

Response ID ANON-8EBD-41YE-6

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

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About You

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

Individual

Individual details

Are you of Aboriginal or Torres Strait Islander descent?

No

What is your name?

Optional:

Jo Thomson

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

Yes

Purpose of the Act

Question 1

No

If not, what changes should be made?:

The long title should acknowledge Aboriginal custodians and Traditional Owners as the primary guardians, keepers and knowledge holders of Aboriginal heritage. It needs to specifically acknowledge Aboriginal people's rights and custodianship. The purpose also needs to be broader and include recognition, conservation and management, not just protection.

Roles under the Act

Question 2

2 - who should be consulted?:

Establish formal regional consultative bodies, run by Aboriginal people. These bodies should then determine who the right people to be consulted are and the appropriate ways of engaging with them.

The operation of the ACMC needs to be culturally appropriate too. Rather than excluding people who are from the country about which a decision is being made because of a perceived conflict of interest, they need to be involved.

Question 3

Ineffective

How can the provision to appoint honorary wardens be improved?:

Implement the provision on a more systematic basis. It would make sense to delegate the powers of the honorary wardens to Aboriginal Rangers. To make this work however, the wardens or rangers need to be remunerated (not just honorary) and there needs to be appropriate funding and training given to the rangers/wardens.

Question 4

No

Role and functions - Minister:

It would be preferable if the decision-making power over whether sites can be disturbed was in the hand of an independent tribunal.

The ACMC recommendations should be binding on the Minister.

The concept of 'general interest of the community' should also be defined in social and cultural terms in addition to economics.

No

Role and functions - Registrar:

The role of the Registrar is an important role and this should be reflected in the role requirements and status. Recommend requiring the Registrar to have

qualifications in heritage management, demonstrated cultural competence and extensive experience in the field.

No

Role and functions - Committee:

One of the most important changes that needs to be made is the separation of the process of significance assessment and decisions about land use. The APMC currently make these two decisions together and this is highly problematic as it opens the whole process up to bias and affects its validity. These two processes must be undertaken separately by separate bodies.

The APMC needs to be remunerated properly, not just for meeting time, but also the time they need to read through documentation and prepare for the meetings. Better preparation means more informed decision-making and more efficient meetings. The APMC should also have a range of relevant specialists that can support and enhance decision-making, rather than ex-officio representatives.

No

Role and functions - DPLH:

The Department needs to refocus its core business to proactively conserve, manage and promote Aboriginal heritage, rather than solely processing section 18 applications. This must be mandated by the Act.

There are also issues with the way the Act is administered. The Department needs to be funded to an adequate level that allows the State to show due respect for Aboriginal people and their heritage. It also needs to be staffed with people with appropriate depths of experience, knowledge and qualifications. It needs to set minimum standards.

What is Protected?

Question 5

No

5. How can section 5 be improved?:

Remove the terms 'of importance', 'of significance', 'of special significance' and 'because of its importance and significance to the State'. Heritage is heritage because it is valued by people. These terms are thus redundant. Including these qualifiers without defining them has also confused the whole process. It is these terms that have been the source of many problems. Section 5 should be broadened to include a much wider and inclusive range of heritage including both tangible and intangible aspects. Rather than making the Act about preventing things from qualifying as heritage, it should be as inclusive as possible then establish clear and appropriate processes to manage the heritage. This will also alleviate the problem of arguments between clients and consultants over what should and shouldn't be recorded in the field.

Question 6

No

6. How can section 6 / Part VI be improved?:

As per my comments on section 5 above, the definition of Aboriginal heritage needs to be much broader and inclusive. The same comments can be applied to section 6. It would make sense to incorporate section 6 into section 5.

Question 7

No

Additional comments:

There needs to be some way to ensure long term protection of some places. Protected Areas in their current form are open to retraction and therefore don't necessarily offer that long term surety. The other problem with Protected Areas is that they exclude people from the area. Aboriginal people need access to their heritage places and provisions also need to be made for their adequate upkeep and maintenance (including cultural maintenance).

Question 8

Yes

8. what needs to be considered?:

The Act needs to specifically include ancestral remains as well as protecting the place in which they are interned. The Act should include provisions for their repatriation and management. Importantly the Act also needs to set a mandate for the repatriation and restitution of Aboriginal ancestral remains and cultural materials from institutions back to communities.

Protection and Enforcement

Question 9

9. Activities that should require consent or authorisation:

Anything that adversely impacts upon the heritage values of that place. It will therefore depend on the nature of the place and its values.

Question 10

10. Criteria to evaluate activities that may affect a site:

No one set of criteria can fit all. The first step is to understand the heritage values. The second step is to understand how the proposed activities will affect those values.

Question 11

11. What is an impact in relation to sacred sites?:

Social impact assessments are a good model to consider.

The main steps would include identifying:

- the heritage values, access and cultural protocols associated with the place;
- what are permissible activities;
- what are the impermissible activities;
- what are the cultural and spiritual ramifications for the custodians and host community if the site was to be impacted or protocols contravened.

The levels of risk to the custodians, host communities, associated Aboriginal groups and proponents can then be weighed up through a social impact assessment.

Question 12

12. consent / authorisation for proposals that will affect sites:

The Aboriginal custodians.

Where there is conflict over consent then it should be referred to a Heritage Appeals Tribunal similar to SAT, where all parties can present their case to an independent panel or judge.

