Terra Rosa Consulting's response to the 'Review of the *Aboriginal Heritage Act 1972* Consultation Paper'

Terra Rosa Consulting is one of, if not the largest professional heritage consulting bodies based in Western Australia. We work across the state for a range of Indigenous corporations and other stakeholders; we also have a significant presence in Victoria through a partnership with the Victorian Federation of Traditional Corporations, as well as in Queensland through a variety of ongoing projects and joint venture initiatives. As a collective we have conducted a very large number of heritage surveys, and site recordings and registrations.

When the initial reform of the Aboriginal Heritage Act 1972 (the Heritage Act) was announced several years ago, we were generally enthusiastic about the need for a more Native Title inclusive Heritage Act that walked in step with the legislated reality of most corporations and Prescribed Body Corporates (PBCs) across the state. The 'heritage industry' also needed further regulation and guidance (and still does), and industry and government itself needed better guidelines on what compliance was and how it was assessed.

The inferred and sometimes stated intent of the Department of Aboriginal Affairs (DAA) at the time was to reduce dependency upon itself as in independent arbiter and to encourage groups to make agreements with proponents. This is a scenario that has been implanted in the Queensland / Cultural Heritage Management Plan (CHMP) model, but with a heavy smattering of influence from the sacred sites legislation in the Northern Territory.

No leadership from the DAA or government at the time addressed the need to align our Heritage Act with the Native Title Act. This appeared to be due to the much abused and ill-conceived 'Due Diligence Guidelines', and became the largest trigger for the drafting of Heritage Agreements and undertaking of subsequent surveys instead of the Heritage Act or the mutual obligations that the existing framework of agreements had imposed on both Native Title and tenure holders.

The initial effort to clarify what a site represented was framed in language that rendered it useless. Combine that with a heavy reinterpretation of policy and it led to a massive drop in the rate registration of Aboriginal heritage sites, no mitigation conditions attached to approvals, and a state of chaos amongst anyone trying to navigate the approvals area.

Our only guide was a one-page document was supposed to assist heritage professionals and Traditional Owners by defining how to get Aboriginal heritage sites registered. However, the Departmental application of these frameworks was inconsistent, and we all saw time and time again sites that only months earlier would have been considered an Aboriginal site under the Heritage Act were not granted any form of protection. Sites of significance to Traditional Owners were not being registered (or in a number of cases de-registered without any additional consultation), which meant they were able to be (from a statutory perspective) unconditionally destroyed.

On top of all these issues with policy, the first draft efforts of the DAA to implement an online site recording solution were initially usable, but once revised in light of increasing litigation became the terrible documents that we have today – cumbersome, clunky files wedded to the awkward language of the legislation and not reflective of common parlance, common sense, or clear instruction.

The legacy of the stalled reform that we (the heritage professionals, disenfranchised Traditional Owners, and confused developers) deal with daily is that it has not delivered any certainty, clarity, or indemnity from the Government of Western Australia. From this perspective, it has been a failure.

The initial purpose of the Heritage Act is to protect heritage places of importance and significance to Aboriginal people. But both it and its Regulations have not been sufficiently leveraged to ensure that this is the case, with the irony that at present it is exceedingly rare for an Aboriginal heritage site to be placed on the Register as a place of importance and significance without going through the Section 18 process where, while it may be granted status as a site, it is likely to also be legally destroyed.

This demonstrates a failure of interpretation and policy. Not a failure of the Heritage Act itself.

If the register of sites and places is to be a repository of places that have been disturbed, then it needs to be branded as such and function in that way.

At present what I have just described, together with the ready encouragement of the register as a planning tool (where former Registrars asserted that everything significant had already been recorded – an assertion which is demonstrably false for a range of reasons), and devices such as the Due Diligence frameworks, are actively undermining Heritage Agreements with Native Title parties.

We have seen a massive failure of policy, hidden behind a screen of process. This has, without a doubt, led to overwhelmingly negative outcomes for heritage protection - and moreover recognition - within the state of Western Australia, as well as a large departure from the original intent of the Heritage Act as it was drafted nearly 50 years ago.

The State of Western Australia has already, or is moving towards, accepting the rights and interests of our First Nation Peoples. Some of those accepted rights and interests are the right to look after Country and the important places within it. Having a policy framework, official or otherwise, that undermines this within a legislation that should reinforce it is a major liability to say the least.

Despite the shortcomings of its current implementation, we do believe that the Western Australian Heritage Act should be a source of pride in many ways.

We do not need to re-invent the wheel. We need to drag it out of the shed and work out just what all this spinning business is actually about.

