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Nerilee Boshammer

Assistant Director General, Heritage Services
Department of Planning, Lands and Heritage
PO Box 7479 Cloisters Square
PO WA 6850

To whom it may concern,

RE: Aboriginal Heritage Act 1972 Review Process: Submission

Please see my submission, as a concerned and interested community member. My answers are in blue text for those survey questions I feel qualified to answer. I hope this is useful in your review process.

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 other purposes incidental thereto.'

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

No.

The definition does not capture the ethnographic importance of places like natural environmental features and/or information provided in support of this.

The importance of the connection of Aboriginal people to the natural environment, irrespective of the identification of objects or Dreaming stories associated with it, is paramount and not currently reflected in the Act.

The removal and then re-listing of the Collie and Swan Rivers as registered sites on the DAA on-line Heritage Site Register in recent years (2015 I believe) illustrates the importance of clarifying this, as it is currently open to interpretation, leaving very important places vulnerable in future.

Question 2

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.

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?

This should be changed so that it is a requirement that Aboriginal people are consulted and that the ACMC includes members of the Aboriginal community. This prevents the process of heritage protection being over-simplified or even subverted.

The ACMC should specifically require Aboriginal community membership to ensure that the cultural and ethnographic considerations, so important to this Act being enforced effectively, are considered when making recommendations on Section 18 applications and other ACMC matters. This needs to be undertaken while maintaining objectivity in terms of the recommendations made by said Aboriginal community members. A difficult, but valuable and important component of the ACMC function.

In addition, the heritage protection process in general needs to be far more proactive in terms of community involvement, information, consultation and education about the protection of Aboriginal culture and heritage. This will prevent the current reactive process creating issues of the 'right' or 'wrong' people being consulted on heritage significance.

Rather than waiting for a proposal to potentially impact a site, the community at large, Local Government, the private sector and other State Government Departments (Particularly DPLH) should be educated and encouraged to participate in Aboriginal Heritage Protection. Having Aboriginal staff embedded in the Planning and Lands branches of the DPLH would assist here.

Improved communication and consultation on an ongoing basis, regardless of pending proposals, is the best way to build community trust and confidence in the Heritage Protection System and for the proponents to be assured that they are meeting their requirements effectively.

Question 3

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.

To what extent has the provision to appoint honorary wardens been effective?

No opinion – I don't feel qualified to comment

Question 4

The Committee is an advisory body that evaluates the importance or significance of Aboriginal places and objects. It also recommends places or objects of outstanding importance for protection as Protected Areas under the Act.

The Act sets out the roles and functions of the Minister for Aboriginal Affairs and the Registrar of Aboriginal Sites.

Are the roles and functions of the Minister for Aboriginal Affairs assigned under the Act sufficiently clear and comprehensive to fulfil the objectives of the legislation to preserve Aboriginal heritage places and objects?

No.

There is much suspicion in the Aboriginal community that the Act and the Minister exist only to facilitate loopholes in the heritage act, rather than facilitate the protection of heritage values.

Information that is easy for the public to access (i.e. via the DPLH website, Land Council websites, public libraries, etc) about the roles and responsibilities of the Minister would assist in this general understanding and building of trust.

Are the roles and functions of the Registrar of Aboriginal Sites assigned under the Act sufficiently clear and comprehensive to fulfil the objectives of the legislation to preserve Aboriginal heritage places and objects?

No.

The description of the role of the registrar could be clearer to the general community, as to how they can access the registrar to lodge heritage site queries. Currently, the information on the DPLH website states:

The Registrar of Aboriginal Sites is appointed under the Aboriginal Heritage Act 1972 (Act) to administer the day to day operations of the Aboriginal Cultural Material Committee and also to perform other functions as allocated to the Registrar under the Act.

This is not particularly clear as to what the registrar actually does on a day-to-day basis, nor does it encourage community interaction.

Information that is easy for the public to access (i.e. via the DPLH website, Land Council websites, public libraries, etc) about the roles and responsibilities of the Registrar, along with processes and protocols for identifying and assessing heritage values, would assist in this general understanding and building of trust.

Are the roles and functions of the Aboriginal Cultural Material Committee assigned under the Act sufficiently clear and comprehensive to fulfil the objectives of the legislation to preserve Aboriginal heritage places and objects?

Many people in the Aboriginal and non-Aboriginal community think that the ACMC makes the final decision on Heritage matters, but it is the Minister. The ACMC makes recommendations to the Minister. This can lead to community angst and unrealistic expectations about what the ACMC is expected to do. Greater interaction between the Minister and ACMC and greater clarity around roles, would assist here.

