# Opportunity is There for the Taking: Legal and Cultural Principles to Re-start Discussion on Aboriginal Heritage Reform in WA

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*The Aboriginal Heritage Act 1972 (WA) was drafted at a time when there was no consultation with Indigenous peoples, and based on a Eurocentric, anthropologically grounded "museum mentality" that failed to understand that Indigenous heritage is living. All sides of the contemporary debate – Indigenous communities, the full range of the political spectrum and the mining industry – acknowledge that major reform is needed. This article provides guidance on how to achieve such reform – not in the sense of specific legislative provisions, but broad legal and cultural principles that must lead discussions about change.*

## INTRODUCTION

The *Aboriginal Heritage Act 1972* (WA) (AH Act) has seen only minor amendments since its commencement. It was drafted at a time when there was no consultation with Indigenous peoples, and based on a Eurocentric, anthropologically grounded "museum mentality" that failed to understand that Indigenous heritage is living. All sides of the contemporary debate – Indigenous communities, the full range of the political spectrum and the mining industry – acknowledge that major reform is needed. This is an opportunity to amend the legislation to be a world leader in cultural heritage protection. However, the last few years have seen much talk, some intervening litigation, and even a proposed Bill, that have not effected change. Guidance is needed on how to achieve such reform – not in the sense of specific legislative provisions, but broad legal and cultural principles that must lead discussions about change.

## THE AH ACT: MADE IN THE 1970S

By the time the AH Act was being considered by the WA Parliament in 1972, it was noted in the Second Reading Speech to the Bill that all "other States with Aboriginal populations have already legislated in this field".[1] The broad ideas behind the *Aboriginal Heritage Bill 1972* were not viewed by the members of Parliament as particularly controversial. The Hansard records discussion of the historical and aesthetic importance to mankind of Aboriginal sites and notes that preservation is of world concern. There were no Indigenous voices. What makes this more shocking is that the AH Act has not seen major amendment since its enactment.

The purpose of the AH Act was, and still is, to provide 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" (long title). This title emphasises two things: preservation on behalf of "the community" generally, not the Indigenous community specifically or even predominantly; and, the sense of Aboriginal heritage relating to custom and tradition which can be seen as historically inclined. These purposes are reflected throughout the legislation. One prominent example in relation to "the community" is that the AH Act is built around recommendations made by the Aboriginal Cultural Materials Committee, yet, the legislation does not require the Committee to have an Aboriginal member (although, currently there are Aboriginal members on the Committee). Instead, the legislation requires that the Committee have a member specialised in anthropology relating to "the Aboriginal inhabitants of Australia" (s 28(3)). Ironically, recent proposed reforms suggested the removal of the

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[1] Western Australia, *Parliamentary Debates*, Legislative Council, 11 April 1972, 472 (Hon WF Willesee).

requirement of an anthropologist because "Aboriginal people are more than able to speak on behalf of themselves", but did not make any amendments to require the involvement of Aboriginal people.[2]

An example in relation to the sense of historical custom or tradition, rather than "living" heritage, is the definitions of Aboriginal "places" and "objects". A "place" includes a place where "persons of Aboriginal descent" have left any object; a sacred, ritual or ceremonial site, a place which is of "historical, anthropological, archaeological or ethnographical interest" or a place which objects are stored (s 5). There is no recognition of Aboriginal culture as living and dynamic or that Aboriginal people should be the contemporary custodians of their heritage. The definitions suggest that Aboriginal heritage is in the past.

At the heart of the operation of the AH Act is s 17, which prohibits destroying or damaging an Aboriginal site or object, and s 18, that allows the Minister to consent to uses of land which would otherwise breach s 17. Section 18 applications are made to the Committee. The Committee then makes a recommendation to the Minister which the Minister is bound to consider but not follow. Applicants for s 18 consents have a right to review by the WA State Administrative Tribunal. Traditional owners do not have any right of review, leaving judicial review as the only option.

