

Review of the Aboriginal Heritage Act (1972)
DRAFT Submission of the
Aboriginal Cultural Material Committee

Summary

Members of the Aboriginal Cultural Material Committee (ACMC) strongly welcome the Government's decision to undertake a comprehensive process to review the *Aboriginal Heritage Act 1972 (WA)* ('the Act').

While this Act was groundbreaking for its time, things have changed in the nearly 5 decades since this this legislation was passed.

It is time a new, or amended Act reflects these changes.

The ACMC recommends changes to the Act be guided by four key principles:

- Protection
- Acknowledgement
- Recognition
- Respect

While these principles flow through, and apply to, many of the points contained in this submission, briefly they refer to:

- Protection – the primary role of the Act must be to establish a comprehensive regime which provides meaningful and ongoing protection for places, objects, and intangible aspects of Aboriginal cultures that retain importance for First Nations peoples across WA;
- Acknowledgement – firstly of the fact that distinct Aboriginal laws and cultures continue to guide Aboriginal people's lives, and provide the basis for determining the nature and importance of their heritage;
- Recognition – particularly of the key role of local traditional owners and knowledge holders in making decisions about important places and objects on their country; and
- Respect – for all aspects of Aboriginal heritage, based on increased understanding, promotion and celebration of this significant aspect of Aboriginal cultures.

Following a brief introduction, this submission provides reflections by Members of the ACMC on their role and experience working under the Act, as well as suggested changes to that role. It then canvasses key issues such as defining what should be protected, who should be consulted, impact, and penalties. Finally, the submission explores one option for reform – the creation of regional cultural authorities to facilitate the participation of traditional owners and knowledge holders in a new heritage regime.

Introduction

The Aboriginal Cultural Material Committee is established under sections 28 to 32 of the *Aboriginal Heritage Act 1972* ('the Act') as the specialist heritage advisory body to the Minister for Aboriginal Affairs. Its role, as set out in s39 of the Act, is:

- to evaluate on behalf of the community the importance of places and objects alleged to be associated with Aboriginal persons;
- where appropriate, to record and preserve the traditional Aboriginal lore related to such places and objects;
- to recommend to the Minister for Aboriginal Affairs (Minister) places and objects which, in the opinion of the Committee, are, or have been, of special significance to persons of Aboriginal descent and should be preserved, acquired and managed by the Minister;
- to advise the Minister on any question referred to the Committee, and generally on any matter related to the objects and purposes of this Act;
- to perform the functions allocated to the Committee by this Act;
- and to advise the Minister when requested to do so as to the apportionment and application of moneys available for the administration of this Act.

This role of evaluating the significance of places and objects which are important to Aboriginal peoples is an onerous one that the Committee takes seriously.

The nature, meaning and significance of Aboriginal heritage is a complex matter to articulate in any context. Capturing this complexity within the strictures of legislation adds further difficulty. Much of the complexity around issues relating to Aboriginal heritage emerges from the fact that the heritage itself – the places and objects of cultural significance to Aboriginal peoples – reflects thousands of years of laws and customs that have governed Aboriginal people's lives, and continue to do so. These laws and customs are tied to social function and organisation. This law, or 'Dreaming' is a continued reality for Aboriginal people. The Dreaming isn't lost even where links to country might be – the land and stories are linked irrespective of whether there are story tellers. In part because these stories and laws have not been written down, they remain 'invisible' to many non-Aboriginal people and politicians.

They also remain invisible in the current Act. The Act does not reflect any real attempt at understanding of the nature of Aboriginal peoples' continuing relationships with places and objects.

Because of this, the trust many Aboriginal people have in the Act is low.

Awareness of Aboriginal culture in general, and cultural heritage in particular, also remains low.

The Committee looks forward to the opportunity provided by this review to bring the Act more up to date, more in line with those traditional laws and customs, and raise awareness of, and respect for, Aboriginal heritage.

Reflection on the Aboriginal Cultural Material Committee Role and Responsibilities

The principal purpose of the Aboriginal Cultural Material Committee (ACMC) is to provide advice to the Minister for Aboriginal Affairs regarding the importance and significance of Aboriginal sites. The Committee makes recommendations to the Minister as to whether consent should be granted to use land containing Aboriginal sites for particular purposes, and if so on what conditions, as required by section 18 of the *Aboriginal Heritage Act 1972*.

It is apparent that the role of the ACMC is not widely understood, including by Aboriginal people.

Members strongly feel there is a need for greater education about the ACMC in particular, and the Act in general. Communities need more information on how the system works and the Committee's role in it. The current system by which heritage is identified, assessed and registered is difficult for Aboriginal people to navigate, without referring to heritage and legal professionals.

