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# AUSTRALIAN ARCHAEOLOGICAL ASSOCIATION INCORPORATED

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Mr Graeme Gammie  
Assistant Director General  
Heritage Services  
Department of Planning, Lands and Heritage  
PO Box 7479 Cloister's Square PO  
WA 6850

1 June 2018

Dear Mr Gammie,

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

I write to you on behalf of the Australian Archaeological Association Inc., our nation's leading archaeological organization with more than 600 members. The Australian Archaeological Association Inc. (AAA) wishes to make submission regarding the Review of the *Aboriginal Heritage Act 1972* Consultation Paper (March 2018). This submission has been prepared in collaboration with the Australian Association of Consultant Archaeologists (AACAI) and we endorse their general recommendations.

We recognise that the existing Act is antiquated and that its application today does not reflect the intent of its original development. The Aboriginal heritage landscape today is a vastly different sphere than in 1972, as now, we all at least recognise the principles of Native Title and are beginning to engage with the concepts of the primacy of Indigenous knowledge of landscape. The original Act, as we are all very aware, did not anticipate its use within the area of major land clearance and developments such as the 'mining boom'. It is our professional opinion that the current Act does little to assist in making transparent ethical decisions regarding Aboriginal cultural heritage.

It is our advice that Western Australia requires a new Aboriginal Heritage Act rather than amendments to the exiting legislation. The review process that you are conducting at present provides the opportunity to commence on this path, and the Australian Archaeological Association offers our assistance at all further stages of the consultation, and development of new legislation and regulations. Our membership includes leading archaeologists and cultural heritage managers from Western Australia and the rest of the nation, many of whom have had a central role in advising government in the past on such matters.

The Australian Archaeological Association Inc. is available to discuss any part of our submission that might be requested, at your convenience.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Michael Slack', written in a cursive style.

Dr Michael Slack  
President, Australian Archaeological Association.

**Question 1 Is the long title an adequate description of what the amended Act should set out to do? If not, what changes should be made?**

1 The current long title does not provide an accurate description of that the Act should set out to do. The long title and goal of the Act needs to recognise that it is about protection, conservation and management of Aboriginal cultural Heritage, rather than restricted to the concepts of administration and preservation of Aboriginal sites.

2 The definition of Aboriginal heritage should be broader, allowing for intangible aspects of Aboriginal culture such as language, song lines, ancestral connections, cultural landscapes and aesthetics.

3 The Act should acknowledge that Aboriginal heritage belongs to Aboriginal people, and that cultural heritage is fundamental to Aboriginal peoples' identity, cultural strength and well being. For this reason, the long title should specifically acknowledge first and foremost Aboriginal peoples and prioritise Aboriginal interests, with the benefit to the broader Western Australian of secondary consideration.

**Question 2 What do you think are the best ways to ensure the appropriate people are consulted about what Aboriginal heritage places should be protected, and how a proposal may impact those places?**

1 The Act could be modified to require explicit consultation with the relevant Aboriginal people of the area.

2 The Act could be modified to recognise Aboriginal custodians and communities as the primary guardians and knowledge holders of Aboriginal cultural heritage and that they should have primacy in making decisions about and have more control and involvement in Aboriginal participation and decision-making and management regarding their heritage.

3 Developments and guidelines in Native Title provide avenues to determine appropriate custodians of so that the appropriate people are consulted – the process should be transparent

**Question 3 to what extent has the provision to appoint honorary wardens been effective and how can it be improved?**

1 The requirement for honorary wardens can be improved by the requirement that they are of Aboriginal descent, preferably nominated from the pool of determined native holders in the first instance or registered native title claimants. . Delegating the powers of honorary wardens to Aboriginal Rangers could be another effective option.

2 The provision for honorary wardens to enforce the AHA would be more effective if they were more widely and systematically implemented, with sufficient funding, training and support provided to enable them to exercise their full authorities under the Act.

