A BRIEF HISTORY OF THE *ABORIGINAL HERITAGE ACT 1972*

BACKGROUND

The late 1960s and early 1970s brought unprecedented mineral exploration and mining development to inland Western Australia which, apart from pastoral use, had remained largely untouched by non-Aboriginal people.

With this 'mining boom' came an increased awareness of the scale and diversity of Aboriginal heritage and culture in Western Australia. Disputes over the development of land on which important Aboriginal sites were located were growing, and it became increasingly clear that formal mechanisms were required in order to protect Aboriginal heritage.

Aboriginal Heritage Act 1972

Recognising the need to reassess previous approaches to land use and development, the Western Australian Government introduced the Aboriginal Heritage Bill into Parliament on 30 March 1972. With, for the most part, bi-partisan support, the Bill received Royal Assent on 2 October 1972, and the *Aboriginal Heritage Act 1972* (the AHA) came into operation on 15 December 1972.

At the time of its introduction, it was widely recognised that the AHA was the most comprehensive piece of Aboriginal heritage legislation in Australia, affording automatic (or blanket) protection to places and objects important to Aboriginal people. In contrast to other legislation developed around the same time, the AHA emphasised the importance of Aboriginal tradition, culture and heritage to contemporary Aboriginal people and their culture, rather than merely matters of archaeological, anthropological or other scientific interest.

Aboriginal Cultural Material Committee

Section 28 of the AHA provided for the establishment of the Aboriginal Cultural Material Committee (ACMC) as the principal advisory body on Aboriginal heritage matters. The ACMC held its first meeting in December 1972, chaired by Sir Thomas Wardle, former Perth Lord Mayor and Trustee of the Western Australian Museum. The newly formed committee counted amongst its members two Aboriginal representatives, Mr K Colbung and Mr P Coffin, and was supported by the Museum's Department of Aboriginal Sites.

Aboriginal Heritage Regulations 1974

The AHA contained two separate provisions authorising the making of regulations; section 68 provided for general decision-making powers for '…all matters and things that…are necessary or convenient to be prescribed for giving effect to this Act', and section 26 authorising regulations specifically in relation to Protected Areas (as declared under section 19 of the AHA).

The Aboriginal Heritage Regulations 1974 came into force on 26 April 1974. Apart from minor amendments, the Regulations remain largely unchanged.

LEGISLATIVE AMENDMENTS/REVIEWS

Since its introduction, the AHA has been the subject of various reviews. However, few amendments have been made to the legislation in almost 50 years of operation, despite significant changes in the legal, social and environmental circumstances surrounding the preservation and protection of Aboriginal cultural heritage. Legislative amendments and reviews of the AHA are discussed in more detail below.

Aboriginal Heritage Amendment (No 2) Act 1980

An increasingly contentious political landscape saw the first significant amendments to the AHA through the introduction of the *Aboriginal Heritage Amendment (No. 2) Act 1980* that was given Royal Assent on 23 September 1980. The amendments effected fundamental changes to the way the AHA operates including:

- Narrowing the definition of an Aboriginal site by:
  - inserting into sections 5(a) to (d) the requirement for 'importance and significance';
  - limiting section 5(b) to 'sacred, ritual or ceremonial sites'; and
  - restricting section 5(c) to apply only to 'such places that should be preserved for the importance *and* [emphasis added] significance to the cultural heritage of the State'.
- Increasing Ministerial direction and control by:
  - shifting decision-making authority for the use of land containing Aboriginal sites, and the power to make recommendations to the Governor for the establishment of Protected Areas (pursuant to section 19 of the AHA) from the Trustees of the Museum to the Minister responsible for the administration of the AHA;
  - requiring the Minister to take into consideration when evaluating applications for land use, amongst other things, the 'general interest of the community'. Prior to this amendment, consideration needed only to be given to the 'importance and significance' of any sites to be impacted; and
  - giving power to the Minister to direct the ACMC and/or the Registrar of Aboriginal Sites in the exercise of their functions and in the 'doing of anything' for the purposes of the AHA.
- Conferring upon landowners the right to appeal decisions made by the Minister under section 18. This right, however, was not afforded to Aboriginal people aggrieved by a Ministerial decision. An application to the Supreme Court was, and remains, the only avenue through which Aboriginal people are able to appeal. (It should be noted that taking such action is usually both onerous and prohibitively expensive for Aboriginal appellants).
- Removal of section 58, which had provided that a person convicted of knowingly committing an offence for the purpose of gain could be penalised by a court through the suspension or forfeiture of any right, title or interest. In his second reading speech in Parliament on 2 September 1980, the Hon Bill Grayden MLA, Minister for Cultural Affairs, suggested that the penalty provisions prescribed at section 57 – fines and/or imprisonment – were strong enough so as to render section 58 unnecessary.

