists and archaeologists. I believe also that it would be most appropriate for this committee to be responsible for issuing Permits such as s.16 permits currently issued by the Registrar.

Evaluation of heritage significance should be consistent with the tenets of the Burra Charter.

With regard to the consideration of applications to disturb heritage values, this should be dealt with by an entirely separate committee to avoid conflicts of interest. This new Land Access Committee should have as its sole purpose the assessment of heritage impact notices. This Committee would consider the determination of the above Heritage Assessment Committee in any consideration of an impact notice.

Any process devised for approval (or otherwise) of these heritage impact notices needs to be efficient, transparent and procedurally fair. A similar process, including rights of appeal, already exists within the Heritage of Western Australia Act 1990 and this could form a useful template for any processes to be created under the revised AHA.

The Act needs to be compatible with the UN Declaration on the Rights of Indigenous People which states:

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.

As you see from the above, Heritage is not simply related to places. Assessment of Heritage therefore needs to be valuers based rather than sites based. This highlights a major shortcoming of the current Act which needs to be addressed.

Any new or revised Act needs to recognise that Aboriginal heritage is living and dynamic and is not restricted to just sites and objects but also includes intangible, non-material elements such as cultural practices and customs. Again the Burra Charter is a good resource for defining these intangible elements of heritage.

Question 3

Ineffective

How can the provision to appoint honorary wardens be improved?:
The provision in the current Act for honorary Wardens is under utilised and under resourced. Perhaps this role could be combined with the Aboriginal Ranger Program. The current grant scheme should be extended and possibly administered through individual Native Title bodies or PBCs in order to get more Rangers/Wardens out on country and also to provide appropriate training and equipment for the individuals who undertake the role.

Question 4

No

Role and functions - Minister:
The Minister has too much power under the current Act. At the very least, the power to overturn the recommendation of the ACMC should be revoked in order to free the process of political motivations and expediency. Remember that the Act does bind the crown so it is inappropriate for a minister of the crown to have such power. I would hope that the new or revised legislation would establish a process for dealing with heritage impact notices which is efficient, transparent and procedurally fair and therefore will not require its assessments or decisions to be vetted by the Minister.

If the Minister is to retain a role associated with the care and protection of Heritage Values, this should be expanded to ensure that the above mentioned tangible and intangible aspects of Heritage are all included under the purview of the Act. The Minister should also have a role in both the PROTECTION and CONSERVATION of Aboriginal Heritage where protection includes legally enforceable sanctions and conservation involves providing funding and resources for the enhancement and on-going management of Heritage.

The Ministers powers under Part VI of the Act would seem to be more appropriately vested solely in the Trustees of the WA Museum. This section appears to be primarily concerned with sacred movable objects although the wording is ambiguous.

No

Role and functions - Registrar:
Again the object of the legislation should not be restricted to preservation but should also include conservation and management. It is appropriate that the Registrar should maintain a register of Aboriginal Heritage places, objects and values but I believe the issuing of permits (specifically s.16 permits) would be better handled by a newly formed Heritage Assessment Committee as discussed above under Q.2

It may in fact be possible to dispense with the Registrar entirely.

No

Role and functions - Committee:
As discussed above in Q.2, Aboriginal Heritage belongs to Aboriginal people and so Aboriginal involvement and voice must be given the highest priority in an Aboriginal Heritage management decisions. Aboriginal people must be consulted about their Heritage and their pre-eminent position must be enshrined in the Act.

Aboriginal people must also be afforded specific decision making powers with regard to Aboriginal Heritage. The Minister should not be given the power to over-ride or usurp this right.

The ACMC as it currently stands and the processes it follows under S.18 of the Act, are outdated and inappropriate. The functions of the current ACMC should be split between two different advisory boards or committees to avoid the inherent conflict of interest between assessing Heritage significance on the one hand and determining whether sites can be destroyed or disturbed on the other.

A new Heritage Assessment Committee needs to be created, for the primary purpose of assessing the heritage significance of tangible objects, sites, areas and intangible values and cultural practices. This Heritage Assessment Committee should primarily consist of Aboriginal people, preferably from the Group who has custodial rights for the Heritage values under consideration and, if possible, those individuals from the community with recognised and appropriate authority. It should also contain one or two professional anthropologists and archaeologists to provide specialist knowledge and expertise where necessary. The evaluation of

heritage significance should be consistent with the tenets of the Burra Charter. This committee should also be responsible for issuing Permits,(e.g. s.16 permits), advising on, and assessing, cultural heritage management practices and reviewing Cultural Heritage Management Plans.

A second and distinctly separate Committe should be established to deal with Heritage Impact Notices. This second committee would consider the determinations of the above Heritage Assessment Committee for any affected sites when considering an impact notice.

Any process devised for approval (or otherwise) of these heritage impact notices needs to be efficient, transparent and procedurally fair. A similar process, including rights of appeal, already exists within the Heritage of Western Australia Act 1990 and this could form a useful template for any processes to be created under the revised AHA.