3 The role of wardens would be more effective if they were remunerated positions rather than honorary.

**Question 4 Are the roles and functions of 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?**

1 The functional capacity of the ACMC would provide better protection and management of Aboriginal Heritage if divorced from the processes of development approvals and land access in the Western Australian Government. For instance, the Minister of Aboriginal Affairs appoints the chairperson of the ACMC as well as Committee members, and there are three ex-officio members representing government agencies such as Landgate, and the Department of Planning, Lands and Heritage. The Minister has full power to make decisions about the fate of Aboriginal heritage objects and sites, having regard to 'the general interest of the community'. The Minister is

not obliged to follow the ACMC's recommendations, nor the views of the Aboriginal custodians. Separating out the decision making processes would allow for independent assessments relating to the significance of Aboriginal heritage that are not influenced by the pending use of the land on which it is located.

2 We recommend that the rights given to Aboriginal people under section 7(2) not be subjected to Ministerial discretion.

3 The role of the ACMC in determining whether sites should be placed on a Register by assessing their importance and significance is redundant. Rather, the evaluation and assessment of sites (section 39) for the purposes of maintaining a register (section 38) should be carried out by senior heritage officers and must have advanced degrees and experience in Aboriginal heritage assessment.

4 It is recommended that decisions and approvals for research and permission to use land (section 16, section 18) be handled by a semi-autonomous body that should include Aboriginal people with cultural authority and practitioners with skills in cultural heritage. Their role would be to assess applications impacting on Aboriginal sites and make decisions about heritage values, management of impact and mitigation.

**Question 5 Does s5 adequately describe the sorts of places that should be protected under the amended Act?**

1 s5 does not adequately describe the sorts of places that should be protected due to ambiguity of definition of the words 'importance' and 'significance' and 'special significance'. These definitions also place Aboriginal knowledge holders in an culturally awkward position of having to expose the meaning of a sacred secret place to the broader community to ensure its protection where culture, ritual and traditions dictate such knowledge is to remain in the sacred private domain of the relevant Aboriginal custodians of an area. It is recommended that the words 'of importance and significance' are removed from s5a.

2 Section 5 should be broadened and brought in line with commonwealth and other state heritage legislation definitions of Aboriginal heritage.

**Question 6 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?**

1 It is recommended that with regards to the area the object may have been derived, that the relevant Aboriginal people should have the option of being consulted about the management of collections held by Museums in WA.

2 The powers of the governor under Part VI of the Act should be removed in favour of greater decision making capacity of the relevant Aboriginal community to manage museum collections.

3 The powers of the Minister to compulsorily acquire objects to which the Act applies should be removed, in favour of greater empowerment to the relevant Aboriginal community.

**Question 7 Are the declaration of Protected Areas the best way to deal with Aboriginal sites of outstanding importance?**

1 The concept of protected areas for the protection of Aboriginal cultural landscapes is inherently a very good one. It does not seem however, that s19 of the Act has been actively applied in the State for some decades. What constitutes the definition of 'outstanding importance' may need to be clearly defined and evaluated specifically to relevant Aboriginal communities.

2 The conditions around Protected Areas also need to be made more flexible to ensure access to places for the Aboriginal custodians and provision for them to undertake cultural and physical maintenance of the places.

**Question 8 Should the Act provide for the management of Aboriginal Ancestral remains? And if so what needs to be considered?**

1 It is essential that the Act provides for the management of Aboriginal Ancestral remains, with direct involvement of the relevant Aboriginal community.

2 Provision for co-management of Aboriginal heritage, including burials by Aboriginal custodians and communities should be considered.

3 The Act should also make provision for the repatriation and restitution of Aboriginal cultural materials back to the relevant communities.

**Question 9 What sort of activities that may affect an Aboriginal site should require consent or authorisation?**

1 Any land clearing activity, be it mining, farming, and or activities that could indirectly or indirectly affect an Aboriginal site eg. Air pollution on rock art.

**Question 10 What should be the criteria against which to evaluate an activity that may affect a site?**

1 Any activity that has the potential to directly or indirectly impact a site or its heritage values.

**Question 11 How can 'impact' from proposals for land use on sacred sites that do not have physical cultural heritage elements be assessed?**

Social Impact Assessments (SIA) offer a clear framework for assessing impacts of proposed developments on a community. The framework could be easily tailored to be used specifically for impacts on intangible heritage as any impacts on sacred sites have ramifications for Aboriginal communities as a whole.

**Question 12 Who should provide consent for proposals that will affect Aboriginal sites?**

1 The relevant Aboriginal custodians and associated community should be involved in decision making regarding proposals that will affect their Aboriginal heritage.