The Heritage Act is clear in what is trying to do. Most of the articles within it discuss roles and responsibilities that could be easily inherited by Aboriginal bodies in a post-Native Title Determination landscape. With some fresher regulations to modernise its operating context, the Heritage Act should enable Western Australia to showcase a legislation that is our own, and something to be proud of.

There is need for a Regulator, and there is an obligation for empowerment. There is also a need for a fair and transparent approvals system that balances a unique cultural resource that is finite and under pressure against the potential economic interest of the state of Western Australia. At the present, we are not seeing any of this, and as a minimum a new reform bill should address these basics.

To address the specific feedback sought by the Department of Planning, Lands and Heritage (DPLH) around the next consultation and reform process[1]:

PURPOSE OF THE ACT The Long Title of the Act is: '…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.'

Q1. Is the long title an adequate description of what the amended Act should set out to do? If not, what changes should be made?

No.

It is hard to know without consent on the direction of the Heritage Act post-amendment, so this question is a little cart before the horse. It is not a good representation of the current Heritage Act. The hope would be that we can both modernise and make succinct the purpose of the Heritage Act, but also ensure that if its stated purpose is protection there are adequate processes to ensure this.

ROLES UNDER THE ACT

Role of Aboriginal People

The Act does not explicitly state that Aboriginal people should be consulted or that the Aboriginal Cultural Material Committee should have members from the Aboriginal community. The Minister may appoint honorary wardens under section 50, who may, or may not, be of Aboriginal descent, to exercise inspection powers under Part VII of the Act. – What a great power for a post-Determination Corporation to possess?

Q2. What do you think are the best ways to ensure that the appropriate people are consulted about what Aboriginal heritage places should be protected, and how a proposal may affect those places?

Through the Native Title process large tracts of the State have already been litigated or granted consent.

PBCs and other corporations have had to have this argument, and it should be a non-issue.

In areas without a determination various models exist, whether consulting with the Native Title parties (with whom you typically haven an agreement that stipulates this process anyway), or with prior site informants.

The Heritage Council model in Victoria, where recognised Elders convene to discuss pan-regional issues such as consultation and the selection of appropriate people for country, would be an interesting extension of the ACMC's role and functions, if it was reconstituted accordingly.

[1] Please note that we are using the headings and questions from the Consultation Paper.

Alternatively, in Queensland Traditional Owners can apply to the Department of Aboriginal and Torres Strait Islander Partnerships for recognition and status as a recognised Cultural Heritage Body.

Q3. To what extent has the provision to appoint honorary wardens been effective and how can it be improved?

It hasn't been done meaningfully for some time to my knowledge. It could be improved vastly by either having a regional warden informed by an Elders committee, or by a PBC possessing their own warden that was directly responsible to the Minister for the enforcement of the Heritage Act.

Q4. 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?

No. At the present there appears to be a large amount delegated responsibility throughout decision making apparatus within the DPLH that makes it very unclear. The whole of the decision making and delegation process needs clarification to ensure basic procedural fairness.

Q5. 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?

The range of Aboriginal heritage sites and places that could theoretically fit within the various criteria of sections 5(a) to 5(d) is vast. However, the word for word or literal definition that was applied by the Department's policy of these criteria has been confusing and inconsistent. The single page document issued by the DAA following the last phase of reform in 2014 was theoretically workable, but its application by the Department was, bafflingly, both too literal and too inconsistent for it to be useful in practice.

There should be clear definitions provided by the DPLH on what they consider to be a site under section 5 of the Heritage Act. These may be disagreed with by Traditional Owners and Native Title holders, but without greater transparency from the Department on what they value enough to provide legal protection to, the semantic arguments over the wording of the Legislation are not helpful.

Greater clarity around what the DPLH consider to be 'important and significant' in relation to section 39 of the Heritage Act would also be helpful.

Q6. Do section 6 and Part VI adequately describe the sorts of objects that should be protected under the amended Act? If not, how can they be improved?

There are by and large no real attempts to address intellectual property or repatriation in the current Heritage Act, and again, it is a relic of its time. However, the implication from section 6 is that there is potential for the Heritage Act to protect objects associated with ceremony and ritual should include protections for the stories, songs and rituals that frame the relevance of any such objects.

Q7. Is the declaration of a Protected Area under the Act the best way to deal with Aboriginal sites of outstanding importance?

No. It is a terrible method as there is no mechanism to allow for the management or funding of such places. We work closely with the Budadee Foundation which has been set up to manage and look after the Woodstock-Abydos Protected Reserve by Palyku people in the Pilbara, uniquely however working with at least six other Traditional Owner groups in the day-to-day implementation of conservation, community development, and training programs in the Pilbara. The aim of Budadee is to establish a ranger program in the Reserve, which is a Protected Area. However, the complete incompetence of the DPLH has meant that even though they were awarded a 'Preserving Our Sites' grant by the DPLH to erect signs in order to demarcate certain areas, Budadee was subsequently informed that they couldn't erect said signs as they did not have permission because it is a Protected Area. A year later, Budadee still do not have a clear path to obtain permission from the DPLH to spend the money that the DPLH gave it for that purpose.

