

# Australian Archaeological Association Stage 2 Submission

## Review of the Aboriginal Heritage Act 1972

### General Comments

Many proposals in the Stage Two Discussion paper will create a modern and better administered Aboriginal heritage Act. Key among these are:

- Proposal 1 - Commitment to repeal the current Act and deliver a new Aboriginal Heritage Act
- Proposal 3A – Local Aboriginal Services
- Proposal 3B – Aboriginal Heritage Council
- Proposal 3E – Heritage Professionals

Each of these, as generally discussed, represents important improvements to advancing Aboriginal heritage policies and procedures in Western Australia. Their development will bring challenges and will not be obtained without the outlay of dedicated resources including adequate time, highly qualified and committed primary contributors, enduring stakeholder goodwill and financing. The Australian Archaeological Association believes there are three areas where particular attention is needed, and these seem to us to be key success factors for the next stages in developing Western Australia's new Aboriginal Heritage legislation.

First, considerable effort and attention to details are required to design and implement a cogent policy framework, as well as workable procedures and processes. Sustaining the progress achieved so far requires an additional framework document for the Green Paper stage coming next. **The Australian Archaeological Association recommends that a Strategic Implementation Plan accompany the Green Paper.** This way Aboriginal communities, heritage professionals, private and public sector agencies and, of course, the Western Australian public will have a firm basis from which to understand how the new Aboriginal heritage legislation will be designed and function in the future.

Second, the participants and professionals working within the new heritage system will require a system of operational standards and professional ethics. Trust is key to the successful functioning of the new legislation. **The Australian Archaeological Association recommends that best practice standards for heritage management and a code of ethical behaviour are in place when the new legislation is enacted.** Best practice guidelines and codes of ethics are already a part of heritage management systems elsewhere (e.g. the Burra Charter, Heritage Victoria, NSW Environment and Heritage *Code of Practice*, and the AIATSIS Guidelines for Ethical Research).

Third, the proposed Local Aboriginal Heritage Services (LAHS) represents one of the strengths of the new Act. Aboriginal people, who are fundamentally important to any system's governance, now gain a primary decision-making role. **The Australian Archaeological Association recommends that attention is paid to agreement-making procedures and processes that are Aboriginal-led and focused around those members of the local Aboriginal community who 'speak for' the Land.** Capability development, adequate seed funding and on-going support will be critical success factors for the LAHS.

The remainder of the submission highlights matters of support and concern, and discusses useful approaches to specific proposals in the Discussion Paper.

*Proposal 1 Deliver a New Aboriginal heritage legislation*

The existing Act aims to preserve sites and, where this is not possible due to particular circumstances, mitigate their loss. The net social and heritage benefits and new knowledge created through site avoidance, detailed recording or complete collection/excavation have been extremely variable and often based on a local statement of significance. A regional and wider evaluation of significance provides the best framework for prioritising site management.

**The Australian Archaeological Association recommends adopting a revision of policy centring on Aboriginal Heritage conservation.** Differing conservation strategies – active preservation, avoidance or in-depth-recording or salvage – may be used in different circumstances depending upon what is most efficient, effective, and acceptable to traditional Aboriginal custodians. Placing heritage conservation at the centre of heritage from the outset is a long-standing practice preferred among heritage professionals globally.

*Proposal 2 Update definitions and scope of New Aboriginal heritage legislation*

The Australian Archaeological Association welcomes the proposal to update and broaden the definitions and scope of the legislation, particularly the inclusion of cultural landscapes, intangible place-based heritage and specific provision for culturally appropriate procedures for dealing with human remains. Maintaining consistency with the present Act, that all Aboriginal cultural heritage is protected whether registered or not, is also welcomed.

**The Australian Archaeological Association recommends that greater thought be given to “compatible land uses” at heritage places and within cultural landscapes. Certain types of land use ought not to be exempted from Aboriginal heritage assessments.** Sites and places should be evaluated for significance at both local and regional levels and proposed land uses commonly designed to remove or minimise impacts, following the principles of the Burra Charter.