Information that is easy for the public to access (i.e. via the DPLH website, Land Council websites, public libraries, etc) about the roles and responsibilities of the ACMC, along with processes and protocols followed when assessing and providing advice to the Minister on applications, would assist in this general understanding and building of trust.

Are the roles and functions of the Department of Planning, Lands and Heritage assigned under the Act sufficiently clear and comprehensive to fulfil the objectives of the legislation to preserve Aboriginal heritage places and objects?

No.

There is considerable confusion in the Aboriginal and non-Aboriginal community as to how many staff work at the Department, what their roles are and what their responsibilities are. This can lead to community angst and unrealistic expectations about what DPLH staff are able to do to facilitate heritage protection outcomes.

There is also confusion as to how the different Departments and Acts interact (i.e. the Aboriginal Heritage Act, WA Biodiversity Conservation Act and WA Planning and Development Act).

The recent reformation of the Department of Lands, Planning and Heritage may be advantageous in this and in developing a culture of a more proactive approach to heritage protection, particularly in the face of development proposals, as staff may be able to interact and share information more readily.

Information is easy for the public to access (i.e. via the DPLH website, Land Council websites, public libraries, etc) about the various roles and responsibilities under the DPLH, along with processes and protocols for identifying and assessing heritage values, would assist in this general understanding and building of trust.

In addition, the Sections under the Act around Compliance and Due Diligence, in particular Section 62, need to be revised so that they are clearer. The legal requirements to report sighting/breaches to the registrar need to be more stringent and clearer.

Under the current Act, a member of the community isn't required to report sightings/breaches to the registrar. If they identify skeletal remains, they can simply call the local police station to report it and they have fulfilled their requirements under the Act. Or they can claim that they could not reasonably have known a sight existed and again, the rules around what constitutes 'reasonable' is not particularly clear.

There is also no legal requirement in the Act for proponents to make the results of Heritage surveys public. The legislation needs to be changed to make this mandatory. The results should be easily

accessible to the public, via the DPLH website, Land Council offices, and other appropriate locations. This not only makes proponent accountable to the community, but also reduces the likelihood of duplication of effort in heritage research and consultation for future proposals, which is a common issue currently. This would make the entire process more resource efficient, effective and streamlined.

These issues with the legal requirements are compounded by the fact that the current system is reactive, as opposed to proactive. The Act and the overarching process of heritage protection does not encourage ongoing dialogue and relationship building with local TOs that could assist in clarifying/avoiding these issues.

Question 5

The Act applies to places of archaeological, ethnographic, historical and anthropological importance and/or interest, and also sacred or ceremonial sites of importance and special significance to Aboriginal people (section 5).

5(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;

5(b) any sacred, ritual or ceremonial site, which is of importance and special significance to persons of Aboriginal descent;

5(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;

5(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.

Does section 5 adequately describe the sorts of places or sites that should be protected under the amended Act?

No

As per the answer to Q1, the definition does not capture the ethnographic importance of places like natural environmental features and/or information provided in support of this.

The importance of the connection of Aboriginal people to the natural environment and family, irrespective of the identification of objects or mythological stories associated with it, is paramount and not currently reflected in the Act or heritage protection process.

The removal and then re-listing of the Collie and Swan Rivers as registered sites on the DPLH on-line Heritage Site Register again illustrates the importance of clarifying this, as it is currently open to interpretation, leaving very important places vulnerable to Section 18 application and/or Regulation 10 approval.

Question 6

Aboriginal objects are covered under section 6 and Part VI of the Act.

'... [the] Act applies to all objects, whether natural or artificial and irrespective of where found or situated in the State, which are or have been of sacred, ritual or ceremonial significance to persons of Aboriginal descent, or which are or were used for, or made or adapted for use for, any purpose connected with the traditional cultural life of the Aboriginal people past or present.'

Do section 6 and Part VI adequately describe the sorts of objects that should be protected under the amended Act?

As per the answer to Q1 and Q5, the definition does not capture the ethnographic importance of places like natural environmental features and/or information provided in support of this.

There are a lot of social customs (traditional and contemporary), memories and family connections associated with natural environmental places that are of huge significance to Aboriginal people, but that aren't recorded as part of heritage survey work and hence aren't recorded in survey submissions or on the site register. This is a major gap in the interpretation of the current legislation by the community and anthropologists/archaeologists alike. The Act can't protect what isn't identified as being of importance.

The importance of the connection of Aboriginal people to the natural environment, irrespective of the identification of objects or mythology associated with it, is paramount and not currently reflected in the Act or in the process of assessing heritage significance.

