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AUSTRALIAN ASSOCIATION OF CONSULTING ARCHAEOLOGISTS INC

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

31 May 2018

Dear Mr Gammie,

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

Please find attached a submission by the Australian Association of Consulting Archaeologists Incorporated (AACAI) on the Review of the *Aboriginal Heritage Act 1972* Consultation Paper (March 2018).

The Australian Association of Consulting Archaeologists (AACAI) is a national representative body for professionals working in all fields of contract and public archaeology. AACAI promotes professional standards and strong ethics in archaeological and heritage practice, advocates for heritage protection, and aims to bring recognition of, and respect to, our profession.

AACAI is the peak professional body for archaeological consultants in Western Australia. Its members hold a wealth of knowledge and have a vast array of experience in heritage matters. The members of the AACAI Western Australian Chapter work closely with Aboriginal groups to assist in managing heritage. Consulting archaeologists work with industry to bridge the divide between commercial innovation and Aboriginal community need, ensuring balance in development that allows Aboriginal culture and heritage to flourish as well as benefit from new technology and development.

AACAI WA Chapter's vision is to:

- Live and work in a vibrant, modern Western Australia that values and respects its heritage;
- Support balanced and sustainable development in Western Australia. Heritage needs to be considered early in the planning process and be acknowledged as fundamental to community identity and wellbeing. The study and management of our heritage brings

real benefits to people's daily lives and we strive to have heritage recognised for its important role in economic growth and tourism; and

- Work with Aboriginal communities, Government and industry to find the best outcomes to manage our heritage well and support development and economic growth.

AACAI acknowledges that Aboriginal heritage belongs to Aboriginal people. We also acknowledge that cultural heritage is fundamental to Aboriginal peoples' identity, cultural strength and wellbeing. It is our view that Aboriginal custodians and communities must be recognised as the primary guardians and knowledge holders of Aboriginal cultural heritage and that they must be involved in decision-making and management regarding their heritage.

AACAI believe that archaeology is important to Aboriginal communities, the archaeological community of practice, and the wider community. Archaeological work has demonstrated that Western Australia is home to globally unique archaeology that is of significance on local, state, national and world scales. It has revealed new insights and highly significant detail about the early Aboriginal settlement of the state and demonstrated the innovativeness of the first peoples. It has contributed to understandings of climate change and how Aboriginal people have adapted over time. It has helped to change public perceptions of Aboriginal archaeology and heritage by demonstrating the sophistication and resourcefulness of Aboriginal ancestors. In doing so, archaeology has enhanced Aboriginal communities' connections to their deep past and cultural heritage.

We see our role as archaeologists as assisting Aboriginal people in the conservation, management, education and promotion of their heritage and, in particular, their archaeological heritage. AACAI members have close working and collaborative relationships with Aboriginal communities and groups across Western Australia. As such, we see archaeologists as valid stakeholders not only with an interest in the Aboriginal heritage of Western Australia, but with a wide range of skills, experiences and knowledge to contribute to its recognition, conservation, management and enhancement.

AACAI advocates for legislative change that is balanced and reasonable, acknowledges Aboriginal rights and custodianship, considers all stakeholder parties, and celebrates and recognises the importance of its cultural heritage.

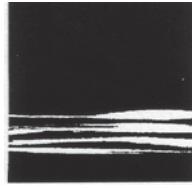
We also would like to express our appreciation that the consultation during this review appears to be more thorough, transparent and honest than in the last review process.

If you would like any further clarification or require further detail, please contact the AACAI WA Chapter Secretary JJ McDermott by email (jagemcdermott2@gmail.com) or phone 0458608786.

Yours sincerely,



Andrew J M Costello
AACAI President



**Australian Association of Consulting
Archaeologists Incorporated (AACAI)**

Submission on the Review of the *Aboriginal Heritage Act 1972* Consultation Paper, March 2018

This submission on the *Review of the Aboriginal Heritage Act 1972 Consultation Paper* (March 2018) has been prepared by the Western Australian Chapter of Australian Association of Consulting Archaeologists Incorporated (AACAI). It has been endorsed by the AACAI National Executive Committee.

It is our position that amendments to the existing *Aboriginal Heritage Act 1972* (the AHA) will not be sufficient to alleviate current problems. We therefore advocate for ***an entirely new Aboriginal Heritage Act***.

The structure of our submission below is based upon this premise. In Part 1, we offer our advice on what a completely new Act should look like and what it should include. In the case that a new Act is not feasible, we detail issues with the AHA and our suggested amendments to address them in Part 2. In Part 3, we outline a number of key problems with the current administration of the AHA and make recommendations to address these.

