Review of the Aboriginal Heritage Act 1972 Consultation Paper Submission

The absence of Aboriginal participation and the dissonance between what the *Aboriginal Heritage Act 1972* (AHA) sets out as its ideology and purpose in its current form, and its application over recent years can no longer be accepted.

The failed Heritage Amendment Bill 2014, under the previous government culminated from a process of review that began in 2011. The arrogance of its proponents, saw them implement policies to support the changes in the Amendment Bill 2014, before it had even been submitted to Parliament. This era of State Aboriginal heritage management caused significant damage; no interests were served and there were no positive outcomes for Aboriginal heritage. The damage to the structures of the former Department of Aboriginal Affairs (DAA), subsequent to mismanagement and misdirection bought about during and after the previous reform process must be critically analysed and addressed.

Failure to undertake meaningful, genuine and engaged reform that strengthens recognition of, respect for, preservation, conservation and protection of Aboriginal cultural heritage will widen the gap between Aboriginal and non-Aboriginal people in Western Australia at a time when a national conversation gains momentum towards a more inclusive future. This submission aims to elucidate, that while the current legislation requires sound review towards amendment as the Consultation Paper suggests, that the principle problem, is not the AHA, but decades of incompetent administration and an Administrator that has been asleep at the wheel.

When things go wrong with the institutions that govern our lives, the reaction is often to create more rules and regulations to ensure that accountability is determined by rigorous sets of prescriptions. However, rules applying to people must be flexible; there will always be cracks that will be exploited and within which the most sound mechanisms to uphold ideologies can be subverted by those motivated by self interest. Any reasonable set of prescriptions can be appropriately carried out by persons who have the right qualities, or what Aristotle termed as 'practical wisdom', which Schwartz (2010) describes as the ‘right way to do the right thing’ or as having the moral skill and moral will to operate in the service of what is right. Knowledge is required, but inadequate if ethical principles are absent.

Justice John Cheney's ruling in the Supreme Court of Western Australia in the case of Robinson VS the ACMC, 1 April 2015 (the Cheney Ruling) demonstrates this notion of practical wisdom in that he regarded the matter through the lens of the AHA; its ideology and the purposes it sets out. Justice Cheney did not find the legislation lacking; his ruling found the Administrator, the Registrar of Aboriginal Sites and the Aboriginal Cultural Materials Committee (ACMC) had failed in their duty to afford procedural fairness/natural justice to the Marapikurrinya People in the course of carrying out their functions under the AHA, and had misconstrued the meaning of section 5 of the AHA. He found that they had acted contrary to the roles prescribed under the AHA that establish them as the leading authorities on determining Places and Objects to which the AHA applies.

How could the Registrar and ACMC fail to recognise the broader implications of their rogue approach to the reinterpretation of a key component of the AHA? An interpretation that was

comprehensively opposed by those with expertise in the area and which saw two longstanding and widely respected ACMC members surrender their positions in protest. After which, from 2012, the Minister was unable to appoint the specialist Anthropologist required by section 28 of the AHA.

The delinquent processes undertaken in relation to the Marapikurinya Aboriginal site and subsequent determinations and recommendations were duplicated elsewhere. This culminated in Ministerial decisions (to consent) in relation to a reported 35 Aboriginal heritage Places subject to section 5(b) of the AHA, over approximately three years. During these years, an undisclosed number of Aboriginal heritage places underwent status amendments without referral to the ACMC, and were removed from public visibility.

The processes that allowed for the amendments to Place statuses and removal of Places from the public database have never been made clear. What is clear however, is that the failings demonstrated by the Cheney Ruling have broader implications than undermining heritage protection; they posed a serious legal risk to developers, the ACMC, the Registrar and the Minister for Aboriginal Affairs (the Minister).

Consent under section 18 of the AHA provides legal certainty for developers, who go to great lengths and allocate significant funds to the mitigate legal risk with regard to the AHA compliance and to fulfil commitments agreed to subject to Aboriginal Heritage Agreements negotiated in association with native title. Developers want robust, binding decisions; site recognition and the use of the precautionary principle by the ACMC, which is to say that unless there is absolute certainty that section 5 of the AHA does not apply, then it should be applied, increases legal certainty and provides protective mechanisms for Aboriginal sites. Ministerial consent conditions can be recommended to mitigate impacts to places of importance and significance to Aboriginal people.

Amendments to the legislation will not succeed without ensuring that the application of the AHA is carried out with integrity and by people of virtue who operate with 'practical wisdom'. What dark era was entered when those in service to the preservation and protection of Aboriginal sites were taken to the Supreme Court of Western Australia by Aboriginal people fighting for recognition of their sacred site; a Place, which had been a recognised Aboriginal site under section 5(b) of the AHA since 2008? And lost.

The Amendment Bill 2014 is one example of what can occur when heritage protection is under political control. It failed because of the protections written into the legislation and it failed because of powerful and persistent resistance from Aboriginal people and non Aboriginal people in support of acknowledgement and protection of Aboriginal cultural heritage in Western Australia.

Despite its flaws, the AHA must also be recognised for its strengths when adequately and appropriately applied. However, due to what it has failed to uphold, it ought to be amended in a way that better serves its intent.

1. Is the long title an adequate description of what the amended Act should set out to do? If not, what changes should be made?

The purpose of the Aboriginal Heritage Act 1972 (the AHA) as outlined in its long title is:

An Act to make provision for the preservation on behalf of the community of places and objects customarily used by or traditional to the original inhabitants of Australia or their descendants, or associated therewith, and for other purposes incidental thereto.

The AHA is primarily concerned with preserving Aboriginal places and objects on behalf of the community. However, what do these terms actually mean? What is the meaning of:
'preservation;'
'on behalf of the community;'
'places and objects customarily used by or traditional to the original inhabitants of Australia and their descendants;' and
'other purposes incidental thereto.'

The Burra Charter, Australia's pre-eminent document on heritage preservation, and which applied the International Charter for the Conservation and Restoration of Monuments and Sites (Venice 1964), defines preservation as: "... maintaining the fabric of a place in its existing state and retarding deterioration". The Burra Charter also recognises the concepts of 'protection', 'maintenance', 'restoration' and 'reconstruction.' These concepts are integral components of preservation and should be used as a guide for any AHA amendments and associated policy.

