

Written submission by WA Museum

Review questions for the AHA

Question 1.

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 the other purposes incidental thereto.’

Is the long title an adequate description of what the amended Act should set out to do?

We believe that the title of the Act is too long and descriptive; it also has a sense of lacking an Aboriginal voice whose sites the Act is aiming to protect.

While there is a wider community interest and support in the protection of Aboriginal heritage sites in WA, there needs to be a reflection of Aboriginal people as the custodians of sites and objects and the value these have in Aboriginal culture overall.

A suggested shortened title:

‘...to make provision for the protection, preservation, and management on behalf of the community, of appropriate places and objects to continue the ongoing values and beliefs of Aboriginal people and their Cultural Heritage.’

A suggested comparison is the Victorian *Aboriginal Heritage Act, 2006*, which has a simplified title, this Act’s subset of objectives lists what is deemed important:

Extract from Victorian Aboriginal Heritage Act. 2006

1 Purposes

The main purposes of this Act are—

(a) to provide for the protection of Aboriginal cultural heritage and Aboriginal intangible heritage in Victoria; and

(b) to empower traditional owners as protectors of their cultural heritage on behalf of Aboriginal people and all other peoples; and

(c) to strengthen the ongoing right to maintain the distinctive spiritual, cultural, material and economic relationship of traditional owners with the land and waters and other resources with which they have a connection under traditional laws and customs; and

(d) 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.

The objectives that follow are also quite strong.

Question 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 those places?

The list of potential consultants (a-d on page 7 of the Consultation paper) is a good start, however, it should be acknowledged that Native title holder claimants do not have a monopoly on knowledge of sites. There may often be other knowledge holders.

The heritage surveys are generally managed by the Native Title services and, at times, this process leaves out the opportunity for other groups who have knowledge of sites.

There are a number of ways in which Aboriginal people have a link to areas, such as through long term 'settlement' in the area which could be a result of forced removal and displacement and lost connection to own country.

These groups of people have lived and worked in areas for long periods of time and have knowledge of heritage sites, but because they do not form part of the Native Title process, they are not included in the consultation process. While Aboriginal people don't speak for other peoples' country, having a historical connection to the area should be considered during the consultation phase.

The Victoria *Aboriginal Heritage Act*, are working towards members of Prescribed Body Corporates, (PBC's) as the more favoured group to be consulted. This could then prove legally difficult to insist that "outsiders" should also have equal voice to PBC members. It should be the duty of the office that administers the WA Act to ensure that NT claimants, PBC members and 'others' who have cultural knowledge are given an opportunity to comment on protection of places/areas/ values.

Question 3.

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

We are not sure how effective this has been as this is a role under the Act that not many people are aware of, or even know exist. The Act and the administrative department need to provide more information about these roles, the benefits to the community and how members of the Aboriginal community can become Honorary Wardens.

The role of Honorary Warden under the Act is essential as departmental staff are not always available, particularly in remote communities or when work is inadvertently being undertaken on an Aboriginal site of cultural significance, without the proper consultation and/or approvals having been gained. These roles enhance the work of departmental staff and enhance the working of the Act when used properly.

In the past, there have been some issues relating to the role of Honorary Warden in particular their rights in entering private or corporately owned land was sometime contested.

Heritage professionals should also be made aware of the existence of Honorary Wardens.

Conveying Honorary Warden status to those engaged in existing Ranger programs would be a useful mechanism, but should provide a wider role in its functions.

Also, is it not time to update the word Warden? This is obviously a word that was reflective of its time of the development of the Act. Given the word is now used as a position of control and its place in history in WA as a title that was used to control Aboriginal people, the word needs to be removed and replaced with something more in line with what the role entails and a word that is not going to be offensive to Aboriginal people of WA.

Question 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?

Currently the Act does not stipulate that Aboriginal people should form part of the ACMC, this should be added to encourage Aboriginal people to apply, which will enable Aboriginal people to have a voice as the decision making process.

Selection criteria should be in place which will show that members of the ACMC have some basic understanding of how government run committees function and some basic understanding of the *WA Aboriginal Heritage Act*.

Under Part III, S10 (2) of the Act, the Minister's role "*extends to Aboriginal cultural material of traditional or current sacred, ritual or ceremonial significance*"; Under *Part VI of the Act, the Minister can delegate powers to the Trustees under the **Museum Act 1969***. Whilst it is important to continue to include the WA Museum as an ex-officio member of the ACMC, is it not time to separate the functions of the two pieces of legislation?

The management of collections of objects and where they sit under any Aboriginal Heritage legislation needs to be scrutinised and reformulated. The WA Museum is not the only state government agency that has collections of Aboriginal cultural material. How could the integrated management of existing collections held by state

and other organisations, (WAM, SLWA, UWA, and Curtin) be managed outside of the Act?

Should there be some form of assistance for communities to manage newly identified and/or newly created objects in country?

Question 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?

Currently the Act says that a site is significant according to the anthropological, archaeological and ethnographical significance. This implicitly denies consideration of the cultural significance that Aboriginal people place on their objects and places.