**Question 13 To what extent is the current section 18 application process effective and how can it be improved?**

The section 18 process is unwieldy and complex. It could be improved by:

- 1 Remunerating the ACMC adequately and ensuring that they are paid not only for meeting attendance but also for the time to review all the information they are required to digest in order to make decisions.
- 2 Removing the decision about site significance out of the process. Having the decision about a place's significance made prior (and in a different forum) to considering impacts upon it would speed the ACMC's deliberations up.
- 3 Having a mechanism for Aboriginal custodians to appeal decisions.
- 4 Making all section 18 decisions transparent.
- 5 The current section 18 process does not take cumulative impact within a region into consideration. Provision should be made to assess impacts on Aboriginal heritage at a regional scale.

**Question 14 How to ensure the long term protection of sites?**

1 The process of assessing and registering Aboriginal Sites must be separate to decisions about land use and impacts to Aboriginal heritage. In the long term this will help ensure the long term protection of sites. In a state whose economy is primarily dependent upon mining and resource development, conflicts over land use and adequate protection of Aboriginal heritage arise with the scale of financial return generated by mining-related activities and the perception that mining is of greater benefit to the general community than Aboriginal heritage. Benefit to the community must be weighed up in social and cultural terms as well as economic.

2 All developments and planning projects should be required to incorporate Aboriginal heritage management protocols early on in the design phase and with a long term view in mind.

3 Major decisions that allows significant impacts to a region of Aboriginal heritage should have regard to the wishes of Aboriginal people and custodians and accountable to Aboriginal custodians and the wider community.

4 A transparent and accessible appeals process should be established to facilitate and mediate cases where management decisions and impacts to Aboriginal heritage values require arbitration and must be open to Aboriginal people.

**Question 15 Are the enforcement provisions under the Act adequate to protect sites? If not how can they be improved?**

1 The penalties for destroying, damaging, concealing or altering Aboriginal sites or objects do not taken into consideration the of scale of investment and financial return of the development proposal. It is reasonable to suggest that in some cases these penalties are so low that they do not act as a deterrent for breaching s17 and 43 of the Act.

2 Ministerial discretion needs to be replaced by a civil procedure or external independent arbitration commission where a judge hears all interested parties and there is equal access to rights of appeal.

**Question 16 Are the current penalties under the Act adequate? If not, how can they be improved?**

No, the current penalties under the Act are not adequate. They can be improved by:

1 Provision for compensation to be paid to affected Aboriginal custodians to undertake remedial action, on the condition that the works are undertaken in consultation with and with the approval of the relevant Traditional Owners and Aboriginal custodians so that further adverse effects on the site as a result of unauthorised or inappropriate remedial work are prevented.

2 Section 58, (repealed in 1980), be reinstated. This section made provision for the suspension or forfeiture of any right, title or interest of a person who committed an offence under the AHA knowingly for the purpose of gain.

3 The statute of limitation for prosecutions under the AHA also needs to be extended, as the current 12 month limit does not allow adequate time to investigate and report on incidents in remote and regional areas. We suggest a minimum of 24-36 months.

4 The use of Aboriginal Rangers with the delegated powers of Honorary Wardens would be a more effective way of enforcing the AHA on-ground.

**Question 17 Should a defence continue to be provided where the disclosure of information is against customary laws?**

Yes. There are very clear customary reasons as to why Aboriginal people may withhold information. This must be respected.

**Question 18 Are the criteria for assessing significance of sites adequate to evaluate if a site should be added to the register? If not what should the criteria be?**

The terms importance and significance are currently critical concepts in the Act, yet they are undefined and poorly understood in practice. If the terms are to remain in the Act they need to be clearly defined with reference to current international best practice in heritage management. Standard dictionary definitions are not sufficient.

In terms of specific criteria, Aboriginal people should in the first instance define the criteria by which significance is appraised. Section 39 currently prioritises Aboriginal values and significance. This prioritisation should be retained.

We would like to see additional criteria, including archaeological and anthropological significance, to be included. Current best practice standards outlined in the Australia ICOMOS *Burra Charter*.

