Yamatji Marlpa
ABORIGINAL CORPORATION

KNOWLEDGE PARTNERSHIPS

ABORIGINAL HERITAGE ACT 1972
SUBMISSION MAY 2018

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ACRONYMS AND ABBREVIATIONS

ACH	Aboriginal Cultural Heritage
ACMC	Aboriginal Cultural Material Committee
AHA	*Aboriginal Heritage Act 1972* (WA)
ATSIHPA	*Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth)
DAA	Department of Aboriginal Affairs
DPLH	Department of Planning, Lands and Heritage
Cth	Commonwealth
NTRB	Native Title Representative Body
PBC	Prescribed Body Corporate
NSW	New South Wales
NSW Bill	*Draft Aboriginal Cultural Heritage Bill 2018* (NSW)
NTA	*Native Title Act 1993* (Cth)
Qld Acts	*Aboriginal Cultural Heritage Act 2003* (Queensland) and *Torres Strait Islander Cultural Heritage Act 2003* (Queensland)
RAP	Registered Aboriginal Parties
RDA	*Racial Discrimination Act 1975* (Cth)
s	Section
ss	Sub-Section
UNDRIP	United Nations Declaration on the Rights of Indigenous People 2007
The Minister	The Western Australian Minister for Aboriginal Affairs
V	Versus
Vic AHA	*Aboriginal Heritage Act 2006* (Victoria)
WASAT	Western Australia State Administrative Tribunal
WA	Western Australia
WASC	Supreme Court of Western Australia
YMAC	Yamatji Marlpa Aboriginal Corporation

EXECUTIVE SUMMARY

On 13 March 2018, Hon. Ben Wyatt MLA, Minister for Aboriginal Affairs (the Minister) announced a review of the *Aboriginal Heritage Act, 1972* (AHA). The review is aimed at modernising the legislation to be respectful of Aboriginal people and ensure that their heritage is recognised, protected and celebrated by all Western Australians. The Minister aims to have the amended legislation passed by both houses of Parliament by the end of 2020.

Yamatji Marlpa Aboriginal Corporation (YMAC) is the native title representative body (NTRB) for the Pilbara, Murchison, Mid-West and Gascoyne regions of Western Australia (WA), encompassing over one-third of the state. YMAC represents over 24 native title claims, all with their own language, culture and traditions. YMAC is a not-for-profit organisation run by an Aboriginal Board of Directors and provides a range of services to its members, including claim and future-act representation, heritage protection services, community and economic development, and natural resource management.

This document presents YMAC's responses to the specific questions raised in the "Review of the *Aboriginal Heritage Act 1972* Consultation Paper – March 2018".

In summary, the AHA reform must:

1. Formally recognise that Aboriginal heritage belongs to Aboriginal people.
2. Align land rights and interests under native title law with the heritage protection regime.
3. Ensure Aboriginal people have a role in surveys, consultation, reporting, decision-making and protection of their cultural heritage.
4. Implement standards, criteria and procedures for identifying and evaluating heritage, and assessing the merits of issuing permits.
5. Make the system of administration and governance transparent, including the reporting and penalising of project proponents that cause a breach of the AHA.

Given the extensive nature of the reform required, YMAC recommends that the AHA be repealed and replaced in its entirety to ensure a cogent statute is introduced which is consistent with the United Nations Declaration on the Rights on Indigenous People (UNDRIP), the *Native Title Act 1993* (Cth) (NTA), and the *Racial Discrimination Act 1975* (Cth) (RDA); all of which post-date the AHA.

A brief discussion on each point is presented below.

Aboriginal heritage belongs to Aboriginal people

The current model of heritage protection is based on Eurocentric heritage laws aimed at preserving sites and monuments for the "common good"/public interest rather than the specific interests of Aboriginal people. Existing heritage protection legislation does not provide ownership rights to Aboriginal people, nor account for the belief systems that impart value on what the current model treats simply as "sites and artefacts". Instead, the system appoints public officials to assess and determine outcomes on behalf of the wider community.

In recent years, the protection of Aboriginal heritage has been weighed against the need for mining projects in terms of what affords the greater "common good". This has led to the immediate economic benefits of development prevailing over the long-term cultural heritage value of many sites, including declared protected areas such as the Woodstock-Abydos Reserve.

It is critical that respect for Aboriginal culture be enshrined within WA's heritage protection system; and, the long title of the replacement legislation must reflect its intention to benefit the Aboriginal community through the provision of primary rights to the Aboriginal people whose heritage it is and through giving them defined roles in defining and determining the significance of their heritage and how it will be protected.

Aligning heritage protection with native title law

The NTA provides for rights on land and in waters arising from the traditional laws and customs of native title holders. The NTA requires good faith negotiations between parties for some future acts, which provide an avenue for the involvement of Aboriginal people to identify sites and negotiate heritage protection. Traditional Owners can protect sites even if they are not under immediate threat.

However, native title (and even the right to exclusive possession) is threatened when the State government approves a future act (e.g. granting mining tenure), as this can result in the disturbance of heritage areas through processes under the AHA. Although native title provides for the right to access, protect and conserve sites or significant places, it does not necessarily protect the sites themselves. The native title system can occasionally protect heritage through its processes, agreements or conditions, but where future acts are granted, the situation then reverts to the AHA, which places the burden of protecting heritage on the Traditional Owners by requiring them to seek injunctions to prevent site disturbance. These injunctions are rarely successful which is illustrated by the regular granting of permits to disturb sites under the AHA despite the objections of the native tile groups whose heritage the AHA ostensibly protects.

Therefore, the AHA must better align with the NTA. This would ensure Aboriginal people are recognised as having ownership rights over their heritage. Explicit requirements for proponents to consult and negotiate with Traditional Owners will provide more certainty regarding their involvement in the project development process. The native title process has also assisted in identifying the Traditional Owners for each area and the PBCs set up can function as key bodies to be carry out functions under the AHA as outlined below. Furthermore, organisations working in the native title space are capturing knowledge and information on customary law and tradition; hence, these organisations also have a role to play in heritage conservation (see below).

Aboriginal people play a role in heritage protection

Although government decision-making about heritage protection may often include pre-conditions for consultation with relevant Aboriginal people, this is not mandated in the AHA and the consultation is only given as much weight as the decision-makers wish. Under the AHA as it stands, it is not necessary for key roles to be filled by people of Aboriginal descent, and the Minister can choose who to appoint into these positions. Without qualified and culturally appropriate consideration of information, problems arise when evaluating heritage protection against economic development for the "common good".

The AHA must formally recognise that Aboriginal people need to participate in the decision-making surrounding their heritage and culture, and that this includes culturally appropriate decision-making processes. Existing gaps in the AHA which require addressing include:

- Local Aboriginal people who are the representatives for a specific area need to be present and participate in surveys and the post-survey decision-making process.