## THE REFORM PROCESS: MUCH TALK, SOME (INTERVENING) LITIGATION, AND A PROPOSED BILL

The contemporary consideration of reforms to the AH Act began in 2012 with the release of a Discussion Paper. An independent consultant with anthropological expertise was engaged to write this as a review of the AH Act. The review included informal discussions with "stakeholders". It did not suggest major changes to the Act. After the review was published, a large number of submissions were received by the Department of Aboriginal Affairs. There was then a lull in the reform process.

In 2014, a draft Aboriginal Heritage Amendment Bill 2014 was released for comment. The Bill included a new s 18 process. As part of this proposed process, the newly created position of "CEO" of the Department could issue a declaration that there was no Aboriginal site on the land without any reference to the Committee. The CEO could also issue a permit where they were satisfied that the activity would not destroy or damage an Aboriginal site, or that there is no significant risk that the act would adversely affect the importance and significance of an Aboriginal site, without reference to the Committee. If the CEO was of the opinion that there is an Aboriginal site on the land then the application could be referred to the Committee. This vests huge amounts of power in the position of the CEO. This is particularly so given that although increased appeal rights were given to proponents in the proposed amendments, no rights of review were given to Aboriginal people whose heritage is affected. Further, the only mechanism to make people aware of such declarations being made was the *Government Gazette*.

While the transfer of many of the functions of the Committee to one officer was a major concern, there were a number of other issues raised. The majority of the 150-plus submissions received on the draft Bill were critical of the proposed amendments. Certainly the Bill made no attempt to bring the legislation into line with modern Indigenous heritage values and understandings, nor even to bring it in line with other Australian States, such as the reformed legislation of Queensland and Victoria. The purported aim of the reforms was to give a stronger voice to Aboriginal people, but instead it had the opposite effect.[3]

The Bill was introduced into Parliament in November 2014. The 150-plus submissions appeared to make very little difference as the Bill introduced was not substantially different to the draft Bill. The progress of the Bill was slow. There was a petition to Parliament with more than 1,600 signatures requesting further consultation with the WA Indigenous community; a rally on the steps of Parliament House with more than 60 traditional owners and elders representing each region of Western Australia (some travelling vast distances to be present in Perth); and the issues were formally raised by a WA

[2] Western Australia, *Parliamentary Debates*, Legislative Assembly, 27 November 2014, 8995b-7a (Hon Dr Kim Hames).

[3] Ambelin Kwaymullina, Blaze Kwaymullina and Lauren Butterly, "Opportunity lost: Changes to Aboriginal Heritage Law in Western Australia" (2015) 8(16) *Indigenous Law Bulletin* 24.

Indigenous land council (Kimberley Land Council) at the United Nations Permanent Forum on Indigenous Issues in New York. Then there was an intervening event.

On 1 April 2015, Chaney J delivered his reasons in *Robinson v Fielding*.[4] This judicial review matter related to a site in Port Hedland harbour called Marapikurrinya Yintha and challenged a determination that it was "not a site" after previously having been registered as a heritage site. The decision of the Committee that Marapikurrinya Yintha was not a site was made on the basis of some new guidelines on s 5 of the AH Act that had been published by the Department. These guidelines set out additional criteria for what was to be considered when determining if a place is a "sacred, ritual or ceremonial site". Chaney J held that the guidelines were inconsistent with the proper construction of the section and that therefore the Committee asked itself the wrong questions and fell into jurisdictional error. His Honour also considered issues around the opportunity to comment before the decision was made. He noted that although there was nothing in the AH Act that required consultation with Aboriginal people, the effective operation of the Act requires "input of some kind" from Aboriginal people.[5] In this particular case, the pattern of consultation that had occurred prior to the site being determined to be an Aboriginal site, meant that procedural fairness should have accorded that sufficient information be given to Aboriginal people who might be affected by the decision. A more recent decision of Pritchard J in *Abraham v Collier, Minister for Aboriginal Affairs*,[6] sought to clarify and limit to particular factual scenarios these notions of procedural fairness around consultation, making reform even more important.