Part 1 – Preferred Approach: A new Aboriginal heritage Act

The need for a new Aboriginal Heritage Act

Significant issues with the operation of the AHA have been noted since the 1970s (Crawford 1980; Dix 1978). Amended twice since its inception, the intent and scope of the current AHA does not adequately reflect its original aspirations. These previous amendments have only served to complicate and frustrate the protection of Aboriginal heritage. Furthermore, the AHA does not reflect the significant changes in the social, political and economic landscape since it was enacted. For example, it does not account for developments in Native Title nor does it reflect fundamental shifts in heritage management principles and practices as exemplified in the *Australia ICOMOS Charter for Places of Cultural Significance* (Australia ICOMOS Burra Charter 2013).

We believe that the AHA does not adequately enable the respectful recognition, positive management or protection of Western Australian Aboriginal heritage in the 21st century. Amending the AHA will only introduce further complexity and ambiguity, and foster widespread confusion about government policy and its intentions. A new Act, based on a combination of Aboriginal worldviews and modern principles of heritage management, will

achieve conceptual consistency and provide an opportunity to achieve clarity and certainty for all parties involved.

Recommendations for a new Aboriginal Heritage Act

Given that Aboriginal heritage and non-Aboriginal heritage are treated separately in Western Australia, we take the position that if this legislative and administrative separation is to remain, Aboriginal heritage should enjoy equal status and levels of recognition, protection, conservation, celebration and penalties, as non-Aboriginal heritage.

AACAI recommend that the following points comprise the principal standards underpinning a new Aboriginal heritage Act. Moreover, they should be elements of any amendments to the current AHA, if this becomes the preferred approach.

1. All Aboriginal heritage should be recognised as living and dynamic and must be afforded blanket protection.
2. Aboriginal heritage, including aspects relating to archaeology, should be recognised as an important asset to the state, and be celebrated and promoted to the wider public.
3. The definition of Aboriginal heritage should be widened to incorporate aspects such as historic and archaeological places and objects, as well as seascapes and cultural landscapes. It must also take into account intangible aspects of Aboriginal culture such as songlines, ancestral connection, belief systems and aesthetics.
4. Aboriginal people with cultural authority for a specific place or region should have primacy in making decisions about, and having control over, their heritage. There should be increased Aboriginal participation in decision-making and management.
5. Traditional custodial rights and laws should be recognised, in accordance with the United Nations Declaration on the Rights of Indigenous Peoples, which Australia has adopted.
6. Provision for co-management of Aboriginal heritage by Aboriginal custodians and communities.
7. Definitions relating to Aboriginal heritage and the processes for conserving, protecting and preserving it must be clear, coherent and transparent.
8. All Aboriginal places and sites must be included in a Register and all reports about them lodged in at least an accessible electronic format with the relevant State authority for public use. Where Aboriginal custodians indicate that information is culturally sensitive, it must be classified as restricted and only be made available when required permissions have been given by the Aboriginal custodians.
9. Aboriginal ancestral remains, and any associated cultural material, should be recognised as Aboriginal heritage and should to be reported with the assistance of specialist archaeologists and returned to the appropriate descendent group.
10. Significance must be considered on a local, regional and state-wide basis, in line with current best practice in heritage management.
11. The significance assessment process and associated criteria should be unambiguous and included in the Act, rather than regulations, in order to foster consistency in all decision-making now and in the future.

12. Assessments relating to the significance of Aboriginal heritage must be **separate** to decisions about land use and impact to Aboriginal heritage.
13. Independent Aboriginal heritage bodies, from region to region, made up of Aboriginal cultural knowledge holders, archaeologists and anthropologists (with regional and specialist expertise) should determine the values and significance of Aboriginal heritage and should make recommendations concerning protection and preservation.
14. The opinion or conclusions of an independent Aboriginal heritage body as to the significance of a site should be binding on the Minister.
15. All developments and planning projects should be required to incorporate Aboriginal heritage management protocols. This should occur early on in the design phase of any project so that impacts can be minimised in a cost-effective manner.
16. Any decision that allows an impact on Aboriginal heritage must: (a) have regard to the wishes of Aboriginal people and custodians, (b) be accountable to Aboriginal custodians and the wider community, and (c) be supported by compelling reasons of public interest that take into account any social and cultural effects.
17. The management and mitigation of impacts to Aboriginal heritage values must be clearly defined in protocols and guidelines. Aboriginal bodies and groups, with the assistance of cultural heritage practitioners, should be empowered through Government grants and funding to maintain and manage Aboriginal landscapes, places and objects.
18. 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 rather than judicial intervention. This appeals process must be open to Aboriginal people, not just proponents.
19. Mechanisms for the determination of sub-surface cultural material must be mandated during development approvals.
20. For large infrastructure projects over a certain dollar value a percentage of funds should be paid into public education/community benefit that can be drawn on by affected communities for cultural heritage projects.

AACAI requests to be further involved in the development of new legislation. We can offer a wide range of relevant knowledge, skills and experience that will enhance any new legislation.

PART 2 – Alternative Approach: Amend the current Act

If drafting a new Act is not feasible, we offer our comments on the Consultation Paper **themes** below. We note that some of the detailed suggestions that follow may have relevance to a new Act.