Question 13

Ineffective

13. How s18 can be improved?:

Replace the section 18 process with a two part process:

1. Establish an Aboriginal Heritage Advisory Council to assess impacts on Aboriginal heritage, and to ensure documentation of heritage values and that appropriate consultation is carried out.
2. Establish a Heritage Appeals Tribunal to facilitate and mediate cases where heritage values, impacts and management decisions require arbitration rather than judicial intervention.

Question 14

14. provisions for long-term protection of sites:

Make provision for conservation and management. Also make provision for heritage agreements and protocols for the management of places.

Question 15

No

15. How can enforcement provisions be improved?:

This section is focused on physical harm. It needs to focus on impacts on heritage values rather than impacts on things.

Question 16

No

16. How can penalties be improved?:

Increase penalties. Make them more enforceable. Extend the period under which prosecutions can be made. Consider reintroducing the forfeiture clause as a penalty.

Site Assessment and Registration

Question 17

Yes

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

A defence should continue to be provided where the disclosure of information under section 15 is against customary laws and protocols. There are clear customary reasons as to why Aboriginal people may withhold information. The removal of this clause would directly contravene the Minister's objective to modernise the AHA 'in a way that is respectful of Aboriginal people and their heritage'.

Question 18

No

18. What should the criteria be?:

Sections 39(2) and (3) currently prioritise Aboriginal values and significance. This prioritisation must be retained. Aboriginal people should, in the first instance,

define the criteria to assess the significance of a site. Secondly, the Act needs to be brought in line with other modern heritage legislation. It therefore needs to include, in addition to those criteria defined by Aboriginal peoples, additional criteria as outlined by the Burra Charter (Australia ICOMOS 2013), Significance 2.0 (Russell and Winkworth 2009) and other federal and state heritage legislation. I'd also recommend including archaeological significance (as separate from scientific significance) and anthropological significance.

Question 19

19. Steps to report place or object:

This process should be further work shopped with a forum of specialists including Aboriginal custodians, heritage professionals and Department staff.

19. Steps to nominate a place or object:

This process should be further work shopped with a forum of specialists including Aboriginal custodians, heritage professionals and Department staff.

19. Steps to assess a place or object:

This process should be further work shopped with a forum of specialists including Aboriginal custodians, heritage professionals and Department staff.

The assessment of sites should be undertaken totally separate to processing section 18 applications. The Department should establish a separate site assessment division to assess sites whilst another section can deal with section 18 processing. This will reduce the problems of bias as referenced to in the ACMC question above. If a site assessment team were sufficiently funded and resourced with appropriately skilled people then they could also start to tackle the backlog...

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

This process should be further work shopped with a forum of specialists including Aboriginal custodians, heritage professionals and Department staff.

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

This process should be further work shopped with a forum of specialists including Aboriginal custodians, heritage professionals and Department staff.

Amending details should not be a lengthy or cumbersome process, particularly in the situation where sufficient evidence is supplied to demonstrate that there is a need for amendment, such as site is located in the wrong location, a site boundary needs to be incorporated into another etc.

19. Steps to remove place or object from Register:

This process should be further work shopped with a forum of specialists including Aboriginal custodians, heritage professionals and Department staff.

De-registration has a multitude of complex issues associated with it that need to be considered and discussed in detail. The main point I'd like to make is that the authority to de-register sites should not rest with one person only.

Other Parts of the Act

Question 20

20. What's missing from the Act?:

I think that there should actually be a new Act developed rather than trying to patch up the existing one. Every other state in Australia has introduced new heritage legislation over the last 40 years.

There are many things missing from the Act:

1. A right of appeal against decisions for Aboriginal custodians.
2. Provision to involve and consult with affected Aboriginal people, communities and custodians.
3. Clear definition of technical and specialist terms.
4. A requirement for ethnographic and archaeological surveys.
5. Provision for the repatriation of Aboriginal skeletal and ancestral remains and restitution of other cultural materials.
6. Alignment with the Native Title Act 1993 and provision for agreements under the NTA.
7. Independent oversight of decisions made by the Minister under the AHA.
8. Accreditation of consultants.
9. Provision for the management of repositories of cultural material.
10. A clear process for the de-registration or de-accessioning of places and objects on the Register.
11. Increase in the grants program for Aboriginal not-for-profit groups to apply for funds to preserve and promote Aboriginal Sites.
12. A clear mandate for the Government to proactively and positively promote, recognise, respect, conserve, manage and protect Aboriginal heritage.

Question 21

21. Sections to be removed from Act?:

There are several sections of the AHA that should be removed:

1. Section 62 Special defence of lack of knowledge. This section was included in 1972 when there was not a great understanding of Aboriginal heritage by proponents.

The situation is now markedly different and under duty of care and due diligence guidelines, a lack of knowledge should no longer be available for defence.

2. The terms 'importance', 'significance', 'special significance' and 'of importance and significance to the cultural heritage of the State' in section 5 should be removed. As identified above these qualifiers are not defined, cause much confusion and are redundant.

Any other comments

Any other comments:

There is a need to consider ways to strengthen the Act so that future decisions under the AHA are made responsibly with the goals of respectfulness, sustainability and education firmly in sight.

Due attention must be paid to the administration of the Act, in addition to the content of it. How the Act is administered plays a big role in how efficient and

effective the Act is. The Department is chronically underfunded and under resourced. This significantly affects performance. It needs to be better supported by the government as a whole. This includes provision of appropriate funding and resourcing, training and capacity building of staff, funding register improvement initiatives, setting and enforcing clear minimum standards, and promoting a positive attitude towards Aboriginal heritage - it would be really encouraging to see the Department take a strong leadership role in the promotion and celebration of Aboriginal heritage.