ACMC Members feel the tension brought about by being required to determine the significance of places which are on another people's country. In carrying out its responsibilities, the ACMC is always balancing competing interests, but see a key aspect of their role as seeking information from local Aboriginal knowledge holders.

Another factor in the way the Committee operates that is not often understood, is that the ACMC is heavily reliant on other parts of the system to do their job before the Committee can do theirs. Often this involves an element of 'faith' in assuming other people and bodies have carried out their tasks effectively.

For instance, the Committee must assume that community members have been appropriately consulted about the existence and significance of potential sites in their country. However, Members are aware that not enough people know about the correct way of providing information on sites. This could potentially do an injustice to local people as the Committee aren't provided with the materials which indicate that a site is of special significance.

The ACMC must also assume that anthropologists and other experts have done a thorough and rigorous job in accurately reflecting traditional owner information. Members must then rely on an assumption that Department staff have done their job in accurately presenting information to the Committee.

Difficulties arise when information the ACMC should be relying on is not forthcoming, whether due to time constraints, or the complex way information is required. It is unfortunate that it is only on relatively rare occasions that the information given to ACMC is sufficient for the Committee to make a judgement on the significance of a site. At times, there may be information that can't be disclosed for cultural reasons, that speaks directly to the question of significance. The Committee is strongly supportive of the need to keep secret/sacred information secret. However, it feels there should be a greater focus on establishing ways to receive, and retain, culturally sensitive information that is important in

the process of identifying and protecting sites. Such information needs to be provided to enable good decision-making, as well as for the use of future generations.

Beyond the issue of sensitive material, while many heritage reports contain a lot of information, rarely do they include a clear, succinct summary of factors that describe why something should be included on the Register of sites. The Committee feels there needs to be better communication of the requirements of the Act, as well as reform of the process by which people provide extra information, including the timeframe that is currently allowed.

Identifying the 'significance' of sites is inherently difficult, particularly in the absence of any consistent criteria by which to assess applications for registration. The Committee feels that denoting levels of significance could allow the ACMC to concentrate its time on those more significant places worthy of higher levels of attention and protection, rather than places that have already been heavily degraded, which could better be handled administratively.

Processes outlined above mean committee Members can feel they are the last to know about key pieces of information. This poor flow of information between different government agencies, proponents, and others, further impacts on the ability of ACMC to carry out its role. To improve the flow of information, as well as the prominence of Aboriginal heritage, the government should, as part of the process of redrafting the AHA, consider making consequential amendments to other State legislation, such as that related to the environment and mining.

In terms of retaining information required for the registration of sites, an archival function within the Department of Planning, Land and Heritage (DPLH) is important. The Committee feels the information that forms the basis of applications for registration is important in its own right. A new or amended Act could also look to strengthen protections afforded those who provide information with respect to their intellectual property.

Members feel that an amended Act should stipulate that the ACMC be required to have Aboriginal membership which is drawn from the different regions of the State. In comprising a diverse committee with a broad range of skills and experience, it is also useful to include non-Aboriginal members to provide expertise in particular areas such as Anthropology, Archaeology, land administration. This Aboriginal and non-Aboriginal membership is also appropriate in light of the Committee's current charter to examine heritage 'on behalf of the whole community'. The ACMC's work needs to be approached from a cultural perspective, and as such, there is a need to look at the 'cultural qualifications' of ACMC members, not just their technical skills or experience.

The Committee believes it is vitally importance that Aboriginal people having trust in the Act, and the processes by which it is implemented. This trust is undermined by misunderstandings which compromise both the registration and protection of sites. For instance, the Committee is aware of a perception held by some Aboriginal people that an Anthropologist is required to register a site, when in reality anyone can seek to have a site registered. This kind of issue will in part be alleviated by increasing the prominence and awareness of the Act. While Members are keen to play their role here, they will need

support if a new or amended Act is to be more prominent – within government and within the wider WA and Aboriginal communities.

Trust in the Act is also undermined via the existence of real, or perceived, conflicts. Conflict of interest processes relating to members of the ACMC are important, especially where they relate to a Member's pecuniary interests. However, overly rigorous processes of managing conflict – or perceived conflict – should not prevent those with knowledge of particular sites from assisting the Committee with their deliberations by passing that information on. This would seem to defeat a key objective of heritage identification and protection, where by knowledge holders are able, and encouraged, to provide appropriate information to the Committee.

The Committee is also aware of the perception that some Anthropologists have a conflict of interest brought about via lucrative and ongoing relationships with proponents. While it may go beyond the scope of the current Review, Members suggest previous attempts to monitor and regulate the practice of Anthropologists should be revisited.

What should be protected?