We also refer you to the following literature which includes detailed critiques of the AHA: Dix (1978), Crawford (1980), Berndt (1982), Seaman (1984), Senior (1995), Evatt (1996), Ritter (2003, 2006), Chaloner (2004), Barnsby (2013) and Vaughn (2015, 2016). Many of these critiques are still valid. Senior (1995) and Evatt (1996), in particular, include numerous recommendations that are still relevant.

Theme 1: Purpose of the Act

The current long title does not provide a sufficient description of the purpose of an amended Act. In its current form, the AHA prioritises the rights of the general community over Aboriginal people. It does not recognise that Aboriginal people are the 'primary guardians, keepers and knowledge holders of Aboriginal cultural heritage', or that protection of heritage should be 'based on respect for Aboriginal knowledge, culture and traditional practices' (Kwaymullina et al. 2015: 25). The long title needs to specifically acknowledge Aboriginal peoples' rights and custodianship over their heritage. The Act should first and foremost benefit Aboriginal peoples and prioritise Aboriginal interests. The benefit to the broader Western Australian community should be of secondary consideration.

The purpose of the AHA should also be about conservation and management not just protection. Whilst protection is an appropriate strategy in some circumstances, it implies the excision or 'sterilization' of objects or places within a landscape and the exclusion of people from those places or objects. We suggest that conservation and management are more appropriate concepts. Conservation entails 'all the processes of looking after a place so as to retain its cultural significance' and is an integral part of the management of cultural heritage (Australia ICOMOS 2013a: 1-2). Importantly, conservation requires the active involvement of people, especially Aboriginal custodians, and will facilitate a much broader range of approaches to managing Aboriginal heritage such as use, enjoyment and enhancement.

The purpose of the AHA should further set a clear mandate for the Government to recognise, respect, promote, celebrate, commemorate, conserve and manage Aboriginal heritage.

Theme 2: Roles under the Act

Aboriginal people

One of the key issues with the current AHA is that Aboriginal people do not have a direct role in decision-making, nor is there any mandate to consult or involve Aboriginal custodians in heritage protection. As the AHA pre-dates values-based and stakeholder-led heritage management paradigms, it does not provide for Aboriginal-led or holistic management of heritage (Kwaymullina et al. 2015: 24-25). Aboriginal people should not only be consulted but actively involved in the management of their heritage. It is vital that the AHA mandate consultation with and involvement of Aboriginal custodians in heritage protection.

We also note that Aboriginal custodians and knowledge holders must also be consulted in addition to Native Title holders or claimants.

The Minister

Prior to the 1980s amendments, the ACMC had the authority to make decisions independent from the Government. Thereafter the Minister was given 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. We think this is a fundamental flaw in the AHA and that the conclusions of the ACMC should be binding on the Minister.

In a state whose economy is primarily dependent upon mining and resource development, with a strong and well-funded pro-mining lobby, the 'general interest of the community' is often narrowly defined in simple economic terms rather than social or cultural terms. In conflicts over land use, the scale of financial return generated by mining-related activities leads to the perception that mining is of greater benefit to the general community than Aboriginal heritage. This leads to a flawed decision-making process as has been illustrated in numerous examples such as the Swan River Brewery, Marandoo, Yakabindie, Rottnest, Broome, James Price Point, Yinjibarndi, Lake Yindarlgooda, Marapikurrinya Yintha (Port Hedland) and Beeliar Wetland (Roe 8).

We therefore recommend that 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.

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

The Aboriginal Cultural Materials Committee

We do not believe that the Aboriginal Cultural Materials Committee (ACMC) can adequately fulfil the objectives of the AHA. The ACMC was set up for a very different time. The amount of work that now comes before the ACMC was never envisaged by the framers of the AHA. The decisions required of the ACMC today are complex and often require specialist expertise. There is no provision in the AHA that guarantees that the range of specific expertise required will be represented within the ACMC. The exception is the requirement that one member be a specialist anthropologist (section 28 (3)), although in recent years this requirement has often been ignored. Inadequate resourcing and limited expertise within the Department also means that the advice and guidance supplied to members can be deficient. The remuneration of members of the ACMC is totally inadequate for the demands on their time and the complexity of the decisions they are now expected to make.

It is very difficult for the ACMC to make clear and consistent decisions given the inadequate and outdated definitions in section 5. Two clearly different processes can be distinguished under the functions of the ACMC:

1. evaluation and assessment of sites (section 39) for the purposes of maintaining a register (section 38); and
2. decisions and approvals about the conservation and management of heritage in the context of development or other impacts (section 16, section 18).

This places members of the APMC in a position where they are both assessing the importance and significance of a place and then making a de facto decision about whether the place should be permitted to be destroyed under section 18. Such a situation is untenable and calls into question the validity of the current process. Therefore these two processes must be separated.

We therefore recommend that the APMC should be abolished and its functions separated.