While 'heritage' can be understood as referring to tangible and intangible elements extant in the present, whose meanings are historically connected, culture is a more complex notion. Culture is fluid, dynamic and evolves along a trajectory from the past. It is essential that Aboriginal culture, which derives meaning from historical origins and precolonial traditions, is acknowledged as existing in the present and reflects the lives and beliefs of the many and varied ways Aboriginal people express their cultural identity.

The preamble should be restructured through collaboration with Aboriginal people and non-Aboriginal people from diverse backgrounds, to reflect contemporary expressions of Aboriginal culture and be phrased in such a way that articulates and supports the human right of Aboriginal people to freedom of belief.

The AHA ought to enshrine in law, the acknowledgement, recognition and respect of the cultures; that is the beliefs, values, practices and traditional land use of the first inhabitants of Western Australia and preserve and protect cultural material, Places, Objects and other elements associated with these beliefs and practices, and/or that have scientific value as determined by the relevant disciplines. This ought to be provided for, on behalf of the community of all Western Australians as an integral part of the narrative and identity of Western Australian and towards the promotion of the values of inclusiveness and respect for the continuity of Aboriginal culture.

2. What do you think are the best ways to ensure the appropriate people are consulted about what Aboriginal heritage places should be protected and how a proposal may impact this places?

The AHA has been in operation for 46 years; it is unfathomable that this question is being asked by its Administrator.

Aboriginal heritage places are most often situated on lands for which there are known associations with particular Aboriginal people, who can be identified and contacted in a number of ways; the 'best' or most suitable of which is in person where they live and by forming relationships to foster partnerships and to provide support and advice with regard to the AHA. A key role of the Administrator must be to ensure those whose lives are impacted by the AHA, and by decisions made pursuant to it, are aware of what it sets out and how it operates.

It is essential for those administering the AHA to have a regional presence and work collaboratively and under the guidance of Aboriginal communities, individuals and organisations and without bias. In addition to which, suitably qualified and experienced professionals working for the Administrator should have the knowledge and skills to undertake a range of enquiries to ascertain the cultural context within which they work to better understand relationships and structures of authority regarding cultural knowledge.

"Aboriginal heritage sites are places for contemporary Aboriginal politics" (REF) and matters related to consultation are rarely going to be straightforward; the context is as fluid as it is contentious. Aboriginal sites and lands are contentious spaces, complicated by diverse historical events, native title, competition over resources and the politics of representation.

Consultation with Aboriginal people should be explicitly required by the AHA. However, in terms of providing a ‘one size fits all’ mechanism to prescribe how consultation should be undertaken, that is flexible enough to be applied broadly, is a challenging proposition and one likely to fail if attempted.

Anyone working with the AHA should know that while Aboriginal sites are known to Aboriginal people, the AHA is not universally known or its implications understood. It should be a key role of those administering the AHA, to actively promote knowledge and understanding of the AHA to those most impacted by it and whose knowledge and views are sought, and in some cases required.

It should not be left to a proponent in the context of their intent to give notice under section 18 of the AHA, seeking consent to avoid prosecution under section 17 of the AHA to negatively impact Aboriginal sites, to make decisions as to who should be consulted. This practice is the source of much conflict among Aboriginal people and breaks families and communities apart, exemplified in the extreme by the activities of Fortescue Metals Group in relation to native title negations and Aboriginal heritage approvals for the Solomon Mine Hub and the Yindjibarndi people.

3. To what extent has the provision to appoint honorary wardens (s52) been effective and how can it be improved?

Section 50 of the AHA allows for honorary wardens to be appointed by the Minister. Section 51 provides for powers of inspection and section 52, the power to represent the Minister; in short, the same powers that officers of the Administrator have under the AHA. However, there is no clear description of the role and it is therefore difficult to understand the intention behind the provision.

Section 50 has been interpreted as providing an opportunity for the inclusion of Aboriginal people to perform duties under the AHA; given the wording "...throughout the State or in a specified area or specified areas only, according to the terms of their appointments...", one might assume the role is designed to provide authority to Aboriginal people to exercise the powers associated with it on their county/in relation to their sites. The suite of powers is significant, particularly those under section 51. It is unclear as to where accountability would lay with regard to the powers of inspection provided to honorary wardens.

The AHA must be explicit in describing the role of honorary wardens. Historically, the appointment of honorary wardens by the Minister failed and has not been attempted again despite opportunities to exercise the provision in relation to the management of the Murujuga Conservation Area on the Burrup Peninsula.

Government funding under the *Burrup and Maitland Industrial Estates Agreement and Implementation Deed 2003* (the Agreement) allowed for two permanent DAA Senior Heritage Officers to operate (from 2006 - 2010) exclusively in relation to heritage matters on the Burrup Peninsula, including ensuring the State met its obligations pursuant to that Agreement. The suite of government commitments required collaboration between the former Department of Industrial Relations, the DAA, the Office of Native Title, the former Department of Environment and Conservation and the five cultural groups that are now represented in the Dampier Archipelago by the Murujuga Aboriginal Corporation.

Coupled with funding commitments for a cultural centre and an Aboriginal Ranger program from Woodside Energy Limited for the conservation area established in accordance with the Agreement, the DAA Senior Heritage Officers proposed to undertake an honorary warden program and pilot it with the Murajuga Aboriginal Corporation.

The guiding principle of this proposal was that in order for section 50 of the AHA to be carried out effectively, honorary wardens require a suitable framework to operate within; providing for training and leadership, with clear guidelines, resources and remuneration.

The proposal was submitted to DAA management, but made no traction. The opportunity, however is not lost if the Administrator were to begin discussions with the Murujuga Aboriginal Corporation to pilot an honorary warden program and evaluate its viability. One benefit of the lengthy process of legislative review of the AHA is that there is time to evaluate the efficacy its current operation to inform the review.

Section 50 of the AHA however, requires an explicit description of the role of honorary wardens and to explicitly state the purpose of appointment of honorary wardens. Can this section be amended to provide for a formal role for Aboriginal people within the legislation? Could it operate in association with section 9 of the AHA and apply specifically to areas to

which section 9 may apply (currently none)? Or to Part III Reserves under section 26 of the Aboriginal Areas Protection Act 1972 (AAPA)?