Aboriginal Land Inquiry 1984 (Seaman Inquiry) and the Aboriginal Land Tenure Bill 1985

In 1983, Mr Paul Seaman was engaged by the Western Australian Government to inquire into Aboriginal land rights in the state. The Inquiry's terms of reference included reviewing the operation of the AHA and making recommendations about the most appropriate way of protecting sites of significance to Aboriginal people.

In conducting the inquiry, Mr Seaman held numerous hearings over the space of 120 days, many in regional and remote Aboriginal communities. In total, Mr Seaman met with 2,200 Aboriginal people and approximately 500 non-Aboriginal people and, at the end of the consultation period, was in receipt of more than 200 submissions.

Mr Seaman handed down his final report on 17 September 1984, recommending that sites of significance to Aboriginal people be afforded stronger protection, and suggesting that substantial legislative amendments should be made to the AHA.

Two weeks after its release, the Government rejected the recommendations of the Seaman report and established a committee to draft an 'Aboriginal Land Tenure Bill'. This Bill was introduced into the Legislative Assembly and passed in March 1985. It was submitted to the Legislative Council on 2 April 1985 and was defeated at its second reading on 16 April 1985.

Aboriginal Heritage Amendment Bill 1990

The late 1980s and early 1990s saw ongoing disputes between the Western Australian Government and Aboriginal people over the proposed development of land containing sites of significance, most notably at the old Swan Brewery site in Perth and at Marandoo in the Pilbara region.

In 1990, the Government attempted to amend the AHA with the drafting of the Aboriginal Heritage Amendment Bill 1990. This Bill has been described as 'an ad hoc measure' which likely arose in response to the frustration being experienced by the Government of the day over the ongoing litigation being conducted by Aboriginal people in connection with the Swan Brewery development.[1]

The four principal aims of the Bill outlined by the Hon J M Berinson MLC, Attorney General, in his second reading speech were to:

1. provide that the Act binds the Crown;
2. clarify procedures under section 18 of the Act;
3. confirm the right of appeal by a landowner, and the right of review to other persons who may be particularly affected by the Minister's decision under section 18; and
4. to validate the exercise of powers delegated by the Museum's Trustees to the ACMC.

There was wide-spread criticism of the draft Bill, most notably because it appeared to be an attempt by government to further limit the right of appeal for Aboriginal people, and it was eventually dropped from the Government's legislative agenda.

First Senior Review

In June 1991, the Government established the Ministerial Council for Policy Development in response to ongoing disputes over Aboriginal heritage matters. The role of the Council was to ensure the early resolution of conflicts between Aboriginal people and environmental groups and mining companies. As part of the Council's remit, a commitment was given to review the AHA again.

Dr Clive Senior was engaged to conduct this review. His final report was unfortunately limited in its terms of reference and by strict time constraints; he was given little more than one month to undertake research, consult with Aboriginal people and other stakeholders, and to draft a report. Notwithstanding these limitations, Dr Senior made numerous recommendations for amendments to the AHA and its administration, including:

- replacing the Museum's Trustees and the ACMC with a new administrative body called the 'Aboriginal Heritage Authority';
- establishing a regional structure based on a number of regional 'Aboriginal Heritage Authorities';
- rationalising the Register of Aboriginal Sites and Objects (the Register) by providing for the de-registration of sites considered to not be of significance;
- establishing a mechanism to provide heritage clearances to prevent development proposals from becoming deadlocked;
- establishing an 'Aboriginal Heritage Tribunal' to arbitrate and resolve disputes;
- refining section 18 of the AHA to ensure that applications were made and lodged under that provision as a last resort;
- introducing provisions to guarantee the confidentiality of information provided by Aboriginal people;
- providing the Minister with the power to provide immediate protection to sites in danger;
- restricting the application of the AHA to sites of 'significance';

[1] Senior, Clive. *Review of the Aboriginal Heritage Act 1972*. Prepared for the Minister for Aboriginal Affairs Western Australia. (pp. 17-21)

- providing custodians with access to Aboriginal sites; and
- increasing penalties for breaches of the AHA.

In early 1992, Dr Senior's report was considered by the Ministerial Council and a number of recommendations were endorsed. A draft Aboriginal Heritage Amendment Bill (1992) was developed, however shortly thereafter the Government announced that the introduction of the Bill into Parliament was delayed, ostensibly so that further consultation could be undertaken. This Bill did not proceed due to the change of government in 1993.