Question 7

Aboriginal sites of outstanding importance may be declared Protected Areas under section 19.

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

Yes.

This is providing that it is agreed in consultation with the local Aboriginal community, the relevant Land Council (so as not to create community tensions and to ensure a range of cultural views are considered) and it also takes into consideration the ethnographic significance, as mentioned in Q1, 5 and 6.

Question 8

The Act does not include specific provisions that cover the discovery and management of Aboriginal Ancestral (Skeletal) Remains.

Should the Act provide for the management of Aboriginal Ancestral (Skeletal) Remains?

Currently, if skeletal remains are found, to meet the requirements and obligations under the Act, a community member/landholder can simply place a phone call to the local police station to report it. This is often as far as it goes. There is no legal provision in the act for what happens next in terms of consultation with the local TOs, management or protection.

The discovery of any skeletal remains should trigger notification of the appropriate Aboriginal people and Departmental representatives, so that steps can be taken for management, protection, removal, and identification, in partnership and collaboration with the police if necessary.

Copies of the results of this work should then be made available to the DPLH, the relevant Land Council/s and other places as deemed appropriate. In addition, incentives for the public to engage more positively in this process and come forward with reports would be of benefit.

Question 9

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

Any that may jeopardise the integrity of the values of the site. This can include physical damage, but also needs to take into account cultural protocols, such as men's and women's places.

The Act sets the base minimum requirements for protection of Heritage. A culture should be fostered in all levels of Government, the DPLH and the community of valuing culture and heritage so that it is protected by default, not by exception and not only through the minimum requirements of the Act.

Why should it be that something should negatively impact/affect a site for it to be valued? Why can it not be valued anyway?

Question 10

What should be the criteria against which to evaluate an activity that may affect a site (eg a proposal to use or develop land)?

As per previous answers, rather than waiting for a proposal to potentially impact a site, the community at large, Local Government, the private sector and other State Government Departments (Particularly DPLH and DBCA) should be educated and encouraged to participate in Aboriginal Heritage Protection.

Improved communication and consultation on an ongoing basis, regardless of pending proposals, is the best way to build community trust and confidence in the Heritage Protection System and for the proponents to be assured that they are meeting their requirements effectively.

Question 11

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

As per previous answers, impact should be assessed in relation to environmental and social impact as they pertain to ethnographic considerations and deeper considerations of 'connectedness to Country'. This is as fundamental a consideration in terms of cultural heritage and often more important than the discovery of specific artefacts or other static, physical cultural heritage.

The Act does not currently adequately provide or this, or even require that this information be recorded as part of heritage survey consultation and assessment work. Often Aboriginal people cite this environmental and social connection in consultation, but it is not recorded, as it is not considered to be relevant by anthropologists/archaeologists, as it does not then relate back to Act requirements.

The fact that environmental condition of the natural landscape and cultural importance are considered separately to the Heritage Act, under separate acts (Biodiversity Conservation Act), with very little interaction, lies at the heart of the current gaps in the Heritage Act.

Question 12

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

As per previous answers, all stages should be undertaken in consultation with the local Aboriginal community. Aboriginal people should be embedded in all tiers of government so that the process considers cultural importance of lands in the context of environmental and social sustainability, as opposed to the current approach of Heritage being considered at the tail end of the process.

Question 13

Two part question

a) To what extent is the current section 18 application process effective?

Ineffective

b) How can the section 18 process be improved?

As per previous answers, Section 18 applications should be assessed in relation to environmental and social impact as they pertain to ethnographic considerations and deeper considerations of

'connectedness to Country'. This is as fundamental a consideration in terms of cultural heritage and often more important than the discovery of specific artefacts or other static, physical cultural heritage.

The Act does not currently adequately provide or this, or even require that this information be recorded as part of heritage survey consultation work. Often Aboriginal people cite this environmental and social connection in consultation, but it is not recorded, as it is not considered to be relevant by anthropologists/archaeologists, as it does not then relate back to Act requirements.

A number of Section 18 proposals have been approved on these grounds, much to the anger and disappointment of local Aboriginal people who were consulted.

The fact that environmental condition of the natural landscape and cultural importance are considered separately, under separate acts, with very little interaction, lies at the heart of the current gaps in the Heritage Act.

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?

As per previous answers, rather than waiting for a proposal to potentially impact a site, the community at large, Local Government, the private sector and other State Government Departments (Particularly DPLH and DBCA) should be educated and encouraged to participate in Aboriginal Heritage Protection.

It should be embedded in process and as part of the established system, with Aboriginal people involved in all areas of heritage management and protection.