**The Australian Archaeological Association recommends that surface deposits, buried heritage materials and potential archaeological deposits, as well as disturbed heritage places, are afforded the same conservation status as other types of Aboriginal heritage.**

*Proposal 3A Local Aboriginal Heritage Services*

The Australian Archaeological Association supports increased local Aboriginal involvement in managing their heritage. However, the proposal for Local Aboriginal Heritage Services currently lacks detail about how these organisations would be constituted and their accountability (other than accreditation by the AHC). The Proposal raises a number of issues of concern with regard to establishing and resourcing of these organisations, the nature and scope of their authority, their relationship with DPLH, and how these matters would be managed in the absence of a capable, representative and resourced local organisations (such as a Land Council, native title corporation or community council, or their nominated heritage providers).

**The Australian Archaeological Association endorses the LAHS as the fundamental decision-maker in heritage conservation decisions. The Australian Archaeological Association recommends the planned Aboriginal Heritage Council establish a sub-committee to facilitate the implementation of the local LAHS model.**

### *Proposal 3B Aboriginal Heritage Council*

The Australian Archaeological Association supports the establishment of the Aboriginal Heritage Council (AHC) and affirms that it must include Aboriginal people and appropriately qualified professionals. This body needs to move beyond the current ACMC model and function as an independent body with a clear and robust system of governance that is audited periodically by the Auditor General.

In keeping with the State Heritage legislation, **the Australian Archaeological Association recommends that the AHC must be able to call on a range of expertise, including establishing sub-committees or expert panels.** This is a particularly important matter to put in place from the outset, especially with regard to areas such as competent heritage and governance standards and guidelines, a code of ethical behaviour in heritage matters, draft business rules for AHC operations and a draft AHC strategic plan.

### *Proposal 3C The Minister's Role*

The Australian Archaeological Association generally supports the delegation of Ministerial powers to the AHC and improved transparency in decision making.

**The Australian Archaeological Association recommends that Ministerial decisions, including those which have been delegated, are expeditiously published in order to increase transparency and hence trust in the functioning of the new Aboriginal Heritage system.**

### *Proposal 3D The Role of the Department of Planning, Lands and Heritage*

The government authorities governing Western Australia's Aboriginal heritage have, from time to time, over at least the last 40 years lacked the support and trust of stakeholders and the WA public. This has often been attributed to the apparent influence of land-users and regulators in the Aboriginal heritage arena.

**The Australian Archaeological Association unconditionally recommends the separation of the government agency responsible for Aboriginal heritage from all aspects of the Act's governance system.** Rather, the relevant agency should mostly take on the roles of **executive support, heritage education and research facilitation.** In order for the successful delivery of the associated tasks, the heritage group must be staffed with more senior heritage professionals and its operations should be supported by more robust funding, such as a specific budget line item and from consolidated revenue.

### *Proposal 3E Heritage Professionals*

The Australian Archaeological Association supports the development of best practice standards for heritage practitioners and for their work standards and guidelines, and a code of ethics that sustains performance. This undertaking will improve greatly on past Aboriginal heritage system deficiencies by the active support for quality work practices and heritage outcomes that increase transparency for system-wide activities and provide certainty.

**The Australian Archaeological Association recommends that the AHC consult with key peak professional organisations when developing standards and guidelines and establishing the proposed Directory.** Professional organisations already evaluate members' qualifications, skills and experience and require adherence to a code of ethics. The Australian Archaeological Association has a Code of Ethics as does the AACAI (Australian

Association of Consulting Archaeologists), and these are consistent with the AIATSIS Code for Ethical Research.

*Proposal 4 The Aboriginal Heritage Register*

An authoritative Aboriginal Heritage Register is essential to re-establishing trust among many stakeholders. The Register must be the fundamental source for heritage places and their location, including spatial dimensions, and their value(s). The calibre of this information must be improved and sustained through recognised standards of evidence.