Aboriginal Heritage (Marandoo) Act 1992

In 1992, the Western Australian Government sought to expedite the development of mineral deposits at Marandoo in the Pilbara region. Significant disputes arose over the proposed impact to Aboriginal sacred sites, which the proponent stated could not be realistically avoided. Due to a 'climate of uncertainty' that had developed over proposals for mining development in the area, the Government decided to 'enshrine in legislation consent under section 18 of the AHA' (Watson second reading speech, 7913 5 February 1992). Effectively, the Marandoo Act allowed the Government to excise from the AHA the areas that the proponent was seeking to develop, thereby allowing the development to proceed.

1995 Amendments

In 1993, the Western Australian Government established a Taskforce on Aboriginal Social Justice to review the activities of government in relation to the social conditions and development of Aboriginal people, and to recommend a strategy for implementation of the Government's program. The Taskforce was chaired by Professor Michael Daube.

The Taskforce handed down its report in April 1994 and made almost 300 recommendations, one of which was the creation of a new Aboriginal Affairs Department to replace the Aboriginal Affairs Planning Authority (AAPA) and incorporate the Department of Aboriginal Sites (DAS). With respect to Aboriginal heritage, the Taskforce Report recommended that certain reporting roles and structures in the AHA be incorporated into the new Aboriginal Affairs Department, and that the ACMC be located within the Aboriginal Affairs portfolio. A broader review of the AHA was also proposed.

Following Cabinet approval, a new Aboriginal Affairs Department was established, bringing together the functions of the AAPA, the DAS and the Office of Traditional Land Use (established after the introduction of the *Land (and Traditional Usage) Act 1993* in December 1993[2]). Cabinet also approved a review of the AHA, with the intention of introducing a Bill into Parliament in 1994. Dr Clive Senior was appointed on 31 March 1995 to conduct this, his second, review.

Around the same time, the Government introduced the Aboriginal Heritage Amendment Bill (1995) to give effect to Cabinet's decision. The Government also sought various other changes; most importantly, it wanted to amend section 18 by adding 'development proponents' to the list of bodies that could legally submit applications under section 18.

The amendment to section 18 was opposed by the Opposition, which was of the view that significant changes should await the outcome of Dr Senior's review. The remainder of the Bill, however, passed through both houses of Parliament and came into operation on 1 July 1995.

Second Senior Review

Dr Senior provided his final report to government on 30 June 1995 and made 92 recommendations that can be summarised in the following themes:

- Scope of the legislation, including the purpose of the AHA, the definition of Aboriginal site and the identification of, consultation with, and the rights of Traditional Custodians.

[2] The *Land (and Traditional Useage) Act 1993* was drafted following the High Court of Australia's 1992 decision in *Mabo and Others v Queensland* and the subsequent introduction by the Commonwealth of the *Native Title Act 1993*.

- Special forms of protection, primarily related to Protected Areas, agreements with private landowners and a restriction on the publication of photographs.
- Policies around the registration of Aboriginal sites, matters of confidentiality including the non-disclosure of information by Aboriginal people and resourcing the heritage management system.
- Procedural fairness, particularly in relation to section 18.
- Conflict resolution and the encouragement of early agreement making.
- Development approvals and clearance work, including the use of section 18, site avoidance procedures, who can apply for approval and the effect of development approvals.
- Compensation principles.
- Integration of planning processes and interaction with other legislation, both State and Federal.
- Enforcement, including prosecutions, penalties, onus of proof, powers of inspection and the application of the AHA to the Crown.
- The application of the AHA to objects and ancestral remains.

Dr Senior's report was tabled in the Legislative Assembly in late 1995. From this point on, it appears the Government did little to progress the report or the recommendations contained within it.

Establishment of the Joint Taskforce

In 1996, the Government established a joint taskforce comprising the Department of Minerals and Energy and the Department of Aboriginal Affairs. An interdepartmental report was prepared and its recommendations included:

- increased levels of protection for Aboriginal heritage site information;
- more effective application of section 15 of the AHA to ensure that all Aboriginal sites are protected;
- the establishment of a separate 'State Aboriginal Heritage Agency', which would be required to endorse all Aboriginal heritage surveys as well as conducting surveys for all major infrastructure projects; and
- the creation and maintenance of a confidential register of Traditional Custodians.