The *Robinson* case led to revelations in the WA Parliament about a number of other sites being determined to be "not a site". The Minister for Aboriginal Affairs said that cases would be reviewed. The Bill was still on foot, but the "talk" in Parliament was about the aftermath of *Robinson*. Then in September 2016, the WA Government announced that it would put the laws on the backburner until after the March 2017 election. Five years after the start of the review process and it has not moved forward. Arguably, it has taken backwards steps.

## KEY GUIDANCE FOR REFORM

Given the current debate has stalled, what is needed at this stage is clear articulation of broad legal and cultural principles that must lead discussions about reform. The AH Act does not need tinkering at this stage – even just to bring it into line with other Australian jurisdictions requires an overhaul. This should be seen as an opportunity to make changes that would see the AH Act became the benchmark in Australia, in a State that has rich, living Indigenous heritage. In this article we identify the six most important principles.

### 1. Consultation During Reform Process

Unsurprisingly, the first principle must be adequate consultation with all sides of the debate. In particular, the consultation must meaningfully involve Aboriginal people from the diverse range of country in Western Australia. Adequate consultation involves giving adequate timeframes, providing understandable and sufficient information to consult on (and make comment about) and then detailing how the Department has made use of the submissions by providing a response. The review process associated with this legislation has a strong history of calling for submissions and then seemingly ignoring them. Further, given the failures that occurred in the last "round" of suggested reforms, consultation will only be meaningful if major reforms are put forward. It was clear from a number of submissions in previous "rounds" that organisations and individuals are not happy with small changes. They want to see a full review of the legislation compared to modern ideas of heritage protection law.

### 2. Aboriginal Involvement in the Heritage Process

Aboriginal involvement in making heritage decisions must be statutory entrenched. This is a most basic requirement. While the decision of Chaney J in *Robinson* gave a procedural fairness requirement

[4] *Robinson v Fielding* [2015] WASC 108.

[5] *Robinson v Fielding* [2015] WASC 108, [129].

[6] *Abraham v Collier, Minister for Aboriginal Affairs* [2016] WASC 269.

of consultation in some factual scenarios, both Chaney J and Pritchard J (in the later case of *Abraham*) emphasised that the legislation itself does not provide for such a requirement.

There are different ways in which involvement can be entrenched. For example, the *Aboriginal Heritage Act 2006* (Vic) has a two-pronged approach: there is an overarching Aboriginal Heritage Council which provides advice to the Minister and is made up of all Aboriginal members who are traditional owners from an area of Victoria (s 131); and at a more local level, registered Aboriginal parties that provide knowledge to the Minister and the Aboriginal Heritage Council about places and objects in their area. These registered Aboriginal parties also consider and advise on applications for cultural heritage permits, evaluate and approve or refuse to approve cultural heritage management plans and enter into cultural heritage agreements (s 148).

The Aboriginal population of Western Australia is particularly diverse given the size of the State. It is likely in Western Australia that a more local approach would be preferred with support from a central Aboriginal-led body. However, consultation about such a model is vital.

## 3. Aboriginal Heritage should be under the Custodianship of Aboriginal People, Recognised as Owned by Aboriginal People and Acknowledged as Contemporary and Living

The objects clause of the *Aboriginal Cultural Heritage Act 2003* (Qld) states clearly that Aboriginal cultural heritage should, as far as practicable, be owned and protected by Aboriginal people if it comprises human remains, secret or sacred objects or cultural heritage lawfully taken away from an area (s 14(3)). This is particularly relevant in relation to repatriation of Aboriginal remains or secret/sacred objects (which no provision is currently provided for in the AH Act). The Queensland legislation also recognises Aboriginal people as the primary guardians, keepers and knowledge holders about heritage more broadly (s 5(b)). The *Aboriginal Heritage Act 2006* (Vic) purpose clause also identifies the importance of strengthening the ongoing right to maintain a distinctive cultural relationship with land and waters that traditional owners have a connection with (s 1(c)).

The AH Act does not contain any provisions about ownership of Aboriginal heritage; the concept of "the [non-Indigenous] community" is still paramount. The AH Act should contain provisions that identify that Aboriginal heritage is owned by Aboriginal people, is part of contemporary Aboriginal life and is of importance to the strength of the Aboriginal community. The wider community should also be included in a provision that recognises the important of educating the community about Aboriginal heritage and accessibility if and when suitable, subject to Indigenous cultural protocols.