While the western scientific assessment of sites is important, the inclusion of Aboriginal spiritual beliefs and values placed alongside the technical expertise of heritage professionals and the assessments of departmental staff all complement each other and should all be considered together, in all decision making associated with the amended Heritage Legislation.

Significance must be placed on not only the opinions of heritage professionals and the assessments of departmental staff but also on the significant values and spiritual belief systems of Aboriginal people which have been passed down through the generations for 65,000 plus years.

In its current form, under S5, the Act is specifically focused on individual places. There is no framework for considering sites in the context of cultural landscape, relationships with the land, e.g. dreaming tracks; ecological knowledge and importance of natural places. There is also no notion of cultural precincts.

There is no inclusion of the notion of value, a notion that is embedded in other types of heritage legislation. In practice, there is a disjunction between the AHA and its focus on sites protected under the Act, and the process of S18s which focuses on parcels of land. The debates about what constitutes a site can derail protection of cultural heritage values.

Significance should be clearly evident, the hierarchy that is considered should be understood by community, applicants and evaluators e.g. local Aboriginal community assessment of the values of place etc. must be paramount; the scope should be expanded to beyond "site"

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?

The Act says the Register has a list of all Aboriginal cultural material. Most cultural material is held with the WA Museum, the AGWA and the SLWA and is managed there. There is no link between the registrar data of the DPLH and state collecting

institutions including WA Museum which holds material from specific sites in DPLH's register. This needs better resourcing and management between the two agencies.

Questions relating to objects need to be addressed in the Act. Is there actual requirement for declaration of objects?

Why aren't all cultural materials automatically objects, with decisions about management managed hierarchically with community and PBCs?

Section VI should also be informed by the classification in place under the Federal Protection of Movable Cultural Heritage Act. Although, the threshold of 'made for sale' may to be considered with reference to a rolling time period.

Question 7.

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

The declaration of a Protected Area, (PA) under the Act should remain, however, the management and protection of a PA needs to be reviewed. There is no national listing or further protection provided and the significance of a PA is often not raised within the community.

Consideration should be given in regards to the management of PAs and that this might be better managed by community. Under the current Act, the PA status prevents community from having any vesting or access to the sites, which removes any cultural management protection rights to Aboriginal people over highly significant sites that are managed as PA sites.

The current listing of PAs should be reviewed in terms of their significance given the number of newly recorded sites that may hold more significance and value.

Questions 8.

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

Yes, there is no provision under the Act that provides the management of skeletal remains. This needs to be included in the Act to indicate that the importance and significance that skeletal remains are of value and importance to both the Aboriginal community and the State, and that the management of the remains will be given importance as if it was a significant site.

Management of Aboriginal ancestral remains should be at the request from the Aboriginal community of whose remains have been returned.

Funding for management of returned remains made available, and should be managed through the DPLH.

The Museum should continue to maintain its current role in providing storage and repatriation support. The Museum's activities are constrained by the allocation of Federal funding. Its focus is on returning existing collections or assisting with the temporary storage of cultural material.

Question 9.

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

Should restrictions be placed on tourism companies who use Aboriginal sites as part of their tourism adventures? Should a permit be provided as they do when accessing communities and ALT land?

The tourism industry needs to be made aware of the significance of Aboriginal sites and should not be encouraging people to visit places without prior consent, authorisation and, where appropriate, benefits sharing. They should at least seek consent from the Traditional Owners of the sites: Maybe they can apply under a Reg10

Question 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)?

Current activities may be allowed but more pressure should be placed on developers, for example, mining companies, to make allowances for significant sites, site complexes and landscapes and to better manage their programs.

Tourism ventures also need to be added to the list of this, as mentioned in the previous question.

Should waters and seas be included in disturbance through activities? Not sure how this can be managed.

Waters should be included and in particular coastal/shoreline to the high water mark. There are many coastal sites and caves which should not be disturbed and all necessary approval processes must be in place for all users.

Question 11.

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

Assessment should be based on consultation with knowledge holders. This would include stories based on the community statement of values relating to the sites.

What will be the spiritual impact; will there be any physical impact on a person? This needs to be taken more seriously than previously.

More importance needs to be placed on the Mythological sites as it is argued, Mythology is as important to Aboriginal people as Christianity and Churches are to the broader community.

Consideration also needs to be given to the fact that Aboriginal people are, at times, reluctant to divulge sensitive cultural information to a government agency that has a history of providing information on a public platform, or to a proponent who wants to exploit the land.

The cultural sensitivity relating to these types of sites could be provided to the ACMC which would add value to the assessment of sites providing better protection of the culturally sensitive sites.

The importance of place to Aboriginal people need to be taken into account, e.g., consider the notions of rivers as person; rivers and waterways play an important aspects in Aboriginal culture, especially in the creation time. The dismissal of places as of generalised significance needs to be avoided.

Rivers have been given protection in New Zealand and on the east coast of Australia for culturally significant reasons.

Question 12.