Section 9 of the AHA is potentially a viable space to apply to Part III Reserves under the AAPA. Section 9 will not be discussed in this submission other than to raise the question of its viability as it has never been applied. The Murujuga conservation area is another place it might be considered to apply to.

4. Are the roles and functions assigned under the Act sufficiently clear and comprehensive to fulfil the objectives of the legislation to preserve Aboriginal heritage places and objects? If not, what changes in roles and functions would you suggest.

The roles and functions of the Minister, ACMC and Registrar are discussed throughout the document so comments here are confined to the Register and to the role of the Registrar in relation to the Register.

Registrar of Aboriginal Sites:

An officer of the Department shall be appointed to be the Registrar of Aboriginal Sites by the chief executive officer.
The function of the Registrar is to administer the day to day operations of the Committee, and also to perform such other functions as are allocated to the Registrar by this Act.
The Registrar may, with the approval of the chief executive officer and by instrument in writing, delegate to another officer of the Department the performance of any of the powers or duties of the Registrar, other than this power of delegation.
All communications required by this Act to be made to or by the Minister or the Committee may be made through the Registrar.

Register of places and objects:

The Registrar shall, so far as practicable, maintain, in such manner and form as the Minister may determine, a register of —
(a) all protected areas;
(b) all Aboriginal cultural material; and
(c) all other places and objects to which this Act applies, whether within the State or elsewhere.

The Register of places and objects is one of the pillars of the AHA. It represents the history of the AHA and documents 46 years of, not just Places but the history of the legislation and its processes and the shifts in recording and reporting methods employed by the various disciplines that take an interest in Aboriginal sites. It indicates ACMC meetings where determinations were made and processes of the legislation that places have been subject to; regulation 10 (*Aboriginal Heritage Regulation 1974*), section 16 and 18 and others. There are over 36 000 places listed on the 'data base'. It is unclear what manner and form the Register actually takes; the Registrar also appears unclear as to this. Unfortunately, what is clear, is that the Register is a mess and demonstrates the failure of the administration at its worst.

The 'Aboriginal Heritage Inquiry System', which is the public search tool for the Register, is a slow and clumsy database that reflects 1980s technology. The physical archive appears to be lost, as are some of the digital copies of site files. The hard copy site files are said to be located across various locations described as 'off site' storage and as being deposited on shelves and the floor of a purpose built departmental archive space. Decades worth of collections of maps, sketches, photos, video and sound recordings dumped in piles. Green and red cardboard folders littered amongst the updated white ones, indicating another DAA project that was never completed.

The database upgrade and review and update of the data on the Register remains incomplete. Mindless, grinding away at the Register as if it were a White pages telephone directory has only served to dig it deeper into a hole. It has become a problem of such proportions that structures need to be developed to provide basic life support from which to slowly and carefully rehabilitate it to a functioning state of well being.

It needs to be determined as to what the Register is? A register of all protected areas, all Aboriginal cultural material and all other places to which the AHA applies. Well, as far as practicable at least, and in such a manner and form as the Minister may determine. This allows adequate scope to consider what is practicable and it is not practicable or necessarily useful or appropriate to record and maintain a data base of ALL of the things and places to which the AHA aspires to document.

Again, one must consider whether it is the AHA that requires amendment here or whether a competent Registrar could adequately apply section 38 in carrying out his/her function to ascertain what is practicable and maintain a Register Places and Objects to which the AHA applies. Not in the ad hoc, blind data entry approach it has been subject to, but a careful, meaningful and strategic approach that considers its purpose and the value and sensitivity of its content.

A Register of Places and Objects to which the AHA applies for the purposes of the legislation is required. A Register that identifies the information required to effectively carry out its purpose. It is imperative to undertake sound review and quality assurance strategically and not numerically.

Allocating resources strategically could allow for outstanding work to be undertaken to improve the reliability and integrity of the Register and develop it into a genuine resource for stakeholders.

A review of the Register was initiated with a view to update and improve it at the request of the former Minister for Aboriginal Affairs commenced in approximately 2014; the results of the first attempt were so poor that the Minister requested that it be done over. Four years later, how much money and time have been allocated to that undertaking and have its aims been achieved? Even for 100 places?

A professional archivist qualified to maintain hard copy and digital records is an absolute requirement. No additional resources than currently available are required to achieve feasible, targeted outcomes; flexibility, creativity and drive towards practical aims is all.

Action to improve the Register can accomplish several things within that one aim; field verification of sites in collaboration with Aboriginal people, who can be trained in site recording methods and the AHA, relationships and partnerships developed, working collaboratively with stakeholders across, academia, industry, government, native title, farming, private land owners among others in an environment of knowledge sharing. Field verification coupled with site maintenance or preservation projects or enforcement investigations, which could potentially attract funding from numerous sources that effectively fund the work to improve the Register. This attracts positive publicity and opportunities for officers of the Administrator to promote Aboriginal heritage in a number of forums.

Every time an officer has a site file in their hands or at their finger tips is an opportunity to evaluate the Register with an aim to improve it and every time an officer is in the field is an opportunity to evaluate the Register and an opportunity to improve it. The Register of Aboriginal Sites is not comprised merely of data, but expressions of the lives of those who contribute their knowledge and experiences to it. This could become the core business of the Administrator and notices under section 18 an expedited process the Administrator leads rather than reacts to.

A well considered, flexible and pragmatic approach that examines the purposes and applications of the Register is a logical starting point to assess the practicality of comprehensive review and updating the Register in its current form. The efficacy of the Register in its current form should be evaluated and restructured to accommodate relevant data subject to review of the data and retaining the Register in its totality and as an accessible resource. There is no quick fix for the volume and complexity of data issues on the Register.

A strategic approach and commitment to an ongoing process of quality assurance can be accommodated within existing resources and can be aspirational in terms of attracting funding for a range of collaborative projects for non-priority areas (priority areas should be viewed as part of essential operations). These projects could range from the repatriation of hard copy archives material to the appropriate Aboriginal custodians, archeological research, field verification, site maintenance among others.

5. Does section 5 adequately describe the sorts of places or sites that should be protected under the amended Act? If not, how can it be improved?