The framework is solid, but with no regulations to enable a framework of active management it has led to a Kafka-esque situation where there is no possibility of forward movement, in an area of amazing cultural and social assets.

The protection of significant areas is valid and important, but it needs to follow the Federal model of at least enabling further funding for management, or they become an untenable burden for Traditional Owners, and an apparent burden for government.

Q8. Should the Act provide for the management of Aboriginal Ancestral (Skeletal) Remains? If so, what needs to be considered?

The current processes need to be vastly improved. There should be a ready mechanism that empowers the local Traditional Owners to act quickly in these scenarios (the revelation of traditional burial or human remains usually happens due to the disturbance of said burial or interment environment) which may be undergoing on going environmental impacts.

Q9. What sort of activities that may affect an Aboriginal heritage site should require consent or authorisation?

Any activity. The first principle of heritage management is avoidance. The easiest path for development is to plan around avoidance. Any impact on a site should be subject to negotiation with and consent by the relevant Traditional Owners. If consent can't be reached, the Regulator should then have a role.

Q10. 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)?

This question is unclear. Typically we would assume that any potential benefit for the State should be assessed against the costs to the State. Is the potential gain for the State offset by the impact of the loss of heritage values to the State?

Q11. How can 'impact' arising from proposals for land use on sacred sites that do not have physical cultural heritage elements be assessed?

Through a variety of models already established and used to manage sacred sites and landscapes. Social and cultural impact literature is a wide and growing field, and take primary direction from the relevant Traditional Owners.

Q12. Who should provide consent or authorisation for proposals that will affect Aboriginal sites?

Under the current Heritage Act, the Minister.

If that was to be amended, I personally think that the optimal model is where a robust framework is agreed between a Native Title body and a developer in the form of a CHMP, which is informed by the results of a heritage survey and allows for avoidance, mitigation, and other strategies to be negotiated between the two parties.

Having the regulator available as an as needed arbiter would be ideal in the case of an intractable dispute.

Q13. To what extent is the current section 18 application process effective and how can it be improved?

It is ineffective and any improvement is welcome. The lack of transparency around decisions made by the ACMC and Minister and the lack of consistency in what is and is not considered to be a site makes the process totally ineffective in protecting heritage values or empowering agency within Aboriginal Corporations to proactively engage in the process.

Q14. 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?

A workable section 19.

Q15. Are the enforcement provisions under the Act adequate to protect sites? If not, how can they be improved?

If there is no desire within the DPLH to enforce a breach then how can it be adequate?

Penalties such as increased fines will not help if there is no shift from the DPLH to take site disturbance seriously.

Q16. Are the current penalties under the Act adequate? If not, how can they be improved?

No - but see our response to question 15, above. If the DPLH does not enforce, prosecute etc, the penalties stipulated are irrelevant.

Q17. Should a defence continue to be provided where the disclosure of information (section 15) is against customary laws/protocols?

Section 15 should protect Traditional Owners from prosecution for not disclosing to the DPLH sensitive information (something which Aboriginal people are sometimes in direct conflict with when trying to establish Native Title). This protection in lieu of some level of protection of Intellectual Property is critical.

Q18. Are the criteria for assessing the significance of sites under section 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?

No, they should be aligned with National standards utilising the Burra charter as a reference point.

Q19. What should be the steps to report, nominate, assess, enter, amend or remove an entry from the Register?

Fundamentally they should be able to be engaged with by Traditional Owners as the primary source, without the current administrative burden.

Traditional Owners should be able to register and protect places of importance and significance outside of an internal trigger such as the Section 18 process.

The esoteric and complex nature of the current HISFs is an example of how this process is too inapproachable.

Q20. What do you think is missing from the Act?

There is a large section of interpretation that is missing from the implementation of the Heritage Act. How does the Site Assessment Team, ACMC or Minister ultimately decide if a site is a site under the Heritage Act?

This is the most glaring example of where, despite the fact that we have a clear and robust legislation, the policy and implementation is opaque and inconsistent.

Without efforts from the DPLH to make clear their decision-making process and how they interpret existing sections and criteria under the Heritage Act , this will need to be revisited.

Q 21. What sections, if any, do you think should be removed from the amended Act, and why?

None. It needs additive regulations to bring it into line with the Native Title environment and increase transparency over policy and decision making.