- Only Aboriginal people can define the significance of heritage, and this includes intangible heritage. Therefore, only Aboriginal people can say if proposals impact or affect areas of significance, and what conditions might minimise or mitigate damage. Relevant Aboriginal people need to be part of the decision-making process regarding the assessments of their heritage and (potential and actual) disturbance/damage.
- If decisions are to be made by bodies other than Aboriginal bodies or people, these decisions should be made by an independent tribunal, such as the State Administrative Tribunal, rather than the Minister or a department officer. In this way political pressures can be removed from the process of decision-making on heritage.
- The right for Aboriginal people to appeal to an independent body relating to decisions resulting in damage to their areas or objects of significance.
- Procedural fairness and natural justice in the right to be notified of applications to damage sites, outcomes of these applications, including the reasons for decisions made, and any resulting appeals. This should include the obligation that Aboriginal parties be served and participate in Western Australian State Administrative Tribunal (WASAT) appeal/hearings with project proponents who have applied for and been refused permits or declarations.
- Key roles and positions on committees need to be held by Aboriginal people.
- Exemptions be made available to Aboriginal people on the need to disclose information, where disclosure is contrary to customary law.
- Aboriginal communities should be able to appoint honorary wardens and be given more authority to manage and make decisions over protected areas, objects of significance, and intangible heritage. This would provide a means to integrate the roles of the Prescribed Bodies Corporate, land councils and NTRBs (i.e. organisations involved in native title and land rights) with heritage protection. While Aboriginal ranger groups offer another avenue for the day-to-day, on-the-ground execution of heritage protection and conservation.
- The legislation should provide for the protection of intangible heritage such as intellectual property and cultural knowledge of art, stories, environmental and ecological knowledge and the like. The Vic AHA in Div 5A provides for these to be able to be registered and for agreements to be made in relation to this, with prohibitions on commercial exploitation of these without consent of the Aboriginal owners.
- The legislation should contain provisions for the repatriation of ancestral remains and objects of significance.

Implement standards, criteria, and procedures

There are no standards or criteria for reporting the identification of heritage, consulting with Traditional Owners, nor assessing the significance of impacts. This creates an environment where project proponents are able to engage heritage consultants who align their conclusions and recommendations within reports to the relevant development's agenda. Current administration of the AHA does not provide adequate protection of Aboriginal heritage as is the purpose of the legislation.

Aboriginal people need to be included in discussions about the protection of their heritage and they need to be involved throughout the process of developing the criteria used to define the relative importance and significance of heritage places. A cultural practice that must be considered during consultation is the fact that Aboriginal groups perceive importance and significance in a non-Eurocentric way.

Cultural training is needed for people working with Aboriginal heritage to understand how Aboriginal people experience and construct significance. For many Aboriginal groups, all places are of equal value regardless of how they are constituted. It is only processes such as heritage destruction regimes that force them to create hierarchies of significance.

It is also essential that there be minimum qualifications set for heritage advisers or consultants who are not part of the Traditional Owner group to ensure that only properly qualified people who are bound by professional standards, code of ethics, and who have a proper understanding of heritage can be engaged as consultants. Guidelines for such qualifications and standards can be promulgated by government regulation. The Vic AHA provides for this in s189. There could be a system of registering such consultants and processes for complaints and removal.

In various states, like Queensland and Victoria, heritage legislation includes safeguards and requirements for notification and consultation, with a minimum level of detail to be reported, as well as additional procedures to be undertaken before a permit to disturb heritage can be obtained. Further afield, some jurisdictions (e.g. New Zealand) have incorporated heritage protection more closely into their environmental conservation and resource management approval system, where protection does not revolve around identifying and defining sites but, instead, considers the impact of proposed activities.

In line with more modern thinking on cultural heritage, there should be a movement away from identifying and protecting discrete sites to using a landscape/complex approach and ascertaining the significance of any impacts (and hence viewing Aboriginal heritage as an integral part of the broader landscape/ecosystem).

In addition, the legislation should reflect that what is to be protected is not only the physical integrity of an area but also the cultural significance and values of the area. This may require expanding the description of what amounts to an offence under the legislation beyond physical impacts to impacts on heritage significance.

Also, a statutory mechanism is required for the long-term conservation and management of areas that have been declared “protected”.

Make the system transparent

The administration of the AHA offers little in the way of visibility of the decisions being made in the public’s interest.

Improvements that can be made include a requirement for the Minister to report:

- The appointment of decision-makers, including qualifying competence for the roles of:
    - The Aboriginal Cultural Materials Committee (ACMC) or any replacement body;
    - The Department of Planning, Lands and Heritage (DPLH); and,
    - Any other bureaucrats or experts that are tasked with managing Aboriginal heritage.
- The number of applications for site disturbance, by whom, how many are refused, and the reasons for decisions.
- Regular reporting of current registration rates.
- A list of project proponents who have breached their permits, or in other ways have contravened the AHA.

- The number of prosecutions, penalties applied, and how the Minister has enforced and taken action regarding misdemeanours.

Repeal and replace the AHA

Aboriginal rights in Australia have changed significantly since 1972, when the original, ground-breaking AHA was introduced in WA. Since then, recognition of Aboriginal people's native title rights in Australian law have been established by the NTA, while their right to live free from discrimination have been stated under the RDA. Other states have enacted heritage protections, many of which have been updated recently and include significantly improved rights and responsibilities for relevant Aboriginal people in the identification, preservation, and management of their cultural heritage. The heritage legislation of Victoria and Queensland offer greater protection for sites and the proposed NSW Bill significantly increase protections and enshrine the agency of Aboriginal people in the heritage process.

YMAC believes that the AHA needs to be modernised to consider the rights that have been achieved by Aboriginal people in the intervening years since its introduction.

The AHA should also be repealed and replaced, rather than amended piecemeal. Precedents have been set in other Australian jurisdictions, including Victoria and Queensland, where the modernisation of heritage legislation was achieved through broad repeals. Furthermore, the AHA predates the NTA and the RDA, and needs to be brought into line with these also.

Aboriginal sites are inherently owned by the relevant Aboriginal community first and foremost, followed by the broader community of interest. The identification, registration and on-going management of sites should be in the hands of these Traditional Owners. The current legislation trivialises and marginalises Aboriginal people's connection to their sites and their country, consequently diminishing their rights.

The UNDRIP provides clear and explicit recognition of the core principles that YMAC believes the AHA should adopt:

- Article 11 - Indigenous peoples have the right to practice and revitalise their cultural traditions and customs, including the right to maintain and protect archaeological and historical sites and artefacts.
- Article 12 - Indigenous peoples have the right to maintain, protect, and have access in privacy to their religious and cultural sites, and the right to use and control their ceremonial objects.
- Article 19 - States should consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.
- Article 25 – Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.
- Article 31 - Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions. This article also provides that States should, in conjunction with Indigenous people, take effective measures to recognise and protect the exercise of these rights.

Repealing the AHA and replacing it with a new statute for protecting Aboriginal heritage will provide the opportunity for a holistic approach to Aboriginal heritage which meets the needs and rights of Aboriginal people, is aligned with the UNDRIP, and ensures that a cogent statutory scheme is implemented.

PURPOSE OF THE ACT

Q1 Is the long title an adequate description of what the amended Act should set out to do? If not, what changes should be made?