Evaluation and assessment of sites for the purpose of maintaining a Register

The maintenance of a Register is a vital tool in decision making with respect to planning and land use issues as well as the conservation and management of heritage, research, and the education of the wider community. The role of the APMC in determining whether sites should be placed on such a Register by assessing their importance and significance is redundant and creates an unnecessary bottleneck in the process. This arises partly because of the relatively high threshold for registration specified in section 5 (especially in the ways this section has been interpreted in recent years and after the 1980 insertion of 'importance') and partly because of the requirement to advise the Minister as to whether sites are present as part of a section 18 application and if they should be impacted.

Initial assessment of sites should be carried out in consultation with relevant Aboriginal people. This process should be conducted by appropriately qualified and resourced officers of the DPLH. Assessment should be conducted against well-defined and uniform criteria such as those defined by Australia ICOMOS Burra Charter (2013).

Decisions and approvals about the conservation and management of heritage in the context of development or other impacts

The evaluation and assessment of sites (section 39) for the purposes of maintaining a register (section 38) should logically be carried out by senior heritage officers of DPLH. Consistent with other heritage management regimes (e.g. NSW and Victoria), these officers must have *advanced degrees and relevant experience* in Aboriginal heritage assessment, anthropology, archaeology and allied disciplines given their senior review and compliance roles.

It is recommended that decisions and approvals for research and permission to use land (section 16, section 18) is handled by a new and semi-autonomous body, the *Aboriginal Heritage Advisory Council (AHAC)*. This would include Aboriginal people with cultural authority and practitioners with skills in cultural heritage, including but not limited to anthropologists, archaeologists, historians, cultural geographers and heritage management specialists. Their role would be to assess applications which involve impact on Aboriginal heritage and make decisions about heritage values, management of impact and mitigation. The *Council* would have several executive staff capable of preparing assessments and documenting how consultations have taken place. This represents a necessary separation from the regulatory roles and functions of DPLH in maintaining the Register of Sites.

A new body, the *Heritage Appeals Tribunal*, should be established to facilitate and mediate cases where heritage evaluations and assessments of sites, impacts and management decisions are contested and would benefit from arbitration. This body would have a mandate to hear and evaluate issues relating to the values, planned actions, potential land uses and impacts, and management options relating to Aboriginal heritage objects, sites, buildings and places. Ideally the Tribunal would be chaired by a senior and accredited heritage/legal

planning specialist with meditation skills and international standing; and a senior Aboriginal facilitator with heritage and (para)legal training, having cultural authority from their host community.

The investment in rescinding the ACMC and establishing these two complementary bodies is commensurate with the increased volume of assessments, native title compliances and permissions granted to use land on which sites occur.

The Registrar

We note that the authority and senior position of the Registrar has been diluted in recent years. The role of the Registrar is an important role and this should be reflected in the role requirements and status. In order to perform this role sufficiently, incumbents must be required to have postgraduate qualifications in heritage management, a deep demonstrated knowledge of Aboriginal culture and heritage, and extensive working experience in Aboriginal heritage.

Honorary Wardens

Whilst the provision for honorary wardens is in principle a good idea, it is not a commonly or effectively used provision. Powers delegated to honorary wardens vary depending on the terms of their appointment and are usually restricted to Protected Areas (Senior 1995: 209). Senior's (1995: 209) observation that 'the appointment of wardens has been on an ad hoc basis and has been hampered by the lack of resources available for training' is still a valid criticism. The provision for honorary wardens to enforce the AHA needs to be more widely and systematically implemented, and sufficient funding, training and support provided to enable them to exercise their full authorities under the Act. We also recommend that these should be paid positions rather than honorary.

We recommend that a more effective approach to on-ground management and enforcement of the AHA is to make provisions for Aboriginal Rangers in lieu of honorary wardens. There are currently several effective Aboriginal Ranger programs administered through Native Title PBCs. The powers and accountabilities of the honorary wardens could be extended to Aboriginal Rangers. These ranger programs could be effectively maintained and funded by extending DPLHs grants program.

Theme 3: What is protected under the AHA?

At present the AHA offers automatic (blanket) protection to Aboriginal places. This must be retained in any future revision of the AHA.

Sections 5 and 6

The concept of cultural heritage embedded in the AHA is outdated and narrow in its scope. Sections 5 and 6 do not adequately reflect current understandings of Aboriginal cultural heritage. This is a significant flaw. The AHA's definition of Aboriginal heritage must be broadened and brought in line with other state and commonwealth heritage legislation. More importantly, it must also be brought in line with Aboriginal peoples' concepts of Country, culture and heritage.

Any definition of heritage should include all aspects of contemporary Aboriginal custom and traditions, both tangible and intangible; including, but not limited to, places of spiritual,

contemporary and anthropological significance, historic places, archaeology, cultural landscapes, seascapes, waterscapes, dreaming trails, song lines, intangible heritage, underwater sites, built environment such as contact sites and missions, resource procurement areas, hunting and camping places, and subsurface heritage. The AHA must also include skeletal and ancestral remains in its scope. The AHA must protect burials, skeletal and ancestral remains and provide for their repatriation and management. We strongly recommend that a mandate for the repatriation and restitution of ancestral remains and other cultural materials be added into the AHA. Section 5 would need to be re-written to make provision for a much broader and inclusive concept of Aboriginal heritage.

