

Submission

Review of the Aboriginal Heritage Act 1972 (AHA)

Glenn Shaw

June 2018

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1. Introduction

The Minister for Aboriginal Affairs, Ben Wyatt MLA states in the My Heritage My Voice Consultation Support Pack that:

“The current legislation does not meet the contemporary needs of Aboriginal people, government or industry, and does little to protect our unique heritage.

“Change is required to ensure that our Aboriginal heritage can continue to be preserved for current and future generations”

The introduction while recognising the *Aboriginal Heritage Act 1972* (AHA) was written in 1972; it does not go to the fact the principle body managing Aboriginal Heritage at that time was the WA Museum through the Sites Department, and with the subsequent change within structures of Government coupled with the fact Aboriginal Heritage now sits within the Department of Planning, Land and Heritage (DPLH), the need to ‘modernise’ the Act is required not only to consider terminologies currently within the Act, but also functionality of the Act.

While it is unclear as to the level of proposed change to the current AHA, I hold the view it would be far more pragmatic to replace the current AHA with newly structured legislation, because the level of amendment required is extremely large.

The second matter in relation to the proposed amendment process is the context in which the legislation will be developed, and it would be preferred if it were developed in a social policy context rather than a domestic policy context, as this is likely to result in improved outcomes for end users and in particular Aboriginal people.

2. Comment on Discussion Paper Questions

2.1 Purpose of the Act

The purpose of the *Aboriginal Heritage Act 1972* (AHA), while being relevant at the time of enacting the original legislation in 1972, clearly needs to be reconsidered as a result of what is likely to be substantive change of not only the purpose but also the spirit of the Act once amended.

It is notable that several other jurisdictions have sought to amend previous Aboriginal Heritage laws, in recent times, and many of those jurisdictions have sought to formalise and modernise the roles and responsibilities through substantive amendments or new legislation within their respective jurisdictions.

The specific question in the Consultation Paper refers to the long title of the Act which reads:

“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.”

While the long title of the Act may have been consistent with government policy positions and community values in 1972, I believe both have changed substantially over the proceeding 46 years, and the long title must be amended to reflect that change in circumstance.

2.1.1 Amendment to the Purpose of the Act

The concerns I have with the long title are:

- The word '*preservation*' is likely to be reflective of the time when Aboriginal heritage came under the purview of WA Museums, but given it now sits within the DPLH, the term '*preservation*' should be replaced with '*protection*'.
- Wording '*on behalf of the community*' should be reconsidered to ensure the '*Aboriginal community*' is clearly articulated in the long title.
- 'original inhabitants' could be amended to read '*Aboriginal people*'.

Any possible amendment of the long title should be considered in line with that contained in the *Aboriginal Heritage Act 2006 (Victoria)* as the legislation appears to place greater significance on the role of the Aboriginal community in the protection of Aboriginal heritage (including intangible) while allowing the legislation "*to promote respect for Aboriginal cultural heritage, contributing to its protection as part of the common heritage of all peoples and to the sustainable development and management of land and of the environment.*"

A change such as this will lift the status for the promotion and protection of Aboriginal heritage for all Western Australians, while providing a key role in the management and protection of Aboriginal heritage with the Aboriginal community, which is a clear message in relation to the recognition of self-determination.

3. Roles under the Act

3.1. Role of the Minister

While the AHA, as expected, provides a defined role for the Minister in relation to a large number of matters, the role in relation to consents is a concern, particularly regarding the consideration of "*the general interests of the community*" and the notion the interests of Aboriginal people are seen as subordinate to all other interests.

The legislation, will as a matter of process, not be established in such a way that it appears (either directly or indirectly) to fetter the ability of the Minister to make decisions regarding the protection of or impact on Aboriginal heritage, but it may provide a clearer and more inclusive mechanism under which this authority is exercised.

3.1.1 Amended role for the Minister

There is a clear understanding any amendments which would fetter the ability of the Minister to make decisions would not necessarily receive support of Government, however there may be alternatives so the Minister has confidence such decisions are *fully informed* and wherever possible have been considered by those affected by such a decision.

This would require any such decisions to be made only following direct consultation with the relevant Traditional Owner groups, and should afford those same Traditional Owners the ability to seek administrative review, either through the State Administrative Tribunal or an independent authority, of such decisions should they be inconsistent with or appear to disregard the advice provided to the Minister.