Any amendment to section 5 of the AHA needs to be driven by Aboriginal people, the current criteria is suitable when adequately applied, however it urgently needs expanding to acknowledge the cultural- ecological associations and how should examine ecological significance as it relates to the cultural life of Aboriginal people. The era of dictating what a site is to Aboriginal people must end.

6. Do section 6 and Part IV adequately describe the sorts of objects that should be protected under the amended Act? If not, how can they be improved?

Section 9 of the Museum Act 1969 requires the WA Museum to 'make and preserve…collections representative of the Aborigines of the State'. The Act should continue

to protect Objects under section 6 and include them on the Register of Aboriginal Sites, however, it should be the decision of the appropriate Aboriginal people or organisation to hold possession and make decisions regarding any Objects that come to the Minister's attention in relation to section 6. The definition of Objects should be clearer and the reasons they are included in the Act be described in detail. Repatriation to the appropriate Aboriginal people should be required by the AHA and the delegation of authority for people to make decisions regarding cultural material that belongs to them.

7. Is the declaration of a Protected Area under the Act the best way to deal with sites of outstanding importance?

Protected Area status provides the highest level of protection to a Aboriginal Sites in the AHA and should therefore be retained with some amendment. The AHA authorises the Minister to revoke Protected Area status at his/her discretion. Revocation requires a clear and accountable decision making process.

Protected Area values should be described in detail and their extent, subject to comprehensive surveys clearly and formerly delineated. Protected Areas should be recorded by the relevant professionals with expertise in this field and the appropriate Aboriginal people. . PA status should require endorsement under the legislation by the appropriate Aboriginal custodians as a required component towards declaration.

8. Should the Act provide for the management of Aboriginal Ancestral (Skeletal) Remains. If so, what should be considered?

The AHA should make provision that refers exclusively to Aboriginal Ancestral Remains. The United States of America's *Native Graves Protection and Repatriation Act 1990* (NAGPRA) is considered stand out legislation internationally in the lost colonial context. One its most salient functions and most appropriate regarding this discussion is described as follows:

The second major purpose of the statute is to provide greater protection for Native American burial sites and more careful control over the removal of Native American human remains, funerary objects, sacred objects, and items of cultural patrimony on Federal and tribal lands. NAGPRA requires that Indian tribes or Native Hawaiian organizations be consulted whenever archeological investigations encounter, or are expected to encounter, Native American cultural items or when such items are unexpectedly discovered on Federal or tribal lands (Section 3). Excavation or removal of any such items also must be done under procedures required by the Archaeological Resources Protection Act (Sec. 3(c)(1)). This NAGPRA requirement is likely to encourage the in situ preservation of archaeological sites, or at least the portions of them that contain burials or other kinds of cultural items. In many situations, it will be advantageous for Federal agencies and Tribes undertaking land-modifying activities on their lands to undertake careful consultations with traditional users of the land and intensive archeological surveys to locate and then protect unmarked Native American graves, cemeteries, or other places where cultural items might be located.

9. What sort of activities that may affect an Aboriginal site should require consent or authorisation?; and

10. What should be the criteria against which to evaluate an activity that may affect a site (e.g. a proposal to use or develop land)?

In contrast to 'preservation', Parliament and the judiciary have referred to activities that are: 'likely to have deleterious effect on the preservation of a site;' and 'development', as the antithesis of preservation. Both concepts are found at section 27 of the AHA, which although dealing specifically with covenants, have been used to define what preservation is not. Any activity that is not 'good for' or beneficial to a heritage place, i.e. preserves its values and maintains the fabric or meaning of the place, is therefore an activity which requires consent on the basis that the activity threatens the elements that define the place as an Aboriginal site pursuant to the AHA and its status as such.

The relevant consideration is whether a proposed activity will alter the status of a site under section 5 of the AHA. Such decisions require case by case analysis depending on the nature of the activity in relation to particular Aboriginal sites.

For example, if fibre optic cable is installed beneath a river bed (as has been the case), which is a place to which section 5(b) applies to, is the status of the river as a sacred site altered? Will the same activity have the same impact if cable is installed under an extensive artefact scatter with depth of deposits indicating research potential, which is a component of the site's significance?

There are no straightforward answers to these questions, it is the role of the ACMC to give careful consideration based on evidence and the application of their collective skills and the AHA. Consistency is required and given the context, is difficult to achieve, so the ACMC and the Registrar must rely on sound processes of evaluation and the expertise of its members. Criteria needs to be applied to process and be applied consistently. Determinations under section 18(2) must be undertaken in accordance with the criteria set out in the AHA and each one supported by demonstrable evidence, constructed by appropriately qualified members of the committee.

The diversity of Aboriginal cultures must also be considered; is a cultural group from the south west going to attribute the same meanings to a sacred river as a cultural group in the Kimberly? Will the installation of fibre optic cable under the river bed have the same consequences for each? And if they do not? Does this make one group wrong? Does consistency require the ACMC to make the same determination for each and the same recommendation to the Minister in relation to the sites? There is no 'one size fits all' regarding Aboriginal heritage. The current AHA can accommodate that with the application of practical wisdom.

The AHA in its current form with regard to sections 5, 16, 17, 18, 39(2), and 39(3) have the capacity to do so, by calling on the expertise of the ACMC to apply the legislation appropriately and ensuring they carry out their functions under section39(3). Missing from section 39 however, is the requirement to seek this information from the appropriate Aboriginal people.

11. How can 'impact' arising from proposals for land use on sacred sites that do not have physical cultural heritage elements be assessed?

The Act does not provide for assessment of 'impact' on sites, but rather states that if a landowner has reason to believe proposed activities on their land may breach of section 17 of the AHA, that notice should be given in accordance with section 18 of the AHA for the ACMC to determine whether or not there is any site on the land. It is also unclear as to what is meant by 'physical cultural heritage elements'.

This poorly structured question seems to demonstrate a lack of knowledge, not only of the AHA, but of cultural heritage in general. Section 5(b) refers to sacred, ritual and ceremonial sites, which may or may not be associated with any particular physical elements, features or material. However, Aboriginal culture is intrinsically tied to place/land; the place where cultural values are present; a place where ceremony occurs; a sacred place; a place where rituals are prescribed; places where one must show respect and behave in accordance with culturally prescribed behaviours; sites with associated sanctions where some may go and others may not; places where no person may go.