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

The role of the ACMC and its decision making recommendations have been difficult at times as the information that is provided is often limited, or, from limited perspectives.

Legally, the Minister has the power to make the decision; however, any assessing body such as the ACMC must be able to make an informed recommendation which can only be done if sufficient information is provided. The attitudes and wishes of community and their reasons are of paramount importance in informing these decisions.

Maybe more awareness training for the community needs to be conducted so the communities know what their obligation are if they want their significant heritage sites protected, and that will ensure that the ACMC assessments are better informed and easier to carry out.

Maybe a two pronged approach could work, e.g. Phase one, following field consult, the community then provides conditional consent based on the field information; Phase two: the information is presented to the ACMC with the conditional consent and site information in order to inform a final recommendation to the Minister.

Question 13.

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

Greater effort needs to be made by the various proponents to avoid impacting Aboriginal sites of significance. This would require early involvement of Aboriginal people in the planning stages of any development, with a strong presumption and commitment to avoid damage, or interference with, such sites.

Question 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?

The Act need to be better aligned with other State legislation in regards to protection of heritage and environment. How can the Act align with the State Heritage Act, and regulations similar like what is used in the Environmental Act.

Heritage management plans and ILUAS could also be used to ensure better management of sites.

The rights of community to protect manage and enforce appropriate behaviour in places under their jurisdiction should be considered.

Question 15.

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

S17 provides a list of ways in which it is an offence to disturb a site, none of which are sufficiently descriptive or detailed. There should be additional information about the terminology of what damage to a site actually mean.

- To 'destroy' a site, what level of destruction does this mean? What are the ramifications once a site has been destroyed? What does it mean to Aboriginal people once a site has been destroyed?
- There needs to be descriptive information relating to the disturbance of sites and the consequences.

Question 16.

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

No. there are a number of issues in relation to the penalties under the Act;

- S62; *special defence of lack of knowledge*” the Act has a section in it that the defence can plead ignorance and that they did not know the site existed. This loophole should, at least, be tightened. Ignorance is rarely a good excuse.
- The prosecution time for an offence is too short. The statute of limitation, (12 months after the date of offence) is too short. In some cases it takes more than 12 months to gather the information!
- Is this time frame in compliance with other regulations of offences such as those under the Environmental Act?

Question 17.

Should a defence continue to be provided where the disclosure of information (S15) is against customary laws/protocols?

If a site is being reported then the managing Department needs to follow up with the Traditional Owners of the area to confirm the validity of the site, the significance of the site and how the site should be included on the registrar. This should then be presented to the ACMC for further assessment of the site.

Question 18.

Are the criteria for assessing the significance of sites under S39 (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?

The significance of S39(2) and 39(3) are guidelines for the ACMC in making their assessments of sites. While the site is already been assessed under S5 of the Act, we suggest that both S5 and S39(2) (a-d) and 39(3) are effectively combined to provide a clearer assessment of sites.

We also note, that while the Act indicates that a member of the ACMC should include members who are anthropologist/archaeologist, in the past, attracting people with these skills has been difficult making the ACMC assessments of sites not as effective.

The aim of having a member with this qualification enables them to assist other members who don't have these skills to better understand the significance of the site. If this aspect of the Act is to continue, then this should be a mandatory requirement of the Act.

Question 19.

What should be the steps to report, nominated, asses, enter, amend or remove an entry from the Register?

Community involvement is key, including detailed discussion with heritage professionals with particular attention being given to those who registered the site. Early intervention is best in these situations rather than the Department taking perceptive action and the community finding out later. This, of course, creates a lack of trust between the parties involved.

The community should be advised in the first instance. If a site is to be removed from the Register, then more information as to why a site needs to be removed should be included.

Before a site is going to be removed from the Registrar, a re-assessment of the significance of the site should be carried out to determine if the site no longer constitutes a site under S5 of the Act.

There has been no transparency about sites that have recently had their status altered from being a Registered site to 'Other heritage place'. Particularly for sites recorded long ago, we doubt Aboriginal communities have been advised, nor have they been given opportunity to provide additional information that may be required under recent interpretations of the Act – certainly since the amendment included the words 'significance and importance'. And what happens to the data once the site is removed (as it should be in the case of artefact scatters etc which have been salvaged/sit within what is now a massive open-cut mine pit, a clear direction is needed around these issues.

Question 20.

What do you think is missing from the Act?

There is a requirement for more trust and respect to be shown to Aboriginal people along with real community involvement. More community engagement, more ownership by the community, more support needs to be given to communities to manage their sites. Where appropriate, self-determination should be given to Aboriginal people on how their sites will be managed, impacted, and how they have been determined. Whilst the legislation is also about ensuring development continues to occur in WA, it must also balance development with the requirements of the Aboriginal communities, to achieve a negotiated outcome that is reasonable to all parties.

Question 21.

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

S39(2) and (3) can be amended and rewritten as guidelines for the ACMC to determine the significance of a site to support the assessments under S5, or it could be incorporated in what is currently S5.