3.2 Aboriginal Cultural Materials Committee

The AHA in its current form, raises concerns as to the possible make-up of the Aboriginal Cultural Materials Committee (ACMC) as it states at s28(4)

“Subject to subsection (3), the appointed members shall be selected from amongst persons, whether or not of Aboriginal descent, having special knowledge, experience or responsibility which in the opinion of the Minister will assist the Committee in relation to the recognition and evaluation of the cultural significance of matters coming before the Committee, and shall be appointed by the Minister from a panel of names submitted for the purposes of this Act by the Registrar.”

The main concern with this particular section of the Act is that it clearly states the membership of the ACMC does not require membership from the Aboriginal community.

This in itself places the legitimacy of such a committee in jeopardy, as it would provide authority to a collective of individuals to make decisions (or recommendations) based on their *“special knowledge, experience or responsibility”*, without necessarily having full appreciation or cultural competency to adequately interpret key information such as the value of sites to the Aboriginal community / Traditional Owners.

3.2.2 Alternative structure to the current ACMC

There is an alternative to the current structure which would see the devolution of matters relating to the Registration of Sites to Regional Aboriginal Heritage Authorities (RAHA), who would be charged with confirming information provided in relation to Sites and providing this information to the Registrar for inclusion on the Register (as set out in 3.3 The Registrar). Each respective entity seeking registration as a RAHA would make an application for registration to the Minister, with the final decision regarding appointment of the RAHA's resting with the Minister.

RAHA's could include but not necessarily be limited to:

- Prescribed Bodies Corporate (PBC) established under the *Native Title Act 1993 (NTA)*. This would ensure those Traditional Owners who have had determinations confirming their Native Title rights and interests would also have responsibilities regarding Aboriginal cultural heritage in their region;
- Native Title Representative Bodies (NTRB) established under the *Native Title Act 1993 (NTA)*. This would operate where existing Registered Native Title Claims are progressing either through litigation or alternative settlements (ILUA's), and the NTRB has in place a formal Cultural Advice Policy which would support the Native Title Claimants/Traditional Owners in the assertion of their interest in relation to matters concerning Aboriginal Heritage;
- Law and Culture Centres;

- Where none of the above exist, other bodies specifically established to fulfil the role of RAHA under the AHA, subject to meeting a strict criteria as established under the AHA and/or association regulation.

This process supports the principles of self-determination for the Aboriginal community/Traditional Owners, as it relates to information held by the State, and also assists the Registrar in ensuring the accuracy of the Register.

The ACMC would be retained, but would have its membership drawn from those nominated by the RAHA, once it has been agreed internally who has authority to speak for the respective RAHA.

This would however not affect the ability for the appointment of ex-officio members as is currently set out in s29 of the AHA.

3.3 The Registrar

There is clearly a requirement to maintain a Register of Sites, which in turn will require maintaining the position Registrar, however the scope of the position of Registrar needs to be amended.

The role of the Registrar, under delegation from the Chief Executive Office of the Department should be limited to:

- Establishing and maintaining the Register of Sites;
- Ensuring the accuracy of the information on the Register; and
- Providing information to the ACMC (in whatever from it takes) on matters pertaining to the placement of Sites on the Register including those relating to accuracy of such information.

The AHA at s37, clearly articulates the role of the Registrar, however to ensure there is no inconsistency between the function of the Registrar as set out in s37 and the day-to-day functions as they currently exist, the operational scope of the position must be codified in legislation.

3.3.1 Redefining the role of the Registrar

The Registrar should function with authority afforded the position under s37 of the AHA but to ensure the independence of the ACMC, should not have authority to make recommendations to the ACMC (in whatever form it takes), on matters under its consideration.

The same should be in place for communications with the Minister in that the Registrar should convey the facts relating to decisions of the ACMC, along with relevant information related to those decisions, but in no way should seek to recommend a course of action.

3.4. The Department of Planning, Lands and Heritage

There is also a requirement for the retention of staff for a division within the Department of Planning Lands and Heritage (DPLH) which would be the Aboriginal Heritage Directorate. These staff would function under direction of the Registrar, which would include but not necessarily be limited to:

- Provide site assessment information, including maps, site attributes and a statement of values of the site as provided by the Aboriginal community/Traditional Owners or the RAHA, to the Registrar to assist with the accuracy of the Register.

- As required provide technical advice to the RAHA to assist them in their deliberations.
- Through the Registrar provide advice to the ACMC (in whatever form it takes) on matters under consideration by the ACMC.

4. What is protected?

For me the question should go to what should be protected, rather than what is protected.

