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Mr Graeme Gammie
Assistant Director General, Heritage Services
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Dear Mr Gammie,

Submission on the Review of the Aboriginal Heritage Act 1972 Consultation Paper

Thank you for providing an opportunity to make a submission about our views regarding the *Aboriginal Heritage Act 1972*.

We are professional archaeologists, each with almost 40 years' experience in Aboriginal archaeology working on academic and consultancy-focused projects. One of us (Caroline Bird) has served on the ACMC.

We believe that the *Aboriginal Heritage Act 1972* is not fit for purpose in the 21st century. The Act originally aimed to provide legal protection to Aboriginal sites. However, the Act does not reflect changes in the social and political landscape since the early 1970s, including developments in Native Title and changes in practices in heritage management principles and practices. The language used in the Act is often imprecise and contradictory, and inconsistent with contemporary practice in heritage management as exemplified by the 2013 Australia ICOMOS Charter for Places of Cultural Significance. Successive amendments to the Act have only served to weaken its provisions by adding complexity and confusion. Furthermore, the administration of the Act over the years has been inefficient, unwieldy, inconsistent and under-resourced. This has added to the confusion and uncertainty surrounding Aboriginal heritage protection and resulted in lack of trust between various stakeholders, to the clear detriment of Aboriginal heritage in Western Australia.

Therefore, we believe that amending the Act can only foster further ambiguity. This is an opportunity to enact legislation that will take full account of Aboriginal views and can be based on 21st century principles and practices of heritage management. This will provide clarity and certainty for all concerned.

The following discussions are based on our professional experience as archaeologists with the workings of the current Act and its problems. We make a number of specific recommendations highlighting how we believe key issues might be addressed in new legislation.

Recommendations

Principles underpinning new legislation

New legislation should be based on the principle that more than 50,000 years of Aboriginal occupation should be celebrated and promoted by the state of Western Australia. It seems that heritage has come to be viewed as merely an impediment to development. Rather, heritage is an

essential expression of cultural identity – who we are – and intrinsically valuable to the entire WA community.

Since Aboriginal heritage is embedded in a living and dynamic culture, it is crucial that Aboriginal people have a primary role in decision-making with respect both to the formulation of any new legislation and its subsequent administration. This should be supported by adequate resources, including both funding and access to expert advice. The primacy given to Aboriginal views in the 1972 Act (for example, section 39 [3]) was highly significant and unusual at the time. However, there is no requirement for Aboriginal people to be consulted in the current legislation and they have no right of appeal.

A new Aboriginal heritage Act should be consistent with international and national guidelines as set out in:

- World Heritage Convention 1972
- UN Declaration of Rights of Indigenous Peoples 2008
- Australian Heritage Council Assessment of Place protocols 2009
- Burra Charter 2013

It should also reflect the sustainability and consultation principles and guidelines followed by, for example,

- World Business Council on Sustainable Development
- International Council on Mining and Metals Indigenous Peoples and Mining Position Statement 2013

We **recommend** that the structure and content of a new AHA assimilate key principles, processes and practices of these best practice standards. This way best practice heritage outcomes, rather than expedient or less cost processes, will form a key element of the government's considerations.

Any new legislation should be periodically reviewed to ensure it continues to meet community needs.

What is protected under the Act

The AHA provides blanket protection for sites whether registered or not. It is important to maintain this. However, the definitions in sections 5 and 6 are outdated and imprecise. In particular, the definitions need to reflect both Aboriginal beliefs and current practices in cultural heritage conservation and management.

In addition to a more comprehensive, nuanced and contemporary view of Aboriginal heritage, we specifically **recommend** new legislation should include protection for the following types of sites.

- cultural landscapes. This concept better reflects Aboriginal perspectives, as well as acknowledging the importance of understanding and managing sites within their context rather than as 'heritage islands' which can be clearly demarcated from their environment.
- potential archaeological deposits. These are sites with sub-surface deposits but little or no surface manifestation. The status of these sites under the current legislation is ambiguous as often archaeological testing is required to determine if subsurface components exist. If a site is determined not to be a site under the Act, no permit is required to excavate it. However, if such excavation determines that significant archaeological material is present, then the excavator is liable to prosecution for disturbing a site. There is no requirement for test excavation to occur if the existence of sub-surface material is suspected. Consequently, such sites may be destroyed with impunity.
- Sites with both Aboriginal and non-Aboriginal components, including built heritage (such as missions. These sites can easily fall between the cracks, as legislation for the protection of Aboriginal and non-Aboriginal heritage is separate.

- skeletal remains/ burials.

A more nuanced and comprehensive view of Aboriginal heritage should also allow the complexity of connections between traditional cultural knowledge, historical information and archaeological evidence to be taken into account. It is common practice for heritage assessments to be poorly integrated, with separate surveys and reporting by anthropologists, archaeologists and historical archaeologists.