The AHA needs to acknowledge at the outset that the true owners of Aboriginal heritage and Aboriginal sites are the descendants of the people who made them. This ownership needs to be recognised throughout the legislation. The long title of the new AHA should clearly identify this ownership as a key principle. The AHA offers an opportunity for WA to take a leading role in acknowledging and celebrating the unique tangible and intangible heritage of Aboriginal people.

The current title refers to the protection of Aboriginal heritage for the community, yet community is not defined. The views and interests of the broader community should be considered but not at the expense of Aboriginal people's rights and responsibilities to protect and manage their own heritage.

The legislation's long title must clearly recognise the ownership and rights of Aboriginal people. The AHA, as it is currently worded, does not give any status to the Traditional Owners of the heritage.

In 2009, the WASAT found the Nyiyaparli People did not have any rights to be informed by the Tribunal about appeals under the AHA against section 18 (s18) decisions or conditions. This conclusion was partly drawn from the interpretation of the AHA, that decision-making in relation to places and sites to which the AHA applied was to be exercised by the Minister, acting on behalf of the community (see: *Traditional Owners – Nyiyaparli People v Minister for Health and Indigenous Affairs* [2009] WASAT 71: at [18], [21]).

The 1992 proposed Bill to amend the AHA sought to change the AHA title by suggesting it was for "the preservation on behalf of the community and in particular the Aboriginal community". This proposed amendment was an improvement but was still insufficient. Dr Clive Senior of Minter Ellison noted in his related report that this still would not give sufficient emphasis to an intent to benefit Aboriginal people and recommended that the AHA should have the explicit purpose of providing for protection and preservation of Aboriginal heritage by and on behalf of Aboriginal people and the community generally, and also to recognise and give effect to the rights and responsibilities which Aboriginal people have in relation to their heritage. (See: "*A comprehensive review of the* Aboriginal Heritage Act 1972", Dr C M Senior, Minter Ellison Northmore Hale. Prepared for the Minister for Aboriginal Affairs, Western Australia. 30 June 1995.)

The long title suggested above by Clive Senior would appear to be appropriate.

In addition, the purpose of the Act could be spelt out, like it has in the recent Victorian and Queensland legislation, in a section at the beginning on purposes, objects or principles.

On 23 February 2018, the NSW Government published its *Draft Aboriginal Cultural Heritage Bill 2018* for comment. Its objectives explicitly recognise and involve Aboriginal people in Aboriginal heritage identification, management and protection. Specifically, the NSW Bill states that it is designed:

- in support of Parliament's recognition of Aboriginal people under s2 of the *Constitution Act 1902*:

  - to recognise that Aboriginal cultural heritage belongs to Aboriginal people and accordingly establish a legislative framework that reflects Aboriginal people's responsibility for and authority over Aboriginal cultural heritage, and
  - to recognise Aboriginal cultural heritage as a living culture that is intrinsic to the well-being of Aboriginal people;

- to establish effective processes for conserving and managing Aboriginal cultural heritage and for regulating activities that may cause harm to that heritage so as to achieve better outcomes for Aboriginal people and the wider NSW community;
- to provide for the collection and use of information about Aboriginal cultural heritage in a culturally sensitive manner to support effective planning, conservation and regulatory actions and to enable the monitoring and evaluation of the outcomes of those actions;
- to promote understanding of and respect for Aboriginal cultural heritage among all NSW people; and,
- to enable and support voluntary actions that conserve Aboriginal cultural heritage.

YMAC recommends that a similarly recognitions be included in the Act and for this open, transparent and plain language approach to the AHA be incorporated.

The Vic AHA contains the following principles to do with repatriation, which YMAC believes should be similarly incorporated within the new AHA:

> "Principles"
>
> The following principles underlie this part –
>
> a) As far as practicable, Aboriginal cultural heritage should be owned by Aboriginal people with traditional or familial links to the area from which the Aboriginal cultural heritage is reasonably believed to have originated if it is any of the following;
>
> i. Aboriginal human remains;
>
> ii. Secret or sacred Aboriginal objects;
>
> b) Aboriginal cultural heritage of the kind referred to in paragraph (a) that is in the custody of the State should continue to be protected by the State until it can be transferred into the protection of its Aboriginal owners."

ROLES UNDER THE ACT

Q2 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?

The AHA pertains to the heritage of Aboriginal people. YMAC believes that Aboriginal people need to play an active and collaborative role in the identification, recording, protection, and management of their heritage, including the assessment of proposals that may impact their heritage.

Preferable systems

The relevant Traditional Owners should be the key decision-makers on what happens to their heritage. The Vic AHA, for example, maintains a system of Registered Aboriginal Parties (RAPs) for particular areas. Applications for cultural heritage permits under s151 must be referred to these RAPS if there is one for the area (s35A, s36) and they may object or not, and/or specify conditions for such permits. For certain areas or proposals, cultural heritage plans may be required and, if so, notice of these are to be given to the RAPs who can elect whether they wish to evaluate the plans, and approve or object to plans.

The RAP system also gives recognition to the native title holders for each area. If there is a native title holding corporation (e.g. a PBC) who wishes to be registered as a RAP, then this has to be registered as a RAP. RAPs are registered by the Aboriginal Heritage Council.

The Qld Acts also provide for the appointment of Aboriginal Cultural Heritage bodies for each area who are given statutory roles in relation to cultural heritage studies and cultural heritage management plans – (see s36 onwards). Such bodies in turn nominate Aboriginal parties who have a role in cultural heritage studies and a right to negotiate on cultural heritage management plans.

The WA legislation should also provide for the recognition and registration of such bodies as the body to whom applications for permits to impact heritage are made and who can make decisions on them. If there are PBCs appointed for an area they should be able to choose to be the RAP (or equivalent body) for their area and in the absence of a PBC or any other appropriate body to handle heritage in an area, the relevant NTRB for the area could be the RAP and able to direct proponents to the appropriate Traditional Owners and, where appropriate, assist Traditional Owners in dealing with heritage requests. In this way the people whose heritage it is are the people who decide on the significance of areas and objects and what may be permissible damage. These are the bodies who should be empowered to grant permits to allow activities that may impact on areas or objects of significance. These bodies can also involve other Aboriginal people with cultural knowledge and interests in the areas.

Consideration should be given to whether permits to damage sites also requires the consent of a higher-level State-wide authority, perhaps equivalent to an Aboriginal Heritage Councils under the Vic AHA. We note that under the NSW Bill, Local Aboriginal Panels and proponents can enter management plans to allow some damage of cultural heritage but these still must be approved by the ACH Authority (s48).This could provide some protection for Aboriginal people outside the PBC membership to whom the sites may be significant.

If a system of appeal against decisions of the relevant Aboriginal bodies are provided for then such appeals should be to an independent body like the State Administrative Tribunal rather than a Minister to avoid the issues of politics as indicated above. The Victorian and Queensland systems both provide for a similar independent tribunal or Land Court system rather than leave the final decision with a Minister.