**Question 19 What should the steps to report, nominate, assess, enter, amend or remove an entry from the Register?**

1 This process should allow for co-management of Aboriginal heritage by Aboriginal custodians and communities.

2 A transparent and accessible appeals process should be established to amend or remove an entry from the register.

**Question 20 What is missing from the Act?**

1. Provision of a clear mandate to the Government, Minister, ACMC and DPLH to recognise, respect, celebrate, commemorate, conserve and manage Aboriginal heritage.
2. Definition of terms. Terms such as sacred, custom, tradition, importance, significance and special significance are not defined.
3. Provision to involve and consult with affected Aboriginal people, communities and custodians.
4. A requirement for ethnographic and archaeological surveys.
5. Provision for the repatriation of Aboriginal skeletal and ancestral remains and restitution of other cultural materials.
6. Recognition of and alignment with the *Native Title Act 1993* (NTA), and agreements negotiated under the NTA.
7. A right of appeal against section 18 decisions for Aboriginal custodians and/or communities.
8. Independent oversight of decisions made by the Minister under the AHA.
9. Accreditation of heritage consultants. The heritage professions are currently unregulated and as a result the standard and quality of practice varies significantly. We advocate that the Act mandate that heritage consultants be accredited by the Government with minimum levels of applicable University qualifications rather than professional affiliations.
10. Provision should be made for the management of places where cultural materials are stored, for example there are many sea containers and sheds full of salvaged materials located in remote and regional areas across the state. The AHA should set a clear mandate for funding the effective management of these places by their host communities.
11. A clear process for the de-registration or de-accessioning of places and objects on the Register.

**Question 21 What sections do you think should be removed and why?**

1. Section 62 Special defence of lack of knowledge. This section was included in 1972 when there was not a great understanding of Aboriginal heritage by proponents. We argue that the situation is markedly different now and under duty of care and due diligence guidelines, a lack of knowledge should no longer be available for defence.
2. The terms 'importance', 'significance' and 'special significance' in section 5.
3. The phrase 'should be preserved because of the importance and significance to the State' in section 5(c) should be removed.

**Other issues to be noted:**

We would like to draw your attention to other issues not covered in the Consultation Paper.

**Section 16 – Excavation of Aboriginal Sites**

Our members have reported that the application of section 16 has become a serious issue. Current wording of the section requires places to be deemed an Aboriginal Site in order for a section 16 permit to be granted. In many cases, places require the test excavation before a full assessment of its significance and decisions about whether it would meet section 5 can be made. Many of these places would not meet the section 5 threshold if they were assessed prior to subsurface testing being undertaken.

Section 16 permits thus cannot be issued for Other Heritage Places or places with a Lodged Status. If excavation is undertaken at an Other Heritage Place or place with Lodged status without a permit, and it reveals extensive subsurface material which would meet the requirements of section 5, then it potentially opens the proponent and consulting archaeologists up to prosecution if the DPLH and ACMC take the position that, after consideration of the additional information about the place, the place does in fact constitute an Aboriginal Site. Also, if the ACMC deem a place to be not a site based on its surface content only, then there is no obligation on a proponent to conduct any additional investigation of the subsurface archaeological material. The result is the neglect and loss of a large number of important Aboriginal heritage places.

As this issue has serious legal ramifications for proponents, consultants and the Government, we would like section 16 to be amended to include potential Aboriginal Sites and places that are included in the Register of Other Heritage Places, particularly with the status of 'Lodged'.

We also recommend that place with the potential for sub-surface deposits must have that potential determined before applications are made to impact sites under section 18 of the AHA. The Victorian Aboriginal Heritage legislation has such a process in place as an example.

### **Administration of the Act**

The administration of the AHA impacts upon its effective operation. We have a number of concerns about the administration:

- 1 The Department is severely underfunded, insufficiently resourced nor sufficiently staffed.
- 2 There is a related lack of appropriately trained and experienced professional staff in the Department and on the ACMC with deep knowledge and skills in Aboriginal heritage management.
- 3 The Register requires further development and should be funded accordingly.
- 4 The Department needs to develop, in consultation with Aboriginal custodians and heritage professionals, minimum standards for heritage consultancy work, including survey, site recording, site assessment, excavation, salvage, monitoring, and cultural heritage management plans (CHMPs). Such guidelines will not only improve the quality and outcomes of heritage work but also give all parties certainty.