Question 15

Anyone who excavates, destroys, damages, conceals or in any way alters an Aboriginal site without authorisation or consent, commits an offence under the Act. There are also restrictions when dealing with Aboriginal cultural material.

Are the enforcement provisions under the Act adequate to protect sites?

No

If not, how can they be improved?

They should be increased, particularly for companies and/or if it is related to a pending development proposal.

In addition, it should be made public when proponents breach the Act and it should impact on trading and reputation.

Conversely, there should be incentives for companies and individuals to be more proactive in their heritage protection efforts. The Act sets a bare minimum for Aboriginal heritage protection. There is nothing to say that these can be exceeded. If this is done, it should count towards a company's public profile and for individual landholders, some kind of incentive to protect and manage sites identified on their properties will assist in better management and protection.

Question 16

The penalties for destroying, damaging, concealing or altering Aboriginal sites or objects are:

Individuals - \$20,000 and 9 months' imprisonment for a first offence and \$40,000 and 2 years' imprisonment for subsequent offences.

Body Corporate - \$50,000 for first offence and \$100,000 for subsequent offences.

Other offences are outlined in sections 18, 23, 26, 43, 46, 49, 54 and 55 of the Act.

A prosecution for an offence must commence within 12 months of the offence.

Are the current penalties under the Act adequate?

No

If not, how can they be improved?

They should be increased, significantly so for companies and/or if it is related to a pending development proposal. It should also factor in company reputation as well as monetary penalties. Currently, the penalties for destruction/desecration are not at a level that will impact a proposal's cost-benefit analysis. They are simply factored in as a cost of operating.

Question 17

Anyone with knowledge of an object or place to which the Act applies is obliged to report it to the Registrar of Aboriginal Sites. This does not apply to Aboriginal people where the disclosure of information is against customary laws or protocols.

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

Yes.

The only people who can decide this are Aboriginal people and the retention of this by-law shows that cultural respect and understanding are part of the Act.

There are those who would argue that if we don't know the sites are there on the public register of Heritage Sites, they can't be protected. This simply isn't true. Aboriginal people consulted will advise accordingly, and should be able to, without having to 'prove' to non-Aboriginal people that a site is so important as to warrant non-disclosure.

Question 18

In evaluating the importance of places and objects, sections 39(2) and (3) of the Act provide that the Committee shall have regard to:

39(2) (a) any existing use or significance attributed under relevant Aboriginal custom;

(b) any former or reputed use or significance which may be attributed upon the basis of tradition, historical association, or Aboriginal sentiment;

(c) any potential anthropological, archaeological or ethnographic interest; and

(d) aesthetic values.

39(3) Associated sacred beliefs, and ritual or ceremonial usage, in so far as such matters can be ascertained, shall be regarded as the primary considerations to be taken into account in the evaluation of any place or object for the purposes of this Act.

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?

Yes. It is the additions in the Act, as per previous answers, that need to be adjusted so that the above can be executed effectively and with true cultural consideration. i.e. Connection to Country, family and community.

Question 19

The Register of Aboriginal Places and Objects helps land users identify locations where Aboriginal heritage is present, and is publicly available for searching online. Searches are subject to exclusions where information is culturally sensitive.

What should be the steps to report a place or object?

The current on-line search and reporting tool is much improved on the previous and the steps to report a place to the registrar are quite good and clear on the site.

However most community members have no idea this great tool exists.

A culture needs to be fostered in the DPLH of promoting this more widely and educating people about the Act so that they aren't scared to report things.

A common (and groundless) fear of private landholders, particularly farmers, and sometimes local governments, is that if they report a site or skeletal remains, they will lose their property or it will have serious implications for management. There are many landholders with artefacts on the mantelpiece that will never report this to the DAA.

These kinds of misconceptions need to be debunked by public education and making fact sheets and easy to absorb information about the Act available to the public via the website.

If people have easy access to information, the Act becomes more understandable and less frightening and will encourage greater sharing of cultural information between Aboriginal and non-Aboriginal people.

The current state of play unfortunately fosters mistrust on both sides, as opposed to collaboration.

What should be the steps to remove a place or object from the Register?

This needs to be done in consultation with the Aboriginal community, and should only be done by exception, not at the discretion of the Minister. They should take into account the environmental and social considerations.

The case of the Collie and Swan Rivers being removed from the register in 2015, with no consultation with the Aboriginal community, is a very good example of what should not be done.

Question 20

What do you think is missing from the Act?

How do you legislate for social and environmental conscience? I believe the answers to previous questions address this question. Nothing further to add.

Question 21

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

No comment

Please don't hesitate to contact me if you require any further information.

Kind regards,



Nerilee Boshammer.