Similarly, section 6 definitions of an 'object' are ambiguous and narrow. We argue that a much broader range of objects, in addition to sacred objects, should be subject to protection under the AHA.

In regards to section 5, we further recommend that the terms 'significance' and 'importance' be removed. Not only are the terms undefined, poorly understood and confusing; they are also redundant, as labelling something as 'heritage' automatically implies that it is valued and of significance to people. As heritage places, objects and phenomena can be significant to people and groups of people at a range of levels from the individual, community group level to the regional, state and national or international level. The degree of significance (importance) should not be used as a qualification.

We recommend that an amended AHA include a more sophisticated and detailed definition that reflects and celebrates the complexity, richness and diversity of Aboriginal heritage.

Section 19 Protected Areas

Whilst the operation of section 19 is not ideal, the AHA needs to retain some form of mechanism to enable the long-term and permanent protection of Aboriginal heritage of 'outstanding importance'. One of our concerns with the current section 19 is that it is still subject to political influence and that protection under it can be revoked. For example, part of the Woodstock-Abydos Protected Area was revoked in the mid-2000s to allow for two railway lines to be constructed through the Protected Area.

There are also issues regarding access and active management of Section 19 Protected Areas. If section 19 is retained, or if a new provision is added, the conditions under which a Protected Area may be accessed need to be more flexible and make provision for access and use by the relevant Aboriginal custodians and communities. Provisions should also be made to allow for the active management of Protected Areas.

Theme 4: Site assessment and registration

Section 7 Traditional Use

AACAI strongly urges the Government to retain section 7(1)(b) of the current AHA. A defence should continue to be provided where the disclosure of information under section 15 is against customary laws and protocols. There are clear customary reasons as to why Aboriginal people may withhold information. The removal of this clause would directly contravene the Minister's objective to modernise the AHA 'in a way that is respectful of Aboriginal people and their heritage'.

Section 15 Report of Findings

Section 15 mandates the reporting of Aboriginal sites. All Aboriginal places and sites must be included in an accessible Register. All survey reports and other related documentation must be lodged in at least an accessible electronic format with the relevant State authority for public use. Where Aboriginal custodians indicate that information is culturally sensitive, it must be classified as restricted and only be made available when required permissions have been given by the Aboriginal custodians. We also advocate for mandatory reporting of sites and information by mining and resource companies.

Site assessment and the Register of Aboriginal Sites

With regards to the question within the Consultation Paper '*what should be the steps to report, nominate, assess, enter, amend or remove an entry from the Register?*', we recommend that this question be the subject of a technical forum that includes a range of Aboriginal custodians, heritage professionals and DPLH staff.

We emphasize the importance of maintaining a Register, as it is a critical decision-making tool for land use planning along with the conservation and management of research, research, and the education of the wider community. As outlined in previous submissions, the Register of Aboriginal Sites and Other Heritage Places needs significant improvement. The Register requires further development to bring its capabilities in line with the theoretical intent of heritage registers (see Brown 2008: 23). This would enable higher quality and more efficient heritage assessments. A Register that has the capacity to function for the purposes of research, conservation management and safekeeping of information on sites and Aboriginal culture for transmission to future Aboriginal custodians, rather than just being a simplistic tool for the facilitation of the development approvals process, would allow assessments to be underpinned by substantive research and would thus ensure increased certainty, quality, effectiveness and efficiency of the heritage process. Strategies to improve access to information should be considered in more detail and in consultation with Aboriginal groups and interested parties. The Register must be as comprehensive as possible in accordance with section 38 and section 39(b) in particular.

The issue of de-accessioning or de-registering sites is of particular concern. Since 2011 there has been a significant increase in the numbers of sites being removed off the Register and a parallel decrease in the amount of places being successfully registered (Dortch and Sapienza 2016; Vaughn 2016). Much of these de-registrations have occurred without notification or consultation with the Aboriginal community. The AHA also offers no right of appeal against these decisions. The process for de-registering or de-accessioning sites is not outlined in the AHA and clear accountabilities and authorities need to be assigned, including a process for appeal. De-registration should be subject to independent oversight.

There are further logical issues with the de-registration of sites. Under the AHA all sites are notionally protected whether they are registered or not. When a site is de-registered, it is no longer afforded legal protection, even if more information later comes to light or there are still extant remnants of the site. Unknown or unrecorded sites are thus afforded more protection than de-registered sites. This is also a particular issue for archaeological sites where it may be difficult or impossible to determine the existence of a site without excavation, and sites are destroyed prior to subsurface content being assessed. The old Interim Register was useful in dealing with this problem respectfully, as the only sites that went to 'stored data' were those that were actually not heritage places, or which had been completely destroyed.