4.1 Current protection under s5 of the AHA

Section 5 of the AHA currently reads:

“This Act applies to —

(a) any place of importance and significance where persons of Aboriginal descent have, or appear to have, left any object, natural or artificial, used for, or made or adapted for use for, any purpose connected with the traditional cultural life of the Aboriginal people, past or present;

(b) any sacred, ritual or ceremonial site, which is of importance and special significance to persons of Aboriginal descent;

(c) any place which, in the opinion of the Committee, is or was associated with the Aboriginal people and which is of historical, anthropological, archaeological or ethnographical interest and should be preserved because of its importance and significance to the cultural heritage of the State;

(d) any place where objects to which this Act applies are traditionally stored, or to which, under the provisions of this Act, such objects have been taken or removed.”

The current s5 may have been adequate at the time of implementation and/or occasional amendment, however the understanding of places of significance to Aboriginal people has improved and therefore legislative mechanisms to adequately protect such places needs to reflect that understanding.

Consideration should be given to amending s5 to reflect the spirit and intent as set out in s3 of the *Aboriginal Heritage Act 2003 (Victoria)*.

4.1.1 Future protection under the AHA

Any future protection regime should seek to maximise the areas over which protection applies, and also alleviate the current categorisation of ‘Stored Data/Not a Site’ as this category does not necessarily match the value of a site as held by Aboriginal people, or provide a mechanism for protection against impacts.

To ensure the Act maximises the areas over which protection applies, I propose the current categories of Sites and Other Places, which are Registered Sites, Lodged Places and Stored Data/Not a Site be scrapped and replaced with the following:

- A multi-level (4) categorisation which not only affords a specific level of protection but also differing mechanisms for consideration of possible impacts to those respective sites. It is proposed all current (80) Protected Areas will be categorised as Level 4 sites and be subject to the highest level of protection available.

- All existing Registered Sites will, as a matter of process, be categorised as Level 3 Sites so as to afford them the maximum protection while undergoing reassessment by the RAHA.
- All existing Lodged Places will be categorised as Level 2 Sites which provides the current level of protection while the RAHA undertakes reassessment against the site categorisation system
- All current Stored Data/Not a Site will be categorised as Level 1 Sites while they undergo reassessment. This will afford these sites some form of protection which is not necessarily available under the current AHA.

There are also proposed inclusions in what should be protected, as it is unclear if they are protected under the current AHA. Several other State jurisdictions have in recent times amended or enacted new legislation to ensure adequate protection of Aboriginal heritage, with a notable inclusion of 'Intangible Heritage' which appears to cover Songlines, Storylines etc. and this should also be included in any amended AHA. The proposed inclusions are:

- Songlines and Storylines.
- Cultural Intellectual Property of songs, stories, artwork, bush foods, bush medicines etc.
- Skeletal remains/Burials (in situ).
- Artefact Scatter (unclear if assessed equally depending on location).
- Traditional food sources and Bush Medicines.

Consideration should also be given to adapting similar wording to that in the *Conservation and Land Management Act 1984 (CALM)* at s33A(c) which states:

“(c) to protect or conserve the value of the land or waters to the culture and heritage of Aboriginal persons.”

The CALM Act goes further at s56 (2) (a) which states:

“(2) In preparing a proposed management plan for any land, the responsible body for the land shall have the objectives of —

- (a) protecting and conserving the value of the land to the culture and heritage of Aboriginal persons, in particular from any material adverse effect caused by —*
 - (i) entry on or the use of the land by other persons; or*
 - (ii) the taking or removal of the land’s fauna, flora or forest produce;”*

The protection of not only the Aboriginal heritage site and values but also the environment in which it is placed is also an issue of importance and is one which should not be ignored through the amendment process.

4.1.2 Site Reassessment process

With there being a need to complete a reassessment and categorisation of approximately 40,000 current Sites and Other Places across the State, it is unreasonable to expect this process to be completed within a short timeframe, and there must be a process which allows the RAHA in conjunction with the Registrar sufficient time to complete the task.

To assist in defining a possible timeframe for this to be completed (but not to determine a fixed timeframe) the boundary of each respective RAHA will be confirmed and a search of the current Aboriginal Heritage Inquiry System (AHIS) completed to identify the number and category of existing sites within that boundary. Once completed this will be provided to the RAHA and negotiations undertaken with each Authority to seek to identify a possible timeframe for completion of the reassessment process.

4.1.3 Resources to support the reassessment process

There will need to be consideration of the allocation of both financial and human resources to each RAHA during the reassessment process and the following is proposed.