Registration and reporting

We emphasize the importance of maintaining a Register to act as the knowledge base, thereby a critical decision-making tool for land use planning along with the conservation and management of research, research, and the education of the wider community. The Register should be accessible and informative. It should contain information about all Aboriginal heritage places reported in the State, with appropriate safeguards for the protection of culturally sensitive information. These data form a critical element of WA's heritage, namely an information register of Aboriginal heritage. As well the retention of information about places and sites comprises a crucial means of preserving Aboriginal cultural remains.

The Register should thus be as comprehensive as possible. Currently, the Act sets a relatively high threshold for sites under section 5, which requires places to be 'important and significant' and should be 'preserved because of its importance and significance to the cultural heritage of the State'. The requirement that places be assessed in this way has been inconsistently applied through and, troublingly, has in recent years been used to deregister sites. There seems to be continual pressure to downgrade the status of places, particularly archaeological sites. This potentially leads to the loss of information about places, particularly archaeological sites many of which are significant through their contribution to a body of knowledge. This is also hurtful to Aboriginal people who value the places where their ancestors lived and use them to teach about their culture.

In our view, the use of the terms 'importance and significance' is problematic because:

- These terms are not defined in the Act and their use is confusing and open to inconsistent interpretation.
- Assessment of significance should not be a primary criterion for entry to the Register. Significance is a mutable quality which may be relevant at different scales, from the individual or family, through local, regional, state, national to international. Significance can also change through time as more information comes to light.

A critical condition of maintaining a register as a tool for administration of the Act must be the establishment of adequate minimum standards for data reporting. The current Act includes a provision for compulsory reporting of sites to the Registrar (section 15). This provision should be maintained and extended to include the compulsory deposition of materials associated with investigations associated with activities under the Act (with suitable safeguards in place for the protection of confidential cultural information). Systematic and detailed documentation of Aboriginal places is a mandatory, best practice standard for an Aboriginal place's importance to be assessed in a satisfactory manner. In the event that permission is given to disturb or destroy a site, then a comprehensive documentation to minimum standards can serve as preservation by record.

The mandatory reporting of heritage information is a key tool for government decision-making with regard to the conservation and management of sites. However, the maintenance of high quality and accessible information should also pay dividends by greatly reducing developer costs for heritage surveys and community consultation. The Register should also be a resource for community education.

Our **recommendation** is that the Register should be as comprehensive a record as practicable of Western Australia's Aboriginal heritage. This is important to ensure that decisions about the conservation and management of Aboriginal heritage can be made on the basis of sound knowledge.

Thus, the key issue in maintaining a register of sites is not how significant the sites are but the quality and fullness of the documentation associated with them.

Site Assessment and the section 18 process

The assessment process and the registration and deregistration of sites lacks logic, transparency and accountability. The current Section 18 process is cumbersome and inefficient. It also lacks transparency and accountability.

The ACMC both assesses sites and provides advice to the minister on the section 18 process. These two roles are incompatible. Currently, the main trigger for assessing sites by the ACMC is the section 18 process. This results in the ridiculous and untenable situation where sites can be assessed as sites under section 5 because they are 'important and significant' and 'should be preserved', only for their destruction to be immediately permitted under section 18.

The requirement for the ACMC to assess all sites results in a significant bottleneck. The original framers of the Act clearly never envisaged the sheer number of sites that that would require assessment or the scale of the pressures posed by development. The process has become unwieldy, as well as onerous for the members of the ACMC, who are inadequately remunerated and resourced for the level of responsibility that they bear. The ACMC should also include individuals with relevant expertise in heritage management. The Act provides that one member should be an anthropologist, although this provision appears to have been ignored in recent years. Given that the largest class of sites is those with an archaeological component, it is essential that suitably qualified and experienced archaeologists should be members of the ACMC. There is no requirement at present for Aboriginal communities to be represented on the ACMC.

We **recommend** that decisions about giving approvals for disturbance of sites for the purposes of development (the current section 18 process) should be clearly separated from the registration of sites. Thus, the ACMC in its present form should be abolished. Its current function of assessment of sites for the purposes of registration should be performed by suitably qualified, experienced and resourced officers of the DPLH, in consultation with relevant Aboriginal knowledge holders. A new body should be established to handle approvals to use land. The role of this group would be to assess applications which impact Aboriginal heritage, and to make decisions about how to manage impacts and mitigation on heritage values. Such a body should include Aboriginal people with suitable cultural authority and qualified professionals with relevant expertise in cultural heritage. It should be supported by an adequately resourced and qualified staff.

Currently, rights of appeal under section 18 are only available to the owners of land aggrieved by the minister's decision (sub-section 5). Other parties, particularly Aboriginal groups, should also have rights of appeal. All parties should have access to a formal arbitration process. We therefore **recommend** that an independent tribunal should be established with a mandate to evaluate these issues and arbitrate resolutions, in the event of disputes over heritage values, impacts and decisions about their management and mitigation.

We are pleased that the government is taking a staged approach to reviewing the AHA and hope this signals that a wide community engagement program will accompany the current review.

Thank you again for the opportunity to make a submission.

Yours sincerely



Dr Jim Rhoads



Dr Caroline Bird