In any system of appeals, the relevant Aboriginal parties must be able to be a party and have full rights of participation. There should also be mediation or alternative dispute resolution possibilities built in t the legislation to encourage resolution by amicable consent. (See for example Vic AHA Part 8).

Surveys

The current AHA does not mandate the need for heritage surveys to occur or for them to involve the participation of Aboriginal people. This creates a situation where the relevant Aboriginal people may not be notified, consulted or given the opportunity to make decisions concerning the protection and management of their heritage. The AHA requires provisions stating that heritage surveys are required prior to any ground disturbing works taking place in areas that have not previously been surveyed for the particular proposed type of activity. The AHA should also state that Aboriginal representatives from the relevant Aboriginal parties for the area are required to participate in these surveys. It should also be made explicit that the relevant Aboriginal parties should be consulted about the development of new projects on their country, and during the procurement of any permits.

Aboriginal people must be present for the identification and recording of heritage places. The process of defining significance must require a qualified anthropologist and/or archaeologist to seek comment from the relevant Aboriginal people *prior* to the submission of any application or Heritage Information Submission Forms to the Department of Planning, Lands and Heritage (DPLH).

Minimum standards of notification and consultation

If the above proposals are not accepted, there needs to be at a bare minimum amendments to protect notification, consultation and participation rights of the kind outlined below.

At minimum, the AHA should contain a statutory requirement that relevant Aboriginal people be notified and consulted on matters related to their heritage. This includes native title holders and registered native title claimants, along with any other people named as informants for sites, and any other Aboriginal people who can demonstrate relevant cultural knowledge in the area.

For example, the South Australian *Aboriginal Heritage Act 1988* includes a specific requirement for the Minister to take all reasonable steps to consult on determinations, authorisations and regulations. Under s13 of this law, a failure to consult properly before a decision is made can invalidate the decision (refer *The Aboriginal Legal Rights Movement Inc. v South Australia and Stevens* (1995) 64 SASR 558).

Further examples of statutes requiring such consultation include:

- *Heritage Act 2004* (Australian Capital Territory) s31;
- *Vic AHA* from s38 onwards;
- *Qld Acts* from s57 onwards and in the Cultural Heritage Duty of Care Guidelines 2004 (Queensland); and
- *Aboriginal Sacred Sites Act 1989* (Northern Territory) from s19F onwards.

It is essential that amendments to the AHA explicitly apply procedural fairness and natural justice to Traditional Owners ahead of the Registrar, the ACMC and the Minister in making s16 and s18 decisions or any equivalent bodies and processes in the new legislation. Currently, Aboriginal people are not recognised in the law as having any interest in Aboriginal heritage, and are not perceived as being the intended main beneficiaries of the AHA. This problem was demonstrated in 1991, when the majority of the Full Court of the Supreme Court of WA (WASC) in *Western Australia v Bropho (1991)* 5 WAR 75 doubted that both standing and procedural fairness applied, particularly because of the mere "spiritual nature" of the interest in the sacred place. Similarly, in 2009, Martin CJ in the WASC in *Woodley v Minister for Indigenous Affairs [2009]* WASC 251 held that there was no obligation for the Minister to accord procedural fairness to the custodians of the relevant site, even if there was a duty on the ACMC to do so, a point which he did not need to decide.

Q3 To what extent has the provision to appoint honorary wardens been effective and how can it be improved?

Section 50 of the AHA does not clearly describe the conditions that lead to an honorary warden being appointed. Under what circumstances are they appointed? What are some examples of the kinds of power they wield? What qualifies people to take on this role? Are they qualified heritage professionals? Section 50(1) states that honorary wardens may "exercise such powers as are prescribed, either throughout the State or in a specified area or specified areas only, according to the terms of their appointments" and implies that the Minister creates the appointment and defines the scope and term of the appointment.

There is no requirement in the AHA for honorary wardens to be persons of Aboriginal descent. A caveat to this section is needed, which states, first and foremost, an honorary warden must be an Aboriginal person who is endorsed/authorised by the Native Title Claimants/Holders or other relevant party with cultural authority to speak for the area. Failing that, any person appointed in this role should be suitably qualified as a heritage professional.

Former provisions for Victoria under s21 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (ATSIHPA) enabled local Aboriginal communities to appoint honorary keepers or wardens to record and maintain Aboriginal cultural property. Local Aboriginal communities were organisations specified in the relevant Schedule (a list of about 32 Aboriginal co-operatives, land councils, trusts, and others). These provisions disappeared with the introduction of the Vic AHA and repeal of the Victorian provisions in the ATSIHPA; with both sets of provisions being replaced with a system of registered Aboriginal parties (RAPs).

In WA, on-Country matters are managed by NTRBs and other Aboriginal corporations. The AHA does not explain whether or how the relevant NTRB or Aboriginal corporation is notified when an honorary warden is appointed for a particular area. This is a gap in the administration of the AHA that needs to be aligned with the NTA. Native title prescribed bodies corporate (PBCs) and registered native title bodies corporate (RNTBCs) offer the best source of authorised and endorsed Aboriginal people who can be appointed honorary wardens to keep and maintain cultural objects and care for significant areas.

Q4 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?

YMAC does not believe that the current roles and functions of the ACMC, the Minister and the non-existent statutory role of the relevant Aboriginal people are sufficiently clear and comprehensive nor are they appropriate.

As outlined above, YMAC believes that the best people to evaluate the importance and significance of Aboriginal heritage places or objects are relevant Aboriginal people whose heritage is involved. The roles that they should have are outlined above.

The ACMC is inappropriately named as it emphasises an antiquated "relics" approach to heritage. It is also inappropriately constituted. Under the system outlined above, there may be little role for an ACMC.

There is scope, however, for an overarching body who registers the relevant local Aboriginal parties and sets guidelines and provides advice, perhaps equivalent to the Victorian Aboriginal Heritage Council. This should be a body made up entirely of Aboriginal people (or at least have Aboriginal people represent a vast majority on the committee). This body should be provided with appropriate expert consultants, including specialist anthropologists and archaeologists, who would serve the body in a purely advisory capacity.

In other jurisdictions, legislation provides for advisory committees to be made up entirely of, or by a majority of, Aboriginal people:

- *Aboriginal Sacred Sites Act 1989* (Northern Territory): ss5–6 (majority of members of the Aboriginal Areas Protection Authority are custodians of sacred sites);
- *Aboriginal Heritage Act 1988* (South Australia): s7 (the advisory committee consists entirely of Aboriginal people); and
- *Vic AHA*: ss131–132 (the committee who must all be Aboriginal persons).