There may not be particular 'physical cultural heritage elements' that a bulldozer can knock over, but that certain activities may alter, damage, remove, destroy conceal or deal with in a manner not sanctioned by relevant custom, thus constituting a breach under section 17 of the AHA. All sites are associated with places situated on land, even celestial elements are associated with places. The places/land, which are associated with intangible elements are still grounded in and associated with place and therefore physical dimensions are always present.

This also applies to places to which section 5C of the AHA may apply; referring to historical places, for example, where massacres have taken place or where other significant events may have taken place, such as many areas in the City of Vincent, which are acknowledged by the local government authority. The destruction of which, consequent of alterations in land use would be detrimental to the meaning and value of those sites, many of which are recognised as places to which the AHA applies and are included on the Register of Aboriginal Sites. All Aboriginal sites are intrinsically linked to place and there for have physical cultural elements.

This question not only reflects a fundamental failure to understand the AHA, but a high level of either ignorance or insensitivity in relation to Aboriginal culture.

12. Who should provide consent or authorisation for proposals that will affect Aboriginal sites?/13. To what extent is the current section 18 application process effective and how can it be improved?

Current section 18 processes demonstrate the incompetence of the administrator, the outcomes of which are discernible and have diverted and misappropriated significant resources that would otherwise have more than adequately served the interest of Aboriginal heritage, even during a period of unprecedented mining and industrial development.

Under section 18(3) of the AHA, the Minister for Aboriginal Affairs consents or declines to the use of the land subject to any notice given to use the land for a particular purpose in avoidance of committing an offence under section 17. This is problematic on the basis that in accordance with section 18(3), the Minister "...shall consider its [ACMC] recommendation and having regard to the general interest of the community..." make his/her decision to consent or decline.

The ambiguity of the wording, which neither defines what is meant by 'community' or describes ‘scope of 'interests', allows the Minister to, at his/her discretion and without qualification, make a decision without accountability and within a political context that is likely to influence a decision based on the political imperatives of Premier and Cabinet.

Historically, decisions appear to favour development over heritage protection and are widely perceived as privileging economic imperatives and as such undermine the role of the Minister as giving primacy to the preservation and protection of Aboriginal heritage with which is his duty under section 10 of the AHA. The phrase 'rubber stamp' in relation to this process is common.

The following extracts from Hansard indicate the overwhelming balance of decisions favouring consent for activities that would, without consent, breach section 17 of the AHA. It also cites the number of occasions the Minister decided against the recommendations of the committee. The comparison between the two extracts indicates clearly the acceleration of notices under section 18 of the AHA in recent years.

Statistical analysis is best derived from percentages, but there are too many contingencies for quick conclusions to be drawn. What the numbers here show definitively however, is the balance of decisions made by the Minister of Aboriginal Affairs to consent to activities otherwise contrary to the intents and purposes of the AHA.

ABORIGINAL CULTURAL MATERIALS COMMITTEE, SECTION 18 APPLICATIONS
369. Hon Robin Chapple to the Parliamentary Secretary representing the Minister for Indigenous Affairs:
(1) How many Section 18 applications (re the Aboriginal Heritage Act 1972 [the Act] has the Aboriginal Cultural Materials Committee (ACMC)) processed since the Act came into force?
957

(2) How many Section 18 applications have the ACMC recommended be approved?
702

(3) How many have the ACMC recommended be refused?
32

(4) How many Section 18 applications (re the Act) has the Minister approved since he came to office?
114

(5) How many Section 18 applications has the Minister refused since he came to office?
0

(6) How many times has the ACMC recommended a Section 18 application be refused and the Minister overridden this recommendation and approved this application?
1

(7) Since the inception of the Act, how many prosecutions under the Act have been laid?
3

(Extract from Hansard [COUNCIL - Tuesday, 4 March 2003] p4945c-4945c
Hon Robin Chapple; Hon Graham Giffard)

ABORIGINAL CULTURAL MATERIAL COMMITTEE — SECTION 18 APPLICATIONS 3267. Hon Robin Chapple to the Minister for Aboriginal Affairs:
I refer to the question on notice No. 1938 regarding the Aboriginal Cultural Materials Committee (ACMC), and ask:
(a) regarding the answer to (9), of all the Section 18 applications dealt with at each ACMC meeting for the years 2000–2009:
(a) Between 2000 and 2009, the Aboriginal Cultural Material Committee dealt with 2 000 Section 18 applications.

(i) how many of those were recommended for refusal by the ACMC; and
(i) During this period, the Aboriginal Cultural Material Committee recommended that 21 Section 18 applications should not be granted consent, and recommended four Section 18 applications should be partially granted consent and partially declined.

(ii) of those recommended for refusal, which ones did the Minister not accept advice of the ACMC; and
(ii) All

(b) of all the Section 18 applications dealt with at each ACMC meeting for the years 2010 to the present:
(b) Between 1 January 2010 and 10 June 2015, the Aboriginal Cultural Material Committee has dealt with 532 Section 18 applications.

(i) how many of those were recommended for refusal by the ACMC; and
(i) During this period, the Aboriginal Cultural Material Committee recommended that 13 Section 18 applications should not be granted consent.

(ii) of those recommended for refusal, which ones did the Minister not accept the advice of the ACMC?
(ii) All

Historically, too often has the Minister acted contrary to the recommendations of the ACMC, which implies a lack of due consideration to their functions under the AHA and represents a lack of accord between the two with regard to heritage protection. The AHA gives absolute power to the Minister to consent to and revoke heritage protection to all sites and protected areas to which the AHA applies, which undermines heritage protection. The wording of the long title of the legislation also allows for this on the basis that the AHA operates "...on behalf of the community...and for other purposes incidental thereto..." The result is legislated tenuous heritage protection that is subject to political and economic imperatives.

The integrity of the ACMC is also compromised when determining whether the AHA applies to places and evaluates the importance of places in the context of a notice under section 18 of the AHA. Sound process would require that such undertakings should occur in isolation and prior to considering the purpose as described in the notice and their recommendation to the Minister to consent or decline. Under section 10(1) of the AHA:

> *It is the duty of the Minister to ensure that so far as is reasonably practicable all places in Western Australia that are of traditional or current sacred, ritual or ceremonial significance to persons of Aboriginal descent should be recorded on behalf of the community, and their relative importance evaluated so that the resources available*

from time to time for the preservation and protection of such places may be coordinated and made effective.