## 4. Duty of Care

The AH Act operates in such a way that it gives the benefit of the doubt to a company or individual who damages a heritage site. Section 62 of the AH Act provides a "special defence of lack of knowledge" so that if the person charged can prove they did not know, and could not reasonably be expected to have known, that a place or object is Aboriginal heritage, that is a defence. There is an enlightened and alternative way to approach this: a duty of care to investigate and ensure it is not heritage.

In the *Aboriginal Cultural Heritage Act 2003* (Qld), this is called a "cultural heritage duty of care" and applies so that a person who carries out an activity "must take all reasonable and practicable measures to ensure the activity does not harm Aboriginal cultural heritage" (s 23(1)). Of course, for such a duty of care to be fair and effective, further information must be given to individuals, organisations and companies so that they know how to comply. To this end, there are published Queensland Duty of Care Guidelines (s 28), which are in fact currently under review and have just been through one round of consultation. It is noted that the duty of care concept has not been without implementation difficulties, however, Western Australia has a chance to learn from and build upon the Queensland experience in this regard.

## 5. Beyond Adversarialism and Isolationism

It does not seem to have been the intent of the original drafters in the 1970s that the legislation be seen as adversarial, particularly given they all believed protecting Aboriginal "artefacts" was an important virtue for non-Indigenous people. The attitude of more recent governments appears to have become increasingly adversarial: mining versus heritage.

Yet, this is not how it works in practice and the legislation can reflect this. Mining companies generally work closely with Indigenous and non-Indigenous heritage consultants who in turn engage with Indigenous traditional owners. Further, engagement with Aboriginal peoples is now an entrenched feature of the WA resources sector. A phenomenon that was originally driven by native title consultation requirements, and corporate social responsibility policies, now forms the bedrock of a changed way of doing business that sees Indigenous communities and businesses networked into relationships with corporations across the resources sector. The legislation should promote responsible, culturally respectful agreement making. It should also acknowledge and facilitate the relationship between native title and heritage, as well as heritage and environment, rather than the current "silo" approach that fails to recognise these important connections. In this regard it is worth noting that in the first review of the AH Act, the Discussion Paper recommended more thought about the relationship between the *Environmental Protection Act 1986* (WA) and the AH Act. This is a good recommendation.

## 6. Respect for an Aboriginal Worldview

A fitting point to conclude on is to suggest that the legislation must acknowledge and respect an Aboriginal worldview about heritage. For Aboriginal peoples, heritage is a part of a vibrant, living culture. In contrast to the reductionist, results-focused linearity that underlies much of western legal thinking (including in relation to heritage), Aboriginal worldviews tend to be holistic, process-focused, and non-linear.[7] Heritage in this regard is not isolated collections of objects or individual sites separate from Aboriginal environments, cultures and peoples, but part of a complex network of relationships through which Indigenous peoples have sustainably managed their homelands for thousands of years.

There is no doubt that reform is much easier in a discrete manner. However, each of these six principles challenges the next round of reform to "think big" and see an opportunity in amending the AH Act to be a world leader in cultural heritage protection.

[7] See, eg Mary Graham, "Some Thoughts about the Philosophical Underpinnings of Aboriginal Worldviews" (1999) 3(2) *World Views: Global Religions, Culture, and Ecology* 105; Blaze Kwaymullina and Ambelin Kwaymullina, "Learning to Read the Signs: Law in an Indigenous Reality" (2010) 34(2) *Journal of Australian Studies* 195; Irene Watson, "Kaldowinyeri-Munaintya: In the Beginning" (2000) 4(1) *Flinders Journal of Law Reform* 3; Victoria Grieves, *Aboriginal Spirituality: Aboriginal Philosophy, the Basis of Aboriginal Social and Emotional Wellbeing* (Cooperative Research Centre for Aboriginal Health, Casuarina, NT, 2009).