The report of the joint taskforce was made available to Aboriginal stakeholders in April 1997. They were generally critical of the report and of the taskforce's failure to consult with Aboriginal people during its development, and did not believe that Aboriginal heritage would be better protected by the implementation of the recommendations. Soon after, the taskforce was disbanded, seemingly due to the controversy surrounding its report.

Dampier to Bunbury Pipeline Act 1997

In 1997, the *Dampier to Bunbury Pipeline Act 1997* extended the definition of 'landowner' to include persons with certain rights under that Act and under the *Petroleum Pipelines Act 1996*.

State Aboriginal Heritage Bill 1999

In 1998, the Western Australian Government approved the drafting of a State Aboriginal Heritage Bill, which was completed in 1999. The main features of the Bill included:

- its application to Aboriginal sites, objects and ancestral remains;
- changes to the definition of 'Aboriginal site';
- amended site registration processes;
- the establishment of an 'Aboriginal Heritage Council';
- the abolition of the provision for Protected Areas;
- an increase in the maximum penalties for offences; and

- the right of Aboriginal people to access registered sites on Crown land.

It appears that the draft Bill was discussed within government throughout 1999 and into 2000. The draft Bill lapsed following a change of government in January 2001.

Sentencing Legislation Amendment and Repeal Act 2003 and AHA Penalty Provisions

Amendments introduced through the *Sentencing Legislation Amendment and Repeal Act 2003* saw a significant increase in penalties for damage to Aboriginal sites: for individuals, fines of up to $20,000 and/or nine months in prison and for corporations, fines of up to $100,000 and two year's imprisonment.

2011 Avery Review

In 2011, the Western Australian Government engaged Dr John Avery, former Director of Indigenous Heritage Law Reform at the Commonwealth Department of Sustainability, Environment, Water Population and Communities, to review and provide advice on reforming the AHA as part of a wider suite of approvals reform across government.

Dr Avery's discussion paper, *Seven proposals to regulate and amend the* Aboriginal Heritage Act 1972 *for improved clarity, compliance, effectiveness, efficiency and certainty*, was released on 1 May 2012. It proposed a range of amendments to the AHA and its subsidiary legislation, the Aboriginal Heritage Regulations 1974, including:

- prescribing the manner and form of the Register of Sites and Objects (the Register) criteria for Aboriginal sites of importance and significance to the State;
- prescribing criteria and processes for the assessment of Aboriginal sites and their entry, review or removal from the Register;
- clarifying who may apply for consent to use land pursuant to section 18;
- strengthening the compliance regime pursuant to section 17;
- allowing for the issue of site impact avoidance certificates;
- enabling the department responsible for administering the legislation to levy fees and recover survey costs and other services; and
- investigating options to amend the *Environmental Protection Act 1986* to streamline decisions about Aboriginal heritage.

Subsequent to Dr Avery's proposed amendments, the Government released the draft Aboriginal Heritage Amendment Bill 2014 (the Bill) for public comment. The Bill proposed a range of amendments including:

- substituting the Chief Executive Officer (CEO) for the ACMC in a number of decision-making/recommendation processes;
- prescribing matters the ACMC should have regard to when evaluating places of importance and significance;
- clarifying who could lodge a notice to use land; and
- increasing penalties and statutory periods within which to prosecute for breaches of the AHA.

The Government stated that this Bill would provide for significant improvements to the AHA by:

- prescribing the manner and form of the Register;
- enabling open and accountable processes for the assessment of Aboriginal sites and entry, review and removal of Aboriginal sites on the Register;
- introducing an expedited permit regime as an alternative to ministerial authorisation to indemnify persons proposing to use land on which Aboriginal sites are, or may be, located;
- clarifying who can apply for permits to ensure the validity of any permits that may be issued and to provide for the transfer of permits;

- strengthening the compliance regime by increasing existing penalties in line with other legislation and jurisdictions;
- amending the onus of proof to apply to sites on the Register;
- clarifying the relationship between the AHA and the requirements of the *Environmental Protection Act 1986*;
- confirming that the Minister can direct the ACMC; and
- enabling complementary amendments to be made under the Aboriginal Heritage Regulations 1974 to provide for prescribed fees to be charged by the administrating department to recover costs.

Whilst supported by industry, the Bill was not well received by Aboriginal people and other stakeholders. In addition to criticism that there was insufficient consultation undertaken on the proposed amendments, there was concern that too much power would be given to the CEO – including the ability to determine what is and isn't an Aboriginal heritage site without the need to consult with Aboriginal people.

The Bill was introduced into the Legislative Assembly and read for a second time on the final Parliamentary sitting day on 27 November 2014. It subsequently lapsed at the dissolution of the 39th Parliament in November 2016.