Had the Minister been able to execute his/her duty describes in section 10, and the Registrar adequately fulfilled his/her duty to maintain an accurate and accessible record of Aboriginal sites, then the processes associated with the ACMC's functions in relation to section 18 of the AHA would be sound, straightforward and far more expeditious and far less onerous for stakeholders. Determinations and evaluations of places to which the AHA applies would be undertaken independent of notices under section 18 of the AHA seeking consent to use land where Aboriginal sites may be, Aboriginal people associated with those places who should be consulted would be known and the ACMC could advise swiftly after receipt of notice, as to whether or not consent would be required.

Pursuant to which, those lodging a notice under section 18 could then do so in accordance with what is prescribed in the AHA; a notice in writing of intent to use their land for a purpose and not, as currently, be directed to bear the burden of responsibility at great financial expense, to undertake the duties of the Minister, Registrar and ACMC in determining whether their are sites on the land to which the AHA applies, recording them and submitting them to be added to the Register of Aboriginal Sites as a formal record of those places.

Further to the above, these administrative processes have given rise to a commercial heritage industry, wherein developers employ heritage professionals, who pay Aboriginal people to participate in heritage surveys to gather Aboriginal site information to support the developer's notice under section 18 of the AHA. Developers do this on the recommendations of the administrator, who refers them to professionals in an unregulated industry, absent of codes of ethics and without reliable information as to which Aboriginal individuals or groups should be consulted. The Registrar then relies on the Aboriginal site information submitted in relation to the developer's notice under section 18 to contribute the bulk of material of which the Register is comprised. This results in the Register being unreliable and largely containing information on areas already subject to the section 18 consent on lands likely to have been developed and the sites registered in relation to them having been altered or destroyed completely not long after being added to the Register of Aboriginal Sites.

As to who should be authorised to make decisions to decline or consent in relation to section 18 of the AHA, and what model might be established to ensure the independence and integrity of decisions? It is difficult to imagine serious consideration being given to such a a question in the current climate. Where one Minister of Government is promoting and granting a mining proposal before Aboriginal heritage considerations under the AHA have commenced, how can their be any integrity of process?

Perhaps, at best it could be expected that those with clearly prescribed functions and duties under the AHA, fulfil them adequately and for a whole of government approach be developed that requires Aboriginal heritage to be a consideration at the front end of proposed large scale projects and not a box ticking exercise years after when construction is set to commence. The administrators of the AHA ought to take a leading role and participate in the collection of Aboriginal heritage data and build enduring stakeholder relationships which would allow less

delegation of resources to processes endless reams of third hand data and divert resources to heritage management.

14. What provisions could be included in an amended Act to ensure the long-term protection of Aboriginal sites where alternative statutory arrangements do not apply?

I am not sure what this question means, but in order to ensure the long-term protection of Aboriginal sites where alternative statutory arrangements do not apply, perhaps provisions for long term protection of Aboriginal sites?

Reinstatement of the Act as it was promulgated by Parliament in 1972.

15. Are the enforcement provisions under the Act adequate to protect sites? If not, how can they be improved?

Enforcement requires adequate resources and support. There are currently two enforcement officers with police backgrounds, which is appropriate, however given the nature of the investigations, it is recommended that a team of appropriately qualified people is dedicated to enforcement be established. Enforcement requires the expertise of Archeologists, Anthropologists and people with sound mapping and or land surveying skills.

Inclusion of such professionals regularly undertaking field work would have the capacity to carry out additional functions while in the field. The provisions in the AHA are adequate but there have never been adequate resources applied to them and they cannot be feasibly carried out. Ideally the team could be expanded to have the capacity to ensure conditions subject to section 18 consent are enforced and the Register updated to reflect the outcomes of activities on sites subject to consent. As to how the current backlog might be managed, is a matter perhaps best manage reactively to allow for proactive mechanisms to take priority in order to stymie the continued growth of the backlog.

16. Are the current penalties under the Act adequate? If not, how can these be improved?

Section 15 of the AHA directs any person who has knowledge of the existence of Aboriginal heritage Places or Objects to the Registrar. However, it is not an offence under section 17 of the AHA not to do so and no penalties are attached to the requirement to report findings.

It is understandable that an Aboriginal person may choose not to comply on the grounds of cultural sensitivities, which is provided for by section 7 of the AHA, or that a member of the public may not want to take the time or feel comfortable in doing so. However for large scale mining projects and the like, the proponents of which are major stakeholders in the context of Aboriginal heritage and the AHA, the failure to comply with section 15 of the AHA, has serious negative impacts on the efficacy of the AHA as demonstrated in the following excerpt:

In May 2010, the then Department of Indigenous Affairs (DIA) responded to the Joint Standing Committee on Delegated Legislation to provide it with advice to assist the Committee in its scrutiny of the Mining Amendment Regulations 2009 as follows:

In relation to the questions raised in your letter dated 4 May 2010 to this Department, we respond as follows:

1. Please advise the Committee whether, prior to this amendment, the Department of Indigenous Affairs had access to Aboriginal heritage survey reports.

a. Prior to the repeal of regulation 96C(2) Mining Regulations 1981, our records show very few Aboriginal heritage survey reports (AHSR) were submitted to the Registrar of Aboriginal Sites pursuant to regulation 96C(2).

b. The Department of Mines and Petroleum (DMP) may have more comprehensive records showing how many AHSR have been submitted to the Registrar of Aboriginal Sites under regulation 96C(2) given the previous requirement in regulation 96C(2)(b) to provide DMP with evidence that the survey has been submitted to the Registrar of Aboriginal Sites.

c. The majority of AHSR received by this Department prior to the amendment to regulation 96C(2) have been through the ministerial consent process outlined in section 18 of the Aboriginal Heritage Act 1972 (AHA) and as a result of the provision of advice by this Department to proponents on a programme of works under the Mining Act 1978.

2. Does the Department currently have access to those reports?

a. In regards to AHSR being submitted to the Registrar of Aboriginal Sites under regulation 96C(2), DIA does not currently have access to those reports.