We also would like to highlight that the perception of heritage places as 'not sites' can be particularly hurtful to Aboriginal people. DPLH and the Government need to publicly emphasize that registration is completely separate to deciding how a site should be treated in the event of a land use conflict, as just redefining sites a 'not a site' is not the solution and is highly disrespectful to Aboriginal people.

Assessment of significance

Assessing significance and making decisions about land use and site impact within the same process and forum is highly problematic. Deciding the significance of a place in the context of its impending destruction can open the process up to conflicts of interest and potentially biased decision-making. To improve this situation we **strongly recommend** separating these two processes, both legislatively and administratively. We suggest that two separate decision-making bodies be established, with one overseeing site assessments and registration of places and the other dealing with section 18 applications and land use decisions.

The concepts of significance and importance are undefined in the AHA. This is highly problematic as it can lead to ambiguity and misapplication as highlighted by the findings of *Robinson v. Fielding* [2015] WASC 108.

In accordance with current international best practice, we define significance as 'an evaluation and articulation of the values that have been assigned to a particular place, object or phenomenon which render it being worthy of maintaining for future generations' (Lafrenz Samuels 2008: 72-73; Pearson and Sullivan 1995: 126). 'Importance' refers to the *degree* of significance and involves comparison with other similar heritage.

Any amendment to the AHA must clearly define all and any specialist terms used with reference to the assessment of Aboriginal heritage, with reference to contemporary best practice.

Sections 39(2) and (3) set out the criteria by which the ACMC evaluates the importance and significance of sites. These sections are particularly important because they prioritise Aboriginal values and significance. We agree with this and are of the opinion that this **prioritisation must be retained**.

With regards to defining additional criteria by which to assess the significance of a site, in the first instance **these criteria should be defined by Aboriginal people**. Further to this, we believe that section 39 can be enhanced by the inclusion of additional criteria such as those of current significance assessment standards outlined in best practice guides such as the Australia ICOMOS *Burra Charter* (Australia ICOMOS 2013a), *Significance 2.0* (Russell and Winkworth 2009) and other state and commonwealth heritage legislation such as the *Heritage of Western Australia Act 1990*. The Australia ICOMOS (2013b) *Practice Note: Understanding and assessing cultural significance* offers specific guidance assessing significance.

Theme 5: Protection and enforcement

Protection

All activities that have the potential to deleteriously impact upon the heritage values and significance of an Aboriginal place should require consent and authorisation. The nature of

Aboriginal heritage is vast and therefore the nature of the heritage and values will determine what kinds of activities are compatible and therefore allowable and those that are not. It is difficult and unadvisable to have strict criteria against which to evaluate an activity, as the effects and conditions will be place-specific. These criteria should be determined by the relevant Aboriginal custodians and groups.

Impacts upon sacred sites with no physical elements can be assessed through a process akin to social impact assessments. Such an assessment needs to articulate: the specific values, access and cultural protocols associated with the place; permissible activities; and cultural and spiritual ramifications for the custodians and host community if the site was to be impacted or protocols contravened. The levels of risk to the custodians, host communities, associated Aboriginal groups and proponents should then be weighed up through a social impact assessment.

Section 18 Consent to certain uses

The current section 18 process is cumbersome. The role of the ACMC particularly creates an unnecessary bottleneck in the process and we recommend that the ACMC's role in advising the Minister with regard to consent under section 18 be abolished.

It is vital that processes for managing impacts on Aboriginal heritage are transparent, efficient and provide certainty for all parties. Any process must include the right of appeal. Aboriginal people have no right of appeal under the AHA at present. It is particularly important that this injustice be rectified.

We believe the current roles of the ACMC be split between two bodies. We propose the establishment of an *Aboriginal Heritage Advisory Council* to assess impacts on Aboriginal heritage, and to ensure documentation of heritage values and that appropriate consultation is carried out. We also propose that a new body, the *Heritage Appeals Tribunal*, should be established to facilitate and mediate cases where heritage values, impacts and management decisions require arbitration rather than judicial intervention.

Section 16 Excavation of Aboriginal sites

The current application of section 16 has become highly problematic recently, due to a combination of only granting permits for registered Aboriginal Sites (as opposed to 'Lodged' status sites), the referral of the application and proposed impacted sites to the ACMC, and the application of higher thresholds for meeting section 5.

Under section 16(2) the Registrar can authorise the excavation, examination and removal of anything on or under an Aboriginal Site. Previously, section 16 permits have been issued to archaeologists in order to test the subsurface potential of places that could constitute a site under section 5 but were not necessarily yet registered. A recent change in administration of this section has seen the strict application of section 16(1) and, as a result, the issuing of section 16 permits for registered Aboriginal Sites only. The DPLH will not issue section 16 permits for Other Heritage Places, particularly those with a Lodged status.