If, contrary to our submissions above, the local Traditional Owner body is not given the powers to decide on permits, the higher level body could be given that role. An example of how such a structure could work is provided by the NSW *Aboriginal Cultural Heritage Bill 2018* under which various roles and limitations of the parties involved in decision-making about Aboriginal heritage can be summarised as follows -:

- objects or ancestral remains are held by the Aboriginal Cultural Heritage (ACH) Authority on behalf of Aboriginal people and may return them to appropriate Aboriginal people (s24, 25);
- the ACH Authority can enter into conservation agreements with owners of land to conserve heritage (s29) and these agreements run with the land (s33). Public authority developments are prohibited on areas subject to conservation agreements without Ministerial consent, and the Minister is limited in grounds for consent, e.g. where there is no adverse impact, no practical alternative, or development is required for an essential public purpose (s34);
- the local Aboriginal panels and proponents can enter management plans to allow some damage of cultural heritage but these still must be approved by the ACH Authority (s48);

- the ACH Authority is an all-Aboriginal board and a member of the NSW Aboriginal Land Council is to be appointed to the Board (s8);
- the ACH Authority approves cultural heritage management plans to allow for damage to cultural heritage rather than the Minister;
- the Board is not subject to the Minister's direction (though they are appointed by the Minister) (s7, s8);
- local Aboriginal Consultation Panels are appointed by the ACH Authority;
- the ACH Authority is required to consult local panels on conservation agreements (s29) *before* a recommendation is made to the Minister to declare land, objects, bodily remains or intangible heritage as cultural heritage (s18).

In amending the AHA to include the delegation of decision-making on and about Aboriginal heritage matters to Aboriginal people, the current burden and backlog of work that is the sole responsibility of the Registrar and the Minister will be lessened or preferably, removed altogether.

WHAT IS PROTECTED?

Q5 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?

S5 suffers from various deficits, the key ones being:

- The approach to Aboriginal heritage in WA needs to evolve from the concept of discrete "sites" (a result of applying Eurocentric, museum methodologies focussed on "archaeological sites" and "monuments") and, instead, must view *areas* or landscapes in terms of their associated cultural significance.

- The bias towards the scientific community's view of what is significant and to places of archaeological significance rather than to areas of significance to Aboriginal people in accordance to their standards. Areas of ethnographic significance to Aboriginal people to be protected are too narrowly limited to sacred, ritual or ceremonial sites.

Beyond discrete sites to landscapes and larger areas

In more recent, general heritage phraseology, such as in the Operational Guidelines for the Implementation of the World Heritage Convention issued by UNESCO, broader terms, such as "cultural landscape", have been used to extend protection to larger areas where the value of a group of features (like a set of buildings or complex) is greater than the sum of the individual parts; and, hence, must be protected as a whole. This landscape approach has also been applied to areas of cultural associations that go beyond the physical evidence of human activity. The concepts of cultural landscapes in World Heritage criteria have enabled the listing of large areas such as Kakadu, Uluru, the Tasmanian Wilderness and others.

Byrne, Brayshaw and Ireland (2001)[1] identified that Aboriginal people think in terms of "country", not discrete sites. They gave the example of an occasion when archaeologists were looking for points on a map, but the Aboriginal women were more interested in their memories of fishing, activities that involved a wider landscape. Henderson (1983)[2] also concluded that sites and land are not easily separated in Aboriginal thinking.

Howard Morphy gave evidence on the difficulty of locating and protecting particular trees of significance when the issue was controlling a totemic landscape environment. (See also: Morphy, H. (1993). *Colonialism, History and the Construction of Place: The Politics of Landscape in Northern Australia*).

A wider approach than just "sites" has been adopted by other jurisdictions in Australia.

The ATSIHPA uses the term 'area' to avoid the "narrow and artificial approach to sites as discrete geological formations" (See: Second Reading Speech by the Minister for Aboriginal Affairs Clyde Holding in Commonwealth of Australia, Parliamentary Debates, House of Representatives, 9 May 1984).

In Victoria, the term "Aboriginal place" is used in the Vic AHA, but is then defined as an "area", which may be inclusive of such things as an area of land or expanse of water (s5). Both the Qld Acts also refer to "areas".

Justice Seaman, in his 1984 Aboriginal Land Inquiry report, favoured the identification and mapping of broad zones of significance rather than sites to avoid the need for in-depth site identification surveys and problems with confidentiality of disclosing information and locations about such sites.

The AHA needs a definition of heritage that allows for areas and landscapes. This should allow for connections between discrete sites which make up a site-complex, and for buffer-zones around discrete features to maximise protection.

Significance to Aboriginal People.

S5(b) which limits protection to sacred, ritual and ceremonial sites is too narrow and should be expanded explicitly to areas of heritage significance to Aboriginal people as it is in the Vic AHA (s5(2)). The criterion needs to be published and transparent to aid Aboriginal people and consultants in the recording and reporting of places and provide certainty to all stakeholders.

The danger of a narrow misreading of s5(b) was recently seen in the case of *Robinson v Fielding* [2015] WASC 108 where the section had been read as requiring a sacred area to also be of ceremonial and ritual significance. The Court determined that the ACMC had misinterpreted the term 'sacred site' in deciding that certain land and waters in Port Hedland Harbour were not an 'Aboriginal site' within the meaning of the AHA. The Court overruled existing guidelines on what constitutes a 'sacred site' and set a precedent for the class of places to which the AHA may apply.

This danger has also been seen in attempts to remove large areas such river systems from the definition of a sacred site. These problems need to be rectified by a definition that makes it clear that the protection is not just for small areas.

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[1] See: Byrne, D., Brayshaw, H. and Ireland, T. (2001). *Social significance: a discussion paper*. Hurstville, NSW: NSW National Parks and Wildlife Service.

[2] See: Henderson, A. (1983). *Submission of the Queensland Association of Professional Anthropologists to the Aboriginal Land Enquiry*. Unpublished. University of Queensland.

The bias towards protecting sites on the basis of their significance to the Committee, such as under s5(c) may have compensated for the narrowness of s5(b) and allowed many sites to be protected but the discretionary element has proven dangerous where there is a desire to reduce the number of sites submitted to the Registrar for consideration or to reduce the number of sites registered.

The broad nature of these categories permits a high degree of subjective interpretation that is leading to places not being registered. This is because the site identification work is being completed by people who do not have a professional background in heritage, native title, and/or working with Aboriginal communities.

Section 5(a) and 5(b) of the AHA are particularly problematic for being able to be (mis)read down. Religious and/or spiritual significance and ceremonial use mean different things in the context of Aboriginal belief systems and, once again, the legislation is flawed by the imposition of a Eurocentric interpretation of such values. These definitions must be clarified using Aboriginal cultural context.

Also, s5 of the AHA needs a new category added to cover burials rather than combining them into the storage places category under s5(d).

YMAC considers the proposed NSW legislation offers a good, expansive definition of Aboriginal cultural heritage to living, traditional and historical practices, expressions, representations, skills, knowledge, beliefs (together with associated environment, landscapes, places, objects, ancestral remains and materials) that Aboriginal people recognise as part of their cultural heritage and identity (s4).

While intangible heritage is not a physical site or area, there will be elements of intangible heritage that relates to areas as well that must be protected as part of the significance of an area. In addition, as intangible heritage also extends beyond places, it is necessary that this is also protected as a separate head of heritage as well. Both the Vic AHA and the NSW Bill provide for the registration, protection and management of intangible heritage and similar provisions could apply in WA.