3. Please advise what bearing the repeal of regulation 96C(2) has on the requirement to comply with s 15 of the Aboriginal Heritage Act 1972 (WA).

a. Assuming tenement holders were claiming AHSR as expenditure under regulation 96C(2) and there was substantial monitoring of compliance with regulation 96C(2) , then repeal of regulation 96C(2) would have the effect of abrogating the requirement to comply with s 15 AHA for the following reasons:

i. S 15 AHA requires that any person who has knowledge of the existence of a site or objects that fall within the provisions of the AHA shall report its existence to the Registrar of Aboriginal Sites.

ii. When commissioning an AHSR, tenement holders will usually come into receipt of the types of information contemplated by s 15 AHA.

iii. Any tenement holders who receive such information about Aboriginal heritage on their tenements have an obligation under section 15 AHA to report their findings to the Registrar of Aboriginal Sites forthwith.

iv. However in the absence of a clear statutory offence for non-compliance with s 15 AHA, compelling tenement holders to do so has proven difficult for DIA, particularly in light of the intellectual property restrictions often imposed on AHSR by the intellectual property owners of those reports.

v. Hence regulation 96C(2), by requiring the submission of AHSR to the Registrar had the positive effect of ensuring compliance with s 15 AHA.

b. The reporting requirements under s 15 AHA are an important requirement and any action to abrogate such requirements will have the effect of hindering the Registrar of Aboriginal Sites and the Aboriginal Cultural Material Committee in performing their functions under the AHA. Such functions include assessment of Aboriginal heritage sites, maintaining a public register of Aboriginal heritage sites and making recommendations to the Minister for Indigenous Affairs in relation to section 18 approvals.

The absence of penalties for consistent and significant breaches of section 15 of the AHA will encourage continued abuse of it. Amendment of section 15 should attach penalties specifically to parties who wilfully and repeatedly fail to report Aboriginal sites to the Registrar and allow for the seizure of material subject to the powers of inspection under section 51 of the AHA.

The current penalties for offences under section 17 of the AHA are not adequate and are in no way prohibitive as recognised in the Amendment Bill 2014, in which they are substantially increased.

It has been the case that those having committed an offence under the AHA, self report and comply willingly with investigations. However few prosecutions occur. A failure of the Administrator to progress and a lack of will to prosecute by the SSO seem to stymie this process. Sections 486DA and 486DB of the *Environmental Protection and Biodiversity Conservation Act 1999* (EPBC) make provision for 'enforceable undertakings'. It provides for an undertaking by a person to the Minister for Environment and Energy that "...that the person will pay a specified amount within a specified period to the Commonwealth or to another specified party for the purpose of protection and conservation of a protected matter".

This process has a number of benefits including a much more expeditious process than a legal prosecution and that monies paid will contribute to heritage preservation.

For matters not suitable for such an undertaking, penalties should be increased to be prohibitive. The EPBC imposes strict civil and criminal penalties of up to $900 000 for individuals and $9 million for a body corporate, and a criminal penalty of up to seven years imprisonment. Funds obtained subsequent to this, should be allocated to benefit Aboriginal heritage and culture.

Any discussion relating to enforcement under the AHA must recall *Aboriginal Heritage (Marandoo) Act 1992* (Marandoo Act) and the blatant assault against Aboriginal Heritage. The existence of the Marandoo Act questions the capacity of the legislation to fulfil its purpose and its very existence.

The Government declaration that the AHA does not apply to the Marandoo mine area is a violation of the statues designed to define and describe what the people of Western Australia value. Calls for transparency of decisions are hardly required when the reasons for drastic decisions like this and the excision under section 21 of the AHA for the Fortescue Metals Group rail corridor through the Woodstock Abydos Protected Area, are all too transparent.

The Marandoo Act must be abolished to restore the provisions of the AHRA, and the act amended to ensure that all Aboriginal Places and Objects to which the act applies under its jurisdiction for the entire state of Western Australia. The era of lip service and rubber stamps is over.

17. Should a defence continue to be provided where the disclosure of information (section 15) is against customary laws/protocols?

Yes, disclosure of information, which is against customary law, should be protected.

18. Are the criteria for assessing the significance of sites under sections 39(2) and (3) adequate to evaluate whether a site should be added to the Register/ if not, what should the criteria be to assess the significance of a site?

Sections 39(2) and 39(3) provide a general framework of considerations that the ACMC may take into account. The specific criteria may be useful to support and/or clarify a determination, but are basically suggestions that do not direct, prescribe or compel the ACMC refer to them in relation to determining the application of section 5.

The functions of the ACMC are set out in section 18(2) and require them to "…form an opinion as to whether there is any Aboriginal site on the land…" and "…evaluate the importance and significance of any such site…".

Varied or additional criteria amending sections 39(2) and 39(3) would not alter interpretation, application or operation of the AHA, therefore there is nothing is to be gained by their amendment.

Is this question intended to elicit a response suggesting more adequate criteria? There is no list of exhaustive criteria. There is no algorithm by which to calculate the importance and significance of the range of potential subjectivities represented by section 5.

The definition of 'evaluate' is to form an idea or to assess, which is to analyse, gauge or estimate. Criteria can be effective in assisting development of an evaluation, but there is no set of objective criteria that can be applied to the application of section 5. The values represented by section 5 are not universal; they hold particular value (significance and importance) to particular groups of people for a variety of reasons. They require persons knowledgeable cognisant of those values and how they might be determined and persuasively demonstrated in the context of each set of circumstances.

A description of such persons can be found in section 28 of the AHA; otherwise known as the ACMC.

19. What do you think is missing from the Act?

Recognition of the strength and continuation of Aboriginal culture as a important aspect of contemporary Aboriginal identities.

Prescribed roles, authority and functions for Aboriginal people.

Accountability and transparency regarding the processes of the ACMC in relation to all of their functional; results of their determinations and recommendations should be made public where appropriate subject to culturally and/or commercially sensitivities.

An appeals process available for Aboriginal people equal to that which is extant under section 47 for parties aggrieved by decisions made under section 18 of the AHA in relation to notices submitted by those parties.