**The Australian Archaeological Association fully supports the conservation of all Aboriginal heritage places having cultural and scientific values and their inclusion in the Register. The Aboriginal Heritage Register should be the essential management tool for WA's Aboriginal heritage and, therefore, be effectively managed as an information repository.** Moreover, all reports about heritage places must also be submitted to and archived by the relevant government authority, in accordance with stipulations set out in the new Act. In the absence of a replete body of heritage reports, WA's Aboriginal heritage system will continue to be fraught and its management will necessarily be inefficient and ineffective. Confidential classes of information (such as culturally sensitive matters) must be afforded adequate protection from access by unauthorised parties.

*Proposal 5 Tiered Assessments and Approval of Land-use Proposals*

The Australian Archaeological Association supports encouraging best practice standards and processes in achieving sound heritage outcomes. While federal legislation (e.g. the NTA, EPBC) is superior to State legislation, due consideration of the significance of sites and places to the State under the new Act can be harmonised. **The Australian Archaeological Association recommends that the AHC judge the soundness of agreements and the processes whereby they came about using a transparent and rigorous set of guidelines relevant to best-practice heritage practices. The AHC then advises the Minister responsible for Aboriginal Heritage on its findings and agreement authorisation occurs at the Ministerial level. The Australian Archaeological Association recommends that an appeals process, as outlined below, be incorporated into the approvals process.**

Australian Archaeological Association applauds the inclusion of predicted Aboriginal heritage and the historic effects on known and potential Aboriginal heritage in land-use impact mitigation planning. Nevertheless, the Association is concerned about the current scope of the assessment and approvals system, as well as the detail specifications of a vaguely sketched tiered assessment mechanism, which is only presented within the context of deliberations for a new Aboriginal Heritage Act for WA.

**The Australian Archaeological Association recommends that the government workshops the tiered assessment system with heritage professionals and Aboriginal stakeholders while the Green Paper is developed.** Such a scheme has had limited but notable application in other jurisdictions and any decision about incorporating it into the new Act should hinge on wide stakeholder support.

*Proposal 6 Agreements Between Aboriginal People and Land Users*

There is considerable overlap in the discussions for Proposals 5, 6 and 7. Here existing agreements within the new heritage Act are the focus for our comments.

The Australian Archaeological Association supports the review of existing agreements and the decision not to ratify those that authorise the destruction of Aboriginal heritage. The Australian Archaeological Association concurs with the use of published best practice information standards and procedural guidelines during such assessments.

**The Australian Archaeological Association recommends that the AHC limit its review of agreements to determining their soundness and advises the Minister of its findings. The Minister should be the authorising authority for all agreements.**

*Proposal 7 Transparency and Appeals*

The publication of the reasoning underlying land-use decision is an essential component of new heritage legislation. The capability of all interested parties, but particularly relevant Aboriginal peoples, to review and appeal decisions is important as well.

**The Australian Archaeological Association is in agreement with the Australian Association of Consulting Archaeologists Incorporated (AACAI) proposal for establishing a Heritage Appeals Tribunal.**

*Proposal 8 Enforcement*

Modernising the current enforcement regime entails more than increasing penalties. The standard of evidence must be workable to ensure heritage conservation principles. Determining the likelihood of Aboriginal heritage places occurring where new land-use activities will occur using stringent evidence and processes will in part work to achieve this outcome. 'Stop Work Orders' comprise another.

**The Australian Archaeological Association recommends that LAHS agencies actively monitor localities with important Aboriginal heritage conservation values and this activity is directly financed and audited by government.**

*Proposal 9 Protected Areas*

The provision of Protected Areas should continue and pertain to those Aboriginal heritage places and cultural landscapes with the highest heritage values and for which stringent conservation management guidelines are necessary.

**The Australian Archaeological Association recommends that all Protected Areas in Western Australia have a Cultural Heritage Management Plan, necessary on-going funding and AHC management oversight.**