It should be made clear, as it is in the Vic AHA s8, that heritage significance of an area is not affected by the fact that the area is affected by damage.

Q6 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?

When referring to physical objects, s6 of the AHA would benefit from a wider reference to cultural heritage significance to Aboriginal people for the reasons set out above. Section 6 would benefit from being expanded to include intangible heritage associated with naturally occurring landscape features. Furthermore, human ancestral remains need to be defined as a separate heritage category, and not just be listed under objects.

As indicated above, while intangible heritage is not an object, such knowledge can relate to objects and should be protected as part of the values and significance of an object as well as in a separate category.

There should also be provisions relating to repatriation of objects and ancestral remains.

The relevant Aboriginal people (e.g. the PBC for the area) would be best placed to be the keepers of objects/ and the people best placed to deal with ancestral remains. They also need to be recognised as the owners of intangible heritage.

Q7 Is the declaration of a Protected Area under the Act the best way to deal with Aboriginal sites of outstanding importance?

Section 19 of the AHA is triggered when the ACMC recommends to the Minister that an Aboriginal site is of sufficient importance that it should be declared a protected area. Alternatively, once a site is registered, interested parties can also make applications to protect an area under s19.

If an application or recommendation is made, the Minster is obliged to notify any parties with rights under s18(2). Further, s19(2) provides a clause for aggrieved parties to set out why a protected area declaration would unjustly impact them. This is to be considered during the Minister's decision-making process.

The 2018 consultation paper states that there are currently 80 Protected Areas in WA but no new places have been added since the 1980s. This suggests that the mechanism isn't working as it should, as there have been numerous places of state and national significance registered under s5(c) since the 1980s. And yet, a s19 recommendation has not been presented to the Minister from the ACMC for over 30 years.

The AHA also has a provision for the variation or revoking of a protected area by the Governor, provided it is in the general interest of the community (s25). This clause is at odds with the principle of heritage protection. Given the current AHA does not explicitly state that Aboriginal heritage protection is in the best interest of the Aboriginal community, economic benefits from infrastructure and mining projects will likely be considered of greater interest and afforded more weight than the conservation of Aboriginal culture. The relative ease of applying s25 has been demonstrated on two recent occasions within the Woodstock-Abydos Protected Area, where Fortescue Metals Group and Roy Hill Infrastructure both successfully applied to have linear portions of the protected area excised for the purposes of building and operating railway infrastructure. The excisions impacted rock and cave areas and sites of cultural significance to the local Aboriginal groups. The inclusion of a clause to permit the variation to or revoking of a protected area (albeit with justification) does not offer a permanent and secure form of protection for Aboriginal heritage.

Furthermore, although the Minister must notify parties of a protected area proposal, and aggrieved parties may present reasons against the declaration of a protected area, there is no requirement for the Minister or any other statutory body to notify or consult the relevant Aboriginal people in relation to applications made by a person aggrieved by the declaration of a protected area. The AHA does not provide procedural or natural justice for Aboriginal people who are impacted by such Ministerial decisions.

The AHA needs to be amended to ensure Aboriginal people have access to due process through notification, consultation and participation in decision-making about their heritage, especially protected areas.

Q8 Should the Act provide for the management of Aboriginal Ancestral (Skeletal) Remains? If so, what needs to be considered?'

The term "Aboriginal ancestral remains" is preferred over the use of the term "skeletal remains". Also, when referring to culture, the addition of the term "law" – so that both "law and culture" is stated – emphasises the intangible ritual and ceremonial significance.

The inclusion of principles for the management of ancestral remains in the AHA will provide consistency across the industry on how such materials are treated. The AHA should consider the proper procedure when such remains are identified:

- Stop work.
- Do not disturb the remains in any way.
- Notify the police and/or Coroner.
- Notify the local Aboriginal people via the most appropriate representative channel.
- If the remains are confirmed to be Aboriginal ancestral remains, they should remain *in situ*, be recorded as a site, and then reported to the DPLH to be placed on the register.

The AHA must not allow for the application for a s18 permit to disturb over a site that contains Aboriginal ancestral remains without the consent of the relevant Aboriginal body for the area.

Mandating the involvement of Aboriginal rangers from the relevant local Aboriginal group in the management of ancestral remains, and of sites in general, would ensure culturally appropriate and respectful handling of these materials.

PROTECTION AND ENFORCEMENT

Q9 What sort of activities that may affect an Aboriginal heritage site should require consent or authorisation?

YMAC considers that any and all activity that will impact heritage objects, or the heritage values of a place, should require consent or an authorisation. The definitions should not be limited to physical damage or alteration but also cover desecration, as the ATSIHPA does and impacts on heritage values and significance of areas. Such impact on an area of significance could occur through people inappropriately viewing or entering onto the area or making loud noises that impact an area.

Q10 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)?

It is only the Aboriginal people who can assess and evaluate an activity for impact on areas and objects of significance and the ways in which that damage can be mitigated. This must be assessed in accordance with their laws and customs.

YMAC recommends a requirement of proponents to evidence consultation and collaboration with relevant Aboriginal people has occurred during project development. Proponents must be able to demonstrate that a concerted effort has been made to avoid Aboriginal heritage (e.g. by modifying the project layout or impact location/s). In WA, there are often intensive consultation and negotiations regarding native title, which may provide an appropriate opportunity to include discussions regarding heritage protection.

The initial questions that need to be answered when assessing a proposal include:

- Have site identification level archaeological and ethnographic heritage surveys involving relevant Traditional Owners been undertaken?
- Has the proponent provided proof of their attempts to redesign their project to avoid as many places as is reasonable, practicable, and economical?

- Has the relevant Traditional Owner group been consulted regarding the notice and any proposed mitigation strategies and approved of these?

There should be provision for mediation in relation to minimisation of damage or impact. There should also be opportunities for the Traditional Owner group to attend a meeting with the decision-makers and make direct submissions, including oral submissions if they wish.

When an application for a s18 permit or its equivalent is assessed, the scope of the approval should be limited to the purposes and activities notified and applied to the immediate discrete area to be impacted. Permits to disturb should never be automatically granted over an entire site, and these types of approvals should never be granted for any area that has not been the subject of consultation and survey. Permits should also not be granted for activities that have not been notified and assessed. These should be clear conditions placed on any permits.

Q11 How can 'impact' arising from proposals for land use on sacred sites that do not have physical cultural heritage elements be assessed?

Such impacts can only be assessed by the Aboriginal people themselves in determining what causes damage to the relevant heritage. The assessment will arise from the ethnographic significance of the area from what people have been taught in their laws and customs. Knowledge about significance of an area will not usually be uniform as different stories and levels of knowledge will depend on the cultural authority, appropriate moieties, totemic relationships and the like. It is necessary to consult with a range of the custodians and owners of the area.

Impacts on the intangible elements of Aboriginal heritage are also often linked to songlines and storylines that have been passed on through the generations and are of a larger scale than discrete sites. In *Robinson v Fielding* [2015] WASC 108, the *Marapikurrinya Yintha* scared site was described as being revered by the Kariyarra people due to the intangible cultural value of the area.