This is a serious issue. Often there are places, such as rock shelters or open areas, that have minimal or no evidence for occupation visible on the surface yet have the potential to contain substantial subsurface archaeology. In order to assess whether the place may meet section 5 of the AHA, subsurface investigations and excavation are required. However, in order to get a section 16 permit to excavate, the place has to go through the site assessment

and registration process. In these situations, most of these sites do not meet the criteria of section 5 based solely on their surface content and are determined to be 'Not a Site'. A section 16 permit therefore cannot be issued for a place that is 'Not a Site'.

This is a serious issue for two reasons. Firstly, when a place determined to be 'Not a Site' is subsequently excavated with no section 16 permit and reveals extensive significant subsurface material which meets section 5 criteria, 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. This exact situation has been reported by our colleagues in relation to a rock shelter in the Pilbara region which was declared by the ACMC to be 'Not a Site'. The DPLH had refused to issue a section 16 permit on the grounds that the place was 'Not a Site'. The shelter was subsequently excavated and revealed occupation dating back around 40,000 years. The proponent then received a letter from DPLH stating that they had disturbed a site.

Secondly, and more seriously, if the ACMC determines a place to not be a site as part of a section 16 application there is no legal impetus for a proponent to carry out those proposed archaeological investigations. This results in the massive loss of potentially ancient and significant Aboriginal heritage places.

As a result of the problems with the section 16 process and the fact that there is no requirement in the AHA for the investigation of the potential for sub-surface archaeological deposits prior to developments, there has been the massive loss of ancient and significant sites across this state over the last six years. A case in point is the de-registered archaeological site 4107 at Beeliar Wetlands along the Roe 8 Development. In this case all but one of the seven consultant archaeologists who assessed the place identified that it had the potential for sub-surface material. This was, however, never assessed prior to de-registration. There was no mechanism in the AHA to make this a necessity prior to its re-assessment by the ACMC in early 2015. Subsequent archaeological reconnaissance showed that indeed the de-registered site 4107 contains sub-surface archaeological deposits that are at least 5,000 years old (Dortch and Hook 2017). Such events show the lack of respect and inability of the AHA and Government to celebrate and discover more about Aboriginal history.

As this issue has serious legal ramifications for proponents, consultants and the Government, we strongly urge you to consider amending section 16. We recommend that section 16(2) 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.

Enforcement and penalties

The enforcement provisions and penalties under the AHA are not adequate. AACAI advocates for stronger penalties and enforcement for the illegal and unpermitted destruction and disturbance of Aboriginal Sites.

We recommend the addition of provision for a person convicted under the AHA to compensate the affected Aboriginal custodians and 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 people so that further adverse effects on the site as a result of unauthorised or inappropriate remedial work are prevented.

We also recommend that section 58, which was 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.

We further recommend that the AHA include additional disincentives for people not to disturb **potential** Aboriginal Sites.

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.

As outlined above, AACAI considers the use of Aboriginal Rangers with the delegated powers of Honorary Wardens to be a more effective way of enforcing the AHA on-ground.

Theme 6: Other parts of the Act

There are several things missing from the current Act that should be included in new or amended legislation:

1. Provision of a clear mandate to the Government, Minister, ACMC and DPLH to recognise, respect, celebrate, commemorate, conserve and manage Aboriginal heritage. We believe that as a result of the previous attempted reform, Aboriginal heritage has been cast in a negative light and has been portrayed as a barrier to economic development (Productivity Commission 2013). We think it is necessary for the Minister and the State Government to champion Aboriginal heritage. A clear mandate set out in the AHA will facilitate this.
2. Definition of terms. Terms such as sacred, custom, tradition, importance, significance and special significance are not defined. These terms have been transplanted into the AHA primarily from within academic disciplines where they have particular meanings. Standard dictionary definitions do not adequately define these terms and we recommend for clarity that these terms and any other specialist terms be included in the definitions section of the Act.
3. Provision to involve and consult with affected Aboriginal people, communities and custodians. This is an absolute necessity as Aboriginal people must not only be consulted but involved in the management of and decision-making around their own heritage.
4. A requirement for ethnographic and archaeological surveys. This must be mandated for the following reasons:
 - a. Aboriginal people have occupied the entirety of Western Australia for at least 50,000 years. Evidence for this occupation is ubiquitous and is likely to survive anywhere in the state. There is always a risk that Aboriginal heritage may be adversely impacted by development.
 - b. There has been relatively limited research into the nature and distribution of archaeological sites. Much of our current knowledge has been circumscribed by previous development. Significance is relative by nature which means that it

always involves comparison. To make reliable assessments of significance we therefore need a reliable baseline for comparison. Requiring archaeological surveys not only addresses specific risks, but also enhances the larger body of knowledge on which future assessments can be based thus ensuring increased assessment reliability.