Some of the difficulties experienced by the ACMC – and the system as a whole – relate to the 'definition' of what is protected under the Act.

Section 5 of the Act attempts to set out which places the Act applies to, that is:

- (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.

In the Committee's experience, the nature of heritage as defined in s5 of the Act is opaque. It is not clear what is 'significant' or 'important'? The lack of any criteria by which Members are to judge these matters leads to frustration. Previous amendments around this issue have also tended to make the Committee's job more difficult.

Members would like to see a change in tone with respect to the critical question of what the Act looks to protect. For instance, in section 5(a) the phrase 'or appear to have' is inappropriate. Objects can often be related to a site and its significance associated with use

at the site. Suggesting the element of ‘appearance’ introduces an ambiguity which is unnecessary.

Committee members suggests the reality of Aboriginal heritage is while Aboriginal people have a special relationship with country in general, some places are regarded as more important than others. The current Act, by contrast, assumes a stark dichotomy whereby places are either significant or not. This leads to a lack of recognition of the particular significance of some sites, places and stories, and a diminution in their status. If all is sacred, then effectively, nothing is. Members suggest the new or amended Act explore ‘definitions’ of heritage which include different levels of significance. This approach would of course require some rigorous criteria, including genuine reports from anthropologists.

Recognition of levels of significance also suggests consideration should be given to passage of a ‘Sacred sites’ Act, as seen in the Northern Territory, to provide a higher level of protection for those sites of special significance. This could also provide a more specific and rigorous process for divulging of secret or sensitive information which is more likely to be relevant to sites of this nature.

The current Act is also inadequate in terms of the scope of what it allows to be protected, including remains and songs. Remains and sacred objects should be repatriated, and an amended Act should facilitate this. This will also require an increase in resources to support the Act. Members are aware of local Aboriginal corporations who are respected as cultural authorities, but who are not able to properly facilitate repatriations because they do not have the resources to so.

At present, songs aren’t covered by the Act, yet they retain ongoing importance as an aspect of Aboriginal heritage, such as for connecting places. Protection of water sources/aquifers and other culturally important environmental values should also be incorporated into a new or amended Act.

Who should be consulted?

One of the major failings of the current Act is that it makes little or no mention of the primary role of Aboriginal people in identifying, protecting, and managing their heritage.

The Committee suggests an amended Act needs to explicitly state that it is traditional owners (those who are part of the land-holding group but who may not yet have deep cultural authority) and knowledge holders (those who have ritual knowledge/authority/responsibility) who should be consulted about Aboriginal heritage in their country. Knowledge holders are the ones who should determine the significance of a site.

Processes by which consultation takes place need to be culturally appropriate, especially with reference to the specific roles of men and women. Revising the Act to appropriately recognise the central role of knowledge holders – often elders – will hopefully differentiate

it from processes under Native Title which do not adequately respect Aboriginal laws and cultures.

When knowledge holders are not consulted in appropriate ways – or at all – this perverts the process at the outset, with flow on effects in the identification (or non-registration) of sites, and protection, or lack thereof, afforded Aboriginal heritage.

Concerns about the nature of consultation is also evident in the production of heritage survey reports. Members of the Committee have from numerous Aboriginal people who suggest their views have been subordinated to those of consultants, especially in situations where proponents are footing the bill for hired experts.

What level of impact requires consent?

One of the most fraught and time-consuming facets of the Committee's work refers to s18 of the Act which requires Members to form an opinion as to whether there is an Aboriginal site on the land that is to be disturbed in some way. Having determined the importance and significance of any site on the Land, the Committee must assess the nature of the impact versus the significance of the site. As discussed above, this is another area where it may be helpful for an amended Act to include guidance as to the different levels of significance. This could assist with the consistency of the committee's approach to different matters.

Committee Members find the focus on development applications and implications for the loss of heritage is frustrating. Particularly when many Members joined the Committee because of a passion for caring for their country, it is jarring that so much of the Committee's time is taken up with matters relating to the destruction or damage of heritage, rather than educating the community about the significance of heritage, or the important task of promoting that understanding.

One of the reasons so much of the Committee's time is taken up with s18 matters relates to a lack of understanding by many in the system. This limited knowledge of available processes means proponents take a risk averse approach, almost automatically sending things to the ACMC that need not to the Committee, but could be efficiently dealt with administratively.

With respect to the question of consent, in the Committee's view, local knowledge holders should be the ones to make decisions on impact.

Penalties and enforcement

In general, the Committee feels both general processes around enforcement, as well as the specific level of fines, are inadequate in the current Act.