Areas can be thus impacted by activities carried out elsewhere. Again consulting with all the relevant people can provide such advice.

When assessing (potential or actual) impacts on intangible cultural values the relevant Aboriginal communities must be consulted in an attempt to answer questions such as:

- What intangible cultural values exist in the site, area, landscape?
- How are these values represented?
- How will physical or structural impacts to the site, area or landscape or the uses of the area change these values?
- Will the proposed impact significantly alter the morphology or aesthetic of the place?
- What are the Traditional Owners' responses to the proposed impacts?

Answering these questions will provide clear direction on whether the proposal is acceptable. For example, if a particular hill forms part of a songline and the shape of the hill is part of the associated storyline, then any impact which changes the shape of the hill will have a significant impact on the intangible cultural heritage values.

Such assessments can be provided for in the legislation by requiring assessments of impacts in values and significance of areas and objects as well as physical damage at that location. It also assists if buffer zones and areas of influence can also be protected as part of the definition of area or landscape of significance.

Q12 Who should provide consent or authorisation for proposals that will affect Aboriginal sites?

See the answer to Q2 above.

The administrative framework for native title provides suitable mechanisms for Aboriginal people to be involved in authorisation processes. Most Aboriginal groups have nominated sub-committees that are comprised of people who have the knowledge and authority to comment on heritage values. NTRBs, land councils, or PBCs can act as the interface for the relevant Traditional Owners and seek their approval for proposals to proceed. See the proposed model outlined above.

As indicated, the preferred model is something similar to the Vic AHA where it is relevant local Aboriginal people themselves who can give the consent or approvals. The Vic AHA provides for RAPs to evaluate and approve cultural heritage management plans (s49A) for high impact activities. If the management plans aren't agreed, an independent resolution process is sought through the Victorian Civil and Administrative Tribunal. This enables to decision to be taken out of the political context.

Q13 To what extent is the current s18 application process effective and how can it be improved?

The current s18 application process is highly ineffective. Aboriginal groups whom YMAC works with are frustrated the process does not afford them any agency, and they perceive the Minister and the ACMC as prioritising economic development over protecting Aboriginal heritage. Aboriginal groups objecting to the granting of s18 permits do so on a site-by-site basis. However, there is no recourse in the AHA to challenge a Ministerial decision to grant approval. Furthermore, Aboriginal people whose heritage will be impacted by s18 decisions are not advised when a permit to disturb is granted nor are they provided with a copy of the consent and its conditions if any nor the reasons for the consent. The Minister should make s18 permits available to the relevant Traditional Owner groups immediately upon approval, and a register of these permits should be made available to the public to maintain transparency. The AHA needs to provide Aboriginal groups with the right to appeal a Ministerial decision (especially given proponents have the right to appeal when an approval is not granted).

Furthermore, the ‘significance of impact on heritage’ needs to be separated from the ‘significance to the public interest’. When the Minister is assessing the significance of an impact to Aboriginal heritage, it needs to be from the perspective of *significance to Aboriginal people*. The public interest test requires a separate, politically accountable assessment. There is a tendency to grant an approval for disturbance because it is considered not significant, or the impact is over an area that the ACMC or Minister says is not a site. When, in reality, often the Minister is giving permission for a significant heritage site to be damaged or destroyed.

As indicated above, the preferable approach, however, is to overhaul the whole permit approval process in line with the modern form of heritage legislation.

Q14 What provisions could be included in an amended Act to ensure long-term protection of Aboriginal sites where alternative statutory authorisation arrangements do not apply?

The existing s19 provision could be used more effectively to protect Aboriginal sites, and the removal of s25 would ensure that a protected area cannot be modified or revoked.

Also, active involvement of Aboriginal people throughout the heritage process – from site identification through to approval and monitoring of ground disturbance activities – would go some way to ensure the better protection of sites.

Ultimately the Department and the relevant bodies engaging in the process and having the ability to enforce the AHA need to be provided with proper funding and staffing to enable the duties to be policed and performed.

Measures provided for that appear in other legislation and the NSW Bill that would assist protection include:

- Providing that works for major developments cannot be made without approved cultural heritage management plans (eg Vic AHA s49, s49A). This could go further to prohibit lodgement of certain development consent applications without the heritage assessment process being completed (eg NSA Bill ss60-61).
- The granting of powers to the Council/ Authority to intervene when they are of the opinion that an action is being, or is about to be, carried out that is likely to contravene the legislation (e.g. issuing stop work orders, remediation orders, and delegating powers to authorised officers to investigate)- (see eg. Vic AHA Part 6, Qld Acts s32, NSW Bill s73 onwards).
- The onus of proof to defend allegations/proceedings relating to any contravention of the legislation is the responsibility of the person/s charged with the offence/s (e.g. landholders are responsible for damage unless they can establish that the activity was carried out by someone else and they did not permit or cause that person to do the activity) (see NSW Bill s145 onwards).

There should also be a specific statement that the Act binds the Crown. While this was established as applying in *Bropho v WA* (1990) 171 CLR 1, the extent of the application of that decision is still uncertain. The heritage legislation in other States provide specifically that the Crown is bound – see eg. Vic AHA s11, Qld Acts s3, NSW Bill s149.

Consideration should be given to providing compensation or a cause of action to Traditional Owners whose heritage is damaged.

PENALTIES

Q15 Are the enforcement provisions under the Act adequate to protect sites? How can they be improved?

Current enforcement provisions in the AHA do not provide adequate protection of Aboriginal heritage. In fact, there is little to no consequence for accidental or deliberate breaches.

YMAC has experienced projects where proponents refused to engage in Alternative Heritage Agreements, or any other agreements. In some instances, the proponents proceeded to ground disturbing works without an agreed or authorised heritage process, instead either engaging directly with a subset of an Aboriginal community (who may not be culturally authorised or hold appropriate knowledge), or completing works without any heritage surveys taking place. This is because the costs associated with conducting a survey are usually higher than the penalty associated with disturbing a heritage site.

In addition, the timeframe for reporting infractions under the AHA is far too short. Many heritage places are in remote locations and unmonitored areas. Therefore, it is unlikely that proponents who breach the AHA would be discovered within the 12-month limit, if at all. In the Vic AHA s187B, the time limit for proceedings is 3 years which is more appropriate. However, to truly enforce protection of Aboriginal heritage and introduce value to these places, infractions should be treated as serious offences for which there are no time limits for proceedings.

An explicit requirement for ethnographic and archaeological heritage surveys occurring prior to any ground disturbance taking place would provide more protection for Aboriginal heritage. In some situations where there may be objects of significance or ancestral remains, there should be a requirement for Aboriginal heritage monitors to be present during ground disturbing activities would ensure no previously unidentified heritage places are impacted.

In terms of enforcement mechanisms, the Vic AHA Part 11, Qld Acts Part 8 and NSW Bill Parts 7 and 8 provide examples of authorised officers and Aboriginal heritage officers and their powers.

See also comments above in relation to Q 14 for other enforcement measures.