No

Role and functions - DPLH:
Yet a I would stress that the object of the legislation should not be restricted to preservation alone but should be extended to include conservation and active management.

For many years now the primary role of the DPLH (and its former incarnations) has been as a service provider to Mining and Industry with its principal activity being the administering of the S.18 provisions of the Act for the approval of develpoment projects and the concomitant destruction of Aboriginal Heritage. Whilst it may be argued that this is not entirely true, and a somewhat uncharitable assessment, what simply CANNOT be argued with is the fact that this is the dominant view of the Department that is held by Aboriginal communities and organisations across the board, as well as by the majority of heritage professionals currently involved with Aboriginal Heritage Management practices (including, it must be said, some of whom who currently work in the DPLH).

The Department needs to be better resourced and better trained in contemporay standards of Cultural Heritage Management Practice. DPLH should undergo a process of internal review in order to identify skill shortages and training requirements necessary for the effective administration of any new or revised Act. The DPLH should then develop initiatives to address these needs and processes.

One important initiative which is sorely needed would be to establish processes and protocols for a more cooperative and inclusive approach to Heritage Management. That is, the DPLH should actively pursue opportunities for on-going community participation in co-management of WA's Aboriginal heritage.

What is Protected?

Question 5

No

5. How can section 5 be improved?:
Once again, the purview of the Act needs to be extended to be more inclusive of the contemporary understanding of what constitutes Heritage (both tangible and intangible). Section 5 is 46 years old and is consequently woefully out of date.

The Definitions of Heritage in the revised or new Act need to be consistent with the definitions contained in other State and Federal Legislation and heritage protocols and principles: including the Native Title Act 1993, the Aboriginal and Torres Straight Islander Heritage Protection Act 1984, the Heritage of Western Australia Act 1990 and The Burra Charter. The Definitions should cover Objects, Sites, Areas, Landscapes, Values and Cultural Beliefs and Practices. This is not difficult to define and there is no need to re-invent the wheel. Simply review other sources and incorporate the elements of best practice from each. The idea being to adopt modern standards and definitions that are already recognised and endorsed by expert bodies.

Question 6

No

6. How can section 6 / Part VI be improved?:
Again the definition needs to be expanded to include historical objects such as glass artefacts or things that have been made from historic materials such as tin etc which may not necessarily a purpose connected with traditional cultural life but may reflect a response or adaptation to rapidly changing circumstances brought about by colonisation.

Question 7

No

Additional comments:
As has been demonstrated in the recent past, the declaration of a Protected Area under the Act does not confer any special protection to the Heritage sites or values therein. For example we now have several additional rail lines through the Woodstock Abydoss Protected Area, that were not there at the time of its declaration. world Heritage Listing would be much more effective for Aboriginal Heritage Values of outstanding significance.

The failure of the s.19 provisions of the current Act highlights the fact that the Act, in practical terms, needs to accommodate and mediate between multiple, often competing or conflicting interests. This will require the implementation of a process in which various forms of land (and water) use can be appropriately managed.

In many parts of the world, including in other Australian States and Territories, 'Heritage' is now an already integrated part of modern land management processes. The New WA Act could again benefit by following the examples already set elsewhere.

I would advocate for the use of Cultural Heritage Management Plans as an effective means of appropriately managing large areas which hold highly significant

heritage values. Such areas might include Dreaming Tracks; they may be a cultural landscapes containing large areas of land and/or waters. Such large areas are difficult to manage with the spatially discrete 'site specific' definition of heritage under the current Act.

Cultural Heritage Management Plans (CHMPs) would be framed in such a way that the heritage values contained within the area are retained and protocols are established for assessing impacts of proposed developments on those values. Essentially an appropriate CHMP does not necessarily preclude developments, providing such developments do not detract from the heritage values or where the CHMP contains specific recommendations to mitigate against potential impacts.

The major advantage of a CHMP being established for Areas of Heritage Value is that both the proponent and the Aboriginal group will know in advance how to proceed with a particular proposal within a heritage area without having to await the s18 outcome.
this provides certainty and a clear processes that can be understood before development proposals are draw up.

It also serves to place Heritage Management considerations at the forefront of development proposals rather than as an afterthought 'box to tick' at the end as is often currently the case.

Question 8

Yes

8. what needs to be considered?:
The usual things - which can be gleaned from the more recent and up to date legislation from other states (VIC, SA and QLD) as well as federal legislation. In particular, provisions for the compulsory acquisition and repatriation of skeletal remains should be included and this is something which the Department has recently had some success with.

Protection and Enforcement

Question 9

9. Activities that should require consent or authorisation:
Any activity which in any way affects the Heritage Values should require consent or authorisation.

There would be two potential exceptions to this:

1. Where such an activity is carried out under the protocols recommended, and the conditions required, by an extant CHMP; and
2. Where such an activity is being conducted under the terms of an agreement such as an ILUA, a Heritage Agreement or a Land Access Agreement established undert other legislation such as the Native Title Act 1993.

The Act will need to have the ability to recognise and endorse such other Agreements that allow Future Acts in this way.