Human Resource Support

- Each RAHA will be provided the support of a DPLH Aboriginal Heritage Directorate staff member who will provide the following information and or support:
 - A list of current Registered Sites and Other Places within the boundary of the RAHA;
 - Copies (electronic or hardcopy) of site files for each Registered Site or Other Place within the boundary of the RAHA;
 - Mapping support should the RAHA seek to redefine the site boundary as part of the reassessment process; and
 - Any other support required to assist the RAHA in meeting its obligations under the AHA or subsequent Regulations.

Financial Support

While there may be an expectation by the RAHA that the State would directly fund the reassessment process, this is unlikely to be supported by Government as a program which should be supported solely by Government.

It is unreasonable to expect each RAHA to undertake this task within their current funding constraints therefore the State, in conjunction with the Commonwealth, should consider a number of options which will generate sufficient income to adequately provide financial support for the reform process.

5. Protection and Enforcement

Future arrangements for protection and enforcement, like other proposed amendments, would need to undergo substantial change with the following being proposed.

Protection (Impacts)

5.1 Future arrangements to impact sites

As mentioned at 4.1.1 the new site category system will provide differing levels of protection, and with each comes a restructured process for the management of applications to impact those sites.

Every application, regardless of the category of site, requesting to impact a site will require the provision of a formal Heritage Impact Statement, which must be considered in any discussion on possible impact, regardless of the category of site.

- Impact Approval - Category 4 Sites

The only mechanism available for an impact to occur on Category 4 Sites is through a decision of the Executive of Government or both Houses of Parliament.

- Impact Approval - Category 3 Sites

Consent to impact a Category 3 Site, can only be provided with the support of:

- A signed Heritage Impact Agreement (including agreed impacts and conditions) between the proponent and the RAHA on behalf of the Traditional Owners;
- The RAHA including a Statement of Consent from the Traditional Owners with proposed conditions;
- Written support of the ACMC; and
- Written endorsement (with conditions) by the Minister.

- Impact Approval - Category 2 Sites

Consent to impact a Category 2 Site can only be provided with written support (including conditions) of:

- The RAHA on behalf of the Traditional Owners; and
- The ACMC.

- Impact Approval - Category 1 Sites

Consent to impact a Category 1 Site can be provided with written consent of the RAHA (including conditions) representing the Traditional Owners.

5.2 Future Enforcement regime

The current AHA has, under s50, the ability to establish Honorary Wardens however this section of the Act has not been used for a number of years, and is a section which should undergo substantial amendment.

With the powers of the Minister under s50 not being exercised for a number of years, and the commencement of other programs on country which have a purpose to undertake land and heritage management responsibilities, I propose there be an extension of the existing Ranger Program to include a number of dedicated Rangers with authority (subject to training) to act as enforcement or compliance officers within the structure of RAHA's.

6. Penalties

Current penalties of \$20,000 for an individual and \$100,000 for a body corporate, are not necessarily seen as adequate disincentives to effect unlawful impacts on Aboriginal heritage sites, and the current penalties should be increased to at least;

- \$200,000 for an individual; and
- \$1,000,000 for a body corporate.

Any subsequent offense would see the penalty double and in the case of a body corporate if the body corporate is in mining or development industry, a third offence would see the surrender of any permit/licence to undertake the activity on the land on which the offence occurred.

To assist with enforcement of the Act, consideration should be given to amending s50 Honorary Wardens, s51 Powers of Inspection and s52 Powers of officers to represent the Minister, to be afforded to those suitably trained Rangers currently employed in areas such as Land Management and/or Site Protection.

7. Site Assessment and Registration

As mentioned above (3.2.2) I am proposing an alternative arrangement for Registration of Sites, which will in turn require an alternative arrangement for the assessment of sites.

The assessment process will also be under the purview of the Regional Aboriginal Heritage Authority (RAHA), with each having a clearly articulated Cultural Advice Policy which sets out the mechanism under which such decisions are made.

While there may be concerns Government are seeking to influence the manner in which Aboriginal community organisation establish their Corporate Cultural Governance, the inclusion of a clearly articulated Cultural Advice Policy is proposed as a mechanism to support the ability of the RAHA to tailor such a policy to reflect their respective Cultural Governance arrangements.

8. Other parts of the Act

While I have sought to articulate issues I believe may need to be addressed in any amendments, as well as possible solutions, however, there will of course be a requirement to make amendments to other parts of the Act to improve its functionality.