The power of veto in relation to Aboriginal sites of outstanding significance; for example places for which the following apply: Protected Areas under sections 19 and 20, section 5C and Aboriginal burial sites/skeletal remains (for which, it is recommended the AHA contains amendments to describe, recognise and protect).

Requirement for two appropriately qualified Archaeologists - one male and one female, and two appropriately qualified Anthropologists - one male and one female, on the ACMC. Review of ACMC membership with a view to require Aboriginal membership and to take gender balance into account.

The right of Aboriginal people to give oral testimony to the ACMC with regard to sacred sites.

The right of Aboriginal people to hold intellectual property rights to material submitted by or in relation to them, to the Registrar.

Minister required to advise Aboriginal people of decisions under section 18 of the AHA that affect them, and to provide copies of any conditions subject to decisions to consent.

20.What section, if any do you think should be removed from the Act and why?

Ministerial power to revoke or vary protected area status under section 21 of the AHA at his/her discretion.

21. What should the steps be to report, nominate, assess, enter, amend or remove an entry from the Register?

The Registrar shall, so far as practicable, maintain, in such manner and form as the Minister may determine, a register of —
(a) all protected areas;
(b) all Aboriginal cultural material; and
(c) all other places and objects to which this Act applies, whether within the State or elsewhere.

Section 37 of the AHA allows the flexibility for the Register for Aboriginal Sites to be maintained in a manner and form as the Minister may determine. This is suitable insofar as systems and technology evolve. Reporting or nominating places or objects to which the AHA may apply should be easy and accessible and received with a commitment to process and advise the submitting party of the progress and outcome of their submission. All submissions should be entered on to the Register of Aboriginal Sites and and be prepared by the Registrar for presentation to the ACMC for formal assessment.

Any amendments suggested to any place on the Register should be approved by the ACMC if they are likely to affect the status of the place or object (with the exception of minor amendments, for example, a minor correction to a spatial boundary or additional photograph to support information already submitted).

Nothing should ever be removed from the Register of Aboriginal Sites database. All information is relevant and a valuable source of data, which can assist stakeholders significantly, be they site custodians, researchers or developers. Aboriginal heritage is in a constant state of flux as legislation attempts to appropriately apply itself to Aboriginal cultural heritage to its fullest expression. The description and definition of places will expand and contract over time and places on the Register will continue to be revisited and revised, or more information or discoveries may come to light that contribute to the meaning and understanding of places.

Amendment to status is all that is required and any such amendments should only be undertaken by the ACMC; it is not appropriate that any individual employed by the Minister within a hierarchical organisational structure to make such decisions. The ACMC is an independent body established to make those determinations and should be the only mechanism that permitted to do so.

In closing, the AHA developed in response to the protection of the sacred site at Weebo, during a era of transition from paternalistic post colonial 'Assimilationist' policies that pervaded the lives of Aboriginal people in the landscape of the Australian nation; a nation to which they had only been invited to full participation of five years earlier. What distance has been travelled between Weebo and the Burrup Peninsula; between the hopes and aspirations of the proponents of the AHA and the circumstances that lead to Justice John Cheney's ruling against the ACMC on 1 April 2015? What has been protected? The right to profit motivated corporate entities to undertake government endorsed and/or sanctioned irrevocable interruption and destruction of cultural landscapes and features that are of immeasurable value.

Ministerial consent for the WEL Pluto Gas Processing Plant on the Burrup and ongoing promotion for further heavy industrial development on the Burrup Peninsula, which overlooks the Dampier Archipelago National Heritage Place, demonstrates very clearly how the Act is currently being operated, and what it is capable of allowing in terms of failing to protect Places and Objects it applies to. This is too narrow in its application.

To observe the operation of and decisions made under the Act in the last 20 years, a set of values that reflect the priorities of the State and what is in the interests of the 'community' of Western Australia. 900 engraved boulders were relocated under what is described as 'best practice' archaeology, to allow for the development of a gas processing plant, which interrupts millennia old cultural landscape that stretches to Uluru, and which contains the largest continuous gallery of rock art known to the world, in addition to other stunning cultural, historical and archaeological features. The Pluto gas processing plant neighbours the preexisting North West Shelf Joint Venture, which has current capacity to process the Pluto gas field product. No resource is present at its location and there is no sound reason to have established it there, other than the infrastructure for heavy industrial development that was

laid down by the government in the 1960's. Areas A, B, C, D, E, F, G and H in the Burrup and Maitland areas; those not already active are still earmarked for heavy industrial development despite potential World Heritage Listing of the Dampier Archipelago based on the rock art.

Industry and Government refer to the co existence of heavy industrial development and the NHL Dampier Archipelago as a 'win-win' situation. Perhaps they refer to each other in this, because the Aboriginal groups in the region do not describe this as a 'win' for them, but rather a source of great pain, invalidation and frustration. Those with a respect for and appreciation of and interest in the values extant there and they are many and across the globe, do not describe this as a 'win' for heritage and the contribution further understanding of the Burrup can make to humankind. Too many Western Australians are not even aware of its existence or value and they ought to be, it is declared in law that such things are to be preserved on their behalf. The AHA must promote awareness; when Aboriginal cultural heritage is respected, it has a better chance of being protected.

The AHA was not intended as a means to subvert heritage protection but as a means of ensuring protection in the event of competing interests regarding land use.

In the interim while proposed reform is considered, a process of ‘troubleshooting’ or logical systematic identification for the source of the historic and current problems, in order to resolve and learn from them and restore effective operational function is urgently required. Any remnants of the previous and current ways of operating need to be identified and rectified. The Administrator must adhere to the principles of ethical and accountable conduct, compliance with the Public Sector Management Act and appropriate due diligence and duty of care.

Adequate resources ought to be allocated to invest in resolving the matters referred to in this submission. Immediate attention should focus on sections 5, 6, 16, 17, 18 and 39(2), in addition to those sections that outline the establishment, composition, authority and obligations of the ACMC. Subsequent to that sections 16, 17 and 18 require sound, consistent and logical sets of processes. Despite the flaws and complexities, basic and effective function under the current AHA is possible under the right leadership and administration.

Robin Chapple MLC
Member for the Mining and Pastoral Region
in the Western Australian Legislative Council

PO Box 94, West Perth WA 6872