Q16 Are the current penalties under the Act adequate? If not, how can they be improved?

Current penalties do not deter infractions. As mentioned above, the costs associated with breaching the AHA are often less than the costs related to compliance. And, given the remoteness of the locations where impacts to Aboriginal heritage occur, as well as the costs associated with prosecution, it is unlikely that the penalties act to prevent accidental (or deliberate) offences. The NSW Bill sets out the types of appropriate penalties and tiers in ss119. Officers of corporations should also be made personally liable for offences and penalties (see Vic AHA s187A, NSW Bill s124-125) and consideration could be given to penalties involving imprisonment, especially for serious or continuing offences.

Civil proceedings could also be provided for so that actions could be brought by Aboriginal groups for offences under the AHA. See for example Part 9 Division 2 of the NSW Bill. The AHA currently does not afford Aboriginal people the right to pursue compensation for any loss they suffer due to impacts on their cultural heritage, whether tangible or intangible. Providing Aboriginal people an opportunity to pursue financial compensation from proponents may act as a deterrent, and/or at least encourage more meaningful consultation and collaboration.

Possessing social licence to operate is an important intangible resource for project proponents. Regularly publishing a list of proponents who have breached the AHA, including details of their transgressions and the penalty imposed (e.g. online, in print, on bulletin boards, etc.) would not only place a reputation risk on proponents, but would also make visible the most common heritage incidents; and thus, create an opportunity for identifying and implementing an industry-wide solution.

SITE ASSESSMENT AND REGISTRATION

Q17 Should a defence continue to be provided where disclosure of information (section 15) is against customary laws/protocols?

Section 15 of the AHA legally requires a person to notify the DPLH if they have knowledge of the location of a potential tangible or intangible heritage place. However, s7(1) also provides that the AHA is not to be construed to require an Aboriginal person who lives subject to Aboriginal customary law to disclose information or act contrary to any prohibition of the relevant customary law or tradition. This means that people who are prohibited from disclosing sites under their laws and customs are not required to do so.

It would be perverse if an Act designed to protect Aboriginal heritage such as sacred sites, was the instrument of requiring Aboriginal people to break their sacred laws. In addition, there is a real fear that disclosure and registration of sites can lead to such sites being sought out and damaged.

There should be a specific exemption for Aboriginal people from having to disclose the location and existence of areas and objects of significance.

However, there has always been an assumption that Aboriginal people do not have to report places for cultural reasons. This creates problems when a proponent uses s62 (i.e. ignorance of places) as a legal defence, alleging that they did not know and could not reasonably be expected to have known that the place was a site. Proponents regularly contact the DPLH to request a record of sites in an area. This information is used by the proponent to decide whether a heritage survey is needed. If an Aboriginal person does not report a site for cultural reasons and the record shows no sites (even after a survey), this increases the risk of very significant sites being impacted by project activity.

The defence in s62 should make it clear that the onus must be on the proponent to consult the relevant Aboriginal group, conduct surveys and employ suitable heritage monitors during ground disturbing works, to ensure heritage sites are appropriately avoided and protected. The defence should only be available when people can show that they took all reasonable efforts to ascertain whether any heritage would be damaged.

Q18 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? If not, what should the criteria be to assess the significance of a site?

S39 has the same issues of s5 with its Eurocentric focus. S39 (2(c) and (d)) are straight forward enough and can be addressed through photos, descriptions of the aesthetic values, and a discussion of the ways in which the place may be of value to the scientific community.

S39(2(a) and (b)) are problematic. 39(2)(a) refers to any existing use or significance attributed under relevant Aboriginal custom, this is usually used in relation to ceremonial places, Thalu, dreaming places and places that people visit to collect traditional materials. The Eurocentric focus makes it hard to help people understand the relationship Aboriginal people have with places and their country. Many sites are excluded despite meeting this criterion because the practises associated are not understood to be in use.

S39(2)(b) refers to any former of reputed use or significance which may be attributed upon the basis of tradition, historical association, or Aboriginal sentiment. If this was being applied literally then every place that we record would be deemed significant. Requiring Aboriginal people to triage the significance of their places is culturally insensitive, most of our groups believe that all sites are equally important and significant and don't draw this distinction.

Recent feedback from the DPLH suggests this is the primary criteria by which they judge if a place is a place. But they require unique comment and a statement of significance. This is asking people to do something culturally inappropriate and where direct information has been lost it's usually as a result of dispossession by white people making the whole process divisive and uncomfortable. If an Aboriginal person says their heritage place is important, who are we to quantify that significance to include or exclude places?

Heritage consultants and all others involved in the assessment of heritage need to have proper training in providing and understanding statements of significance. This links in with the recommendation above that there be qualifications and professional standards required for heritage consultants.

Q19 What should be the steps to report, nominate, assess, enter, amend or remove an entry from the Register?

Entries in the register should only be able to be made and amended or removed with full notice to and consultation with the Traditional Owners and any registered body for the area.

In the case of entries onto the Register, this should require the approval of the relevant Aboriginal people.

As a matter of natural justice, it is only fair to also notify the property owner of the area proposed to be entered onto the Register.

There needs to be explicit provision for confidentiality of information provided by Aboriginal informants about areas and objects so as not to breach cultural protocols. (See for example Vic AHA s146A providing for sensitive information). This may have the effect of encouraging disclosure of sites if people can be assured that the information about sites will be kept confidential.

OTHER PARTS OF THE ACT

Q20 What do you think is missing from the Act?

The AHA predates the NTA, the RDA and the UNDRIP, and must be amended to align with these frameworks.

We have outlined above some the key areas which should be included in the AHA. In summary:

- Recognition of ownership of Aboriginal heritage by Aboriginal people.
- Aboriginal ownership and values taking precedence over any other community of interest.
- Roles for Aboriginal organisations to be the bodies to whom applications for consent or permit to damage or impact on heritage is made.
- Independent tribunal processes for appeals to replace the role of the Minister and avoid political decisions in relation to heritage matters. Such processes need to include Aboriginal owners of the heritage as parties with full rights of notification and participation.
- Clearer and more concise instructions regarding specific processes relating to heritage protection (e.g. the role of NTRBs, land councils and PBCs, best practice for conducting heritage surveys, what happens in areas where native title has been extinguished, etc.).
- The inclusion of protection for intangible heritage.
- Provisions for repatriation of heritage to the Traditional Owners.
- Clarification regarding the binding of the Crown and State to the legislation.

The specific rights from the UNDRIP outlined above in the Executive Summary need to be reflected in the AHA.

Q21 What sections, if any do you think should be removed from the amended Act, and why?

There is a substantial number of amendments that are needed to the existing AHA before it can be used to genuinely protect Aboriginal cultural and heritage.

YMAC recommends that the Minister repeal the legislation and replace it with a wholly new, modern and respectful statute (rather than attempt a piecemeal approach to AHA reform). Repealing the current AHA presents the opportunity to align it with the RDA, NTA, UNDRIP, as well as address community views which are sympathetic to the frustrations and struggle of WA's Traditional Owners.