Question 10

10. Criteria to evaluate activities that may affect a site:
One of the most important and central tenets of the Burra Charter is that policy is based on understanding all aspects of the cultural significance of a place - i.e. the significance of a place should guide all decisions about it. Putting this another way, decisions should not be based on the nature of the proposed activity but rather on the nature of the Heritage Values concerned.

It is a simple matter of getting the priorities the right way round, but a principle which is very important in any piece of legislation which presumes to be effective in the preservation of cultural heritage values.

Question 11

11. What is an impact in relation to sacred sites?:
They can be assessed in relation to the CHMP already established for the Heritage Values intrinsic to the 'sacred' site in question.
There are already well defined and established processes for just this scenario.
Refer to the Practice Notes for the Burra Charter.

Question 12

12. consent / authorisation for proposals that will affect sites:
As mentioned previously, there should be a committee (not the ACMC) responsible for considering heritage impact notices. The decisions made by this committee (The Land Access Commmittee?) should be informed by the assessments of the significance of any associated Heritage Values that has been independently assessed by the Heritage Assessment Committee discussed at length previously.).

It is this land access committee who should be responsible for issuing permits and authorisations for proposals as per the model previously desacribed.

Question 13

Ineffective

13. How s18 can be improved?:
Much of what i have already said in response to previous questions, already addresses this. Particlarly, the replacement of the current ACMC with two independent Committees made up predominantly of Appropriate Aboriginal custodians and relevent Heritage Specialists.

The Minister should not have the power to overrule the decision of these committees in relation to significance assessments and development approvals.

Question 14

14. provisions for long-term protection of sites:
The Act should be specific about providing a blanket protection to all Aboriginal Heritage Values whether currently known or not.
The Act should place the onus on proponents to inform themselves of any such Heritage Values on land they wish to develop though research, consultation and heritage surveys.
Section 62 of the Act should be repealed to remove the defence of lack of knowledge.

Question 15

No

15. How can enforcement provisions be improved?:
Section 62 of the Act should be repealed to remove the defence of lack of knowledge.

Question 16

No

16. How can penalties be improved?:
The penalties need to at least be equivalent to those in the Heritage of Wa Act in order not to appear discriminatory.

These are currently a fine of $1 000 000 and imprisonment for 2 years.
Daily penalty: a fine of $50 000.

Site Assessment and Registration

Question 17

Yes

17. Why shouldn't a defence be provided?:

Question 18

No

18. What should the criteria be?:
The criteria specified in 39(2) and (3) are outdated and out of step with current best practice regarding significance assessment protocols. This demonstrates a very unsophisticated approach to significance assessment and needs to be brought up to date an in line with the now well established and supported processes of significance assessment that exist elsewhere. Again see the Burra Charter and associated practice notes for a good example.
The new/reviewed Act needs to focus on the significance of Heritage Values rather than vague notions of 'use' or 'interest'.

Question 19

No opinion

19. Steps to report place or object:

No opinion

19. Steps to nominate a place or object:

19. Steps to assess a place or object:
This should be undertaken by the above mentioned indepenent Heritage Assessment Committee and should follow established procedures and protocols that already exist for assessing the significance of the Heritage Values.

All decisions of both the Assessment Committee and the Heritage Impact Notice Committee should be communicated to and explained to the Traditional Owner group who's heritage is affected.

No opinion

19. Steps to enter a place or object on the Register:

No opinion

19. Steps to amend a place or object on Register:

No opinion

19. Steps to remove place or object from Register:

Other Parts of the Act

Question 20

20. What's missing from the Act?:
The Act is hopelessly outdated now.

What is needed is a contemporary Act which embodies modern standards and a contemporary understanding of the full gamut of Cultural Heritage Values - both tangible and intangible - and best practice principles for managing these values.

Question 21

21. Sections to be removed from Act?:
Part VI concerning moveable objects should be removed. This is better suited to being handled by the Museum.

S.62 relating to lack of knowledge being a defence should be removed.

Any other comments

Any other comments:
The Act really needs to be brought in line with other more modern legislation with which is co-exists (e.g. The Native Title Act 1993, and other federal and state based heritage legislations including the HOWA Act). The definitions of heritage need to be updated and be consistent with custodial rights and responsibilities conferred by Native Title and with the definitions that are used in other legislative instruments.

The Act needs to be consistent with the UN Declaration of the Rights of Indigenous People.

Principles of significance assessment need to be brought into line with established and endorsed procedures that are now widely used elsewhere - eg Burra Charter.

The Act must first and foremost be a Heritage Act, not an instrument of Land Access.

The Act must acknowledge the primary role of Aboriginal people in assessing and making decisions pertaining to THEIR Heritage.

I commend the Minister for initiating this review of the Act and congratulate him on the open and transparent and inclusive approach to consultation that has been taken so far. I have great hopes for an outcome that will result in a piece of new legislation that truly represents world best practice in relation to Heritage Management.

I wish him luck in following through with what has been a good and promising start.