The Committee notes with dismay, the lack of historical prosecutions for breaches of the Act and the lack protection this perpetuates. Members suggest more resources need to be put into enforcing the Act, and the timeframe by which prosecution takes place needs to be extended. There should be some mechanism for urgent injunctions to be granted /stop work orders to be made where significant sites are threatened.

Current fines are insufficient to act as a deterrent from damaging or destroying sites, especially with relation to companies. The current regime of fining individuals \$20 000, and companies \$50 000 compares with unfavourably with comparable State legislation referring to non-Aboriginal heritage, such as the *Heritage of Western Australia Act (1990)*. Proceeds of fines should be directed towards protecting Aboriginal heritage, rather than go to consolidated revenue.

While the concept of wardens is supported, Members suggest the name needs to change. Rather than residing with the DPLH, officers who look to protect Aboriginal heritage may be better based with local Aboriginal corporations or ranger groups, where they exist.

Regional Cultural Heritage Authorities?

Members feel that some of the issues raised both with respect to their role and other aspects of the Act, could be addressed via the creation of regional bodies to assist with administration of the Act. These 'regional cultural heritage authorities' could, rather than make decisions about places of significance, facilitate the process by which local knowledge holders provide information. There would obviously be a range of issues to address in creating such bodies. While these are not canvassed in detail in this submission, the Committee offers some initial thoughts below.

Boundaries

Assuming not every First Nation would have its own organisation, determining which peoples or language groups come together under which regional umbrella is difficult.

One way to determine the make-up of the regions may be to align these with the current Native Title Representative Body (NTRB) regions. This would mean WA has six regions – Kimberley, Pilbara, Central Desert, Goldfields, Geraldton and the South West. This would not necessarily mean those NTRBs or PBCs playing the primary role in establishing these regional cultural bodies. The ACMC acknowledges that some representative bodies may be better than others about consulting with traditional owners. Given this, the appropriate body would be determined by Aboriginal people in the particular region.

To be clear – the Committee regards the purpose of creating regional cultural heritage authorities is not to empower NTRBs or PBCs, it would be about empowering Aboriginal knowledge holders.

Composition

The exact composition of regional cultural heritage authorities would necessarily reflect the particular characteristics of each region. For instance, in the Kimberley, where there is a large amount of determined native title land being managed by PBCs, these bodies may have the capacity to play a significant role in liaising with local knowledge holders to identify and protect heritage. In the South West, there will be no PBCs, following the conclusion of an alternative settlement agreement with the State. There, the resulting Regional Corporations may be the appropriate bodies to manage heritage.

Regional bodies may be made up of senior old people, or appropriate knowledge holders, and in this way would assist with developing and instituting more culturally appropriate management of heritage issues, such as dealing with the sensitive question of men's law and women's law. It would also be a positive way of bringing local people with knowledge into the heritage system. This could help with the critical task of building a greater level of trust between the Committee and local knowledge holders, including senior law people.

Role

Members believe there remains a role for a centrally based Committee such as the ACMC. However, a regional body may play the role of 'screening' information from local knowledge holders, and providing a recommendation to the ACMC about the significance of sites. There may also be some cross over in membership between a regional cultural heritage authority and the Committee, for instance, an ACMC member may be an observer at meetings of the body from their region. Regional bodies could also thereby alleviate pressure felt by Members whereby they are expected to speak for an entire region, and be knowledgeable about the status of every site within that region.

A critical role for the regional body may be to streamline the flow of information between the ACMC and people on the ground, to ensure both that people better understand heritage processes, and that they have more knowledge about the status of places in their locality. Given the suggestion above that local knowledge holders are the appropriate people to examine the issue of impact of sites, consideration of s18s could properly begin at the regional level.

Members believe that for the foreseeable future, there will continue to be a role for a central body such as the ACMC. Such an established entity could evaluate and monitor decision making and process in the regions, particularly where there are private agreements being formed that feed into that process. The Committee could also have a role in assisting with local disputes, if mediation at a local level fails.

Conclusion

All parties, be they Government, industry, or the group with most at stake in these discussions – Aboriginal people – have acknowledged the Heritage Act needs to change. It needs to be modernised, and in no more important way than to bring it up to date with

contemporary understanding of the vital nature of Aboriginal laws and cultures that underpin the deep meaning Aboriginal peoples ascribe to the places, objects and other aspects of culture the Act seeks to protect.

A new or amended Heritage Act will gain the support of Aboriginal people – and the wider community – when it provides true protection for places of significance, it provides long overdue acknowledgement of the laws and customs that continue to govern First Nations peoples in WA, and is based on recognition of the central place of Aboriginal knowledge holders in the heritage regime. An Act that respects Aboriginal heritage in this way, is one that Aboriginal people, and the wider community, can also truly respect.