- c. As acknowledged by the *Native Title Act 1993*, Aboriginal people have been deeply connected to all parts of this land for at least 50,000 years and these connections endure despite 200 years of colonial disruption. It is therefore important to ensure that these connections are maintained. Heritage surveys play an important cultural role in facilitating continuing connection to country.
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. Such a system currently operates successfully in Victoria. We recommend that as part of this accreditation, consultant archaeologists be encouraged to be members of incorporated professional organisations such as the Australian Association of Consulting Archaeologists Incorporated (AACAI). AACAI apply a strict, competency-based membership review process and we require our members to adhere to our Code of Ethics and Consulting with Aboriginal Communities Policy.
10. Management of repositories of cultural heritage. 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.
12. Retain and increase the grants program for Aboriginal not-for-profit groups to apply for funds to preserve and promote Aboriginal Sites. We suggest that the total annual amount should be increased significantly to a nominal starting point of \$5 million to be held in Trust, with the annual interest used to fund the grant program. This grant program should also be extended to Aboriginal Ranger programs administered through Native Title PBCs and other Aboriginal organisations.

There are several sections of the AHA that should be removed:

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 should be removed.
3. The phrase 'should be preserved because of the importance and significance to the State' in section 5(c) should be removed.

Other concerns

The history of the Act has shown a clear pattern of the AHA being progressively weakened and Aboriginal heritage subordinated to development-related interests (Chaloner 2004; Vaughn 2016). The administration of the AHA has also become open to political influence and subversion, as the administrative reforms prompted by the 2009 Industry Working Group have demonstrated (see Vaughn 2016: 264). These reforms were not transparent and were undertaken without consultation with Aboriginal people or heritage professionals. Indeed, the reinterpretation of section 5 definitions of 'site' and 'sacred' and the resultant de-registration of a significant number of sites highlights this (Dortch and Sapienza 2016; Vaughn 2016). This is not respectful of Aboriginal people or their heritage and has done great damage to heritage in this state.

We therefore urge the Minister and his reform team to carefully consider ways to strengthen the AHA to ensure that it is no longer able to be subverted by specific political agendas and development interests, and that future decisions under the AHA are made responsibly with the goals of respectfulness, sustainability and education firmly in sight.

Part 3 – Issues with the current administration of the AHA

The administration of the AHA impacts upon its effective operation. In this section we identify a number of major issues with the administration of the AHA and make suggestions as to how they can be addressed.

Resourcing and funding

The most significant issue with the administration of the AHA is that it is drastically underfunded. Many of the issues noted in previous reviews, reforms and inquests have arisen because the administering department is neither appropriately resourced nor staffed sufficiently.

If the Minister intends to modernise the Act 'in a way that is respectful of Aboriginal people and their heritage', then the first step in respecting Aboriginal people and their heritage is to ensure it is adequately funded and that those who work in the department are suitably experienced/qualified in heritage and are respected. Sufficient resources must be provided not only to ensure compliance with the AHA but more so for the proactive recognition and celebration of Aboriginal culture and heritage.

The importance of Aboriginal heritage to the State is reflected by the resources that it dedicates to it. Current levels of resourcing allocated to Aboriginal heritage do not reflect a 'respectful' attitude. The Minister and the Government need to champion Aboriginal heritage and set the standard for proponents and the wider community. This can only be done by treating Aboriginal heritage as core business and funding it as such.

Training and up-skilling

Linked to the lack of resourcing is the current lack of a sufficient level of professionally trained and experienced staff in DPLH and on the ACMC with deep knowledge and experience in Aboriginal heritage management. Making site assessments and decisions that can determine the fate of Aboriginal heritage is a solemn and weighty task, particularly as the outcomes can affect the wellbeing of the associated Aboriginal custodians and communities. The people who are responsible for these assessments and decisions must have adequate experience, knowledge and qualifications (including cultural qualification). We believe there is currently a significant skills gap within the Department that needs to be addressed as a matter of urgency.

Unrealistic workload

Similarly, the ACMC is also significantly under-remunerated. ACMC members are required to undertake extensive workloads in reviewing section 18 applications and supporting material. ACMC members are only remunerated for the time they spend at the meetings, not the copious amounts of time spent reviewing material. Whether the ACMC is to be retained or a new *Aboriginal Heritage Advisory Council* established, as recommended above, the Government must ensure that it is sufficiently funded to operate effectively. This includes significantly increase the levels of pay for members. This will allow for more regular meetings and make the section 18 process more timely and efficient. Better remuneration will facilitate higher levels of expertise and familiarity with the content of section 18 applications, more efficient meetings, and better decision-making. We would also encourage

the engagement of more heritage specialists and senior cultural custodians onto the ACMC or *Aboriginal Heritage Advisory Council*.

Improving the Register of Aboriginal Sites

As identified above, the Register is a vital decision-making tool for land use planning along with the conservation and management of research, safeguarding of knowledge, research, and the education of the wider community. The ongoing development of the Register needs to be prioritised and funded accordingly.

Site assessment and the backlog

Another significant issue is the backlog of places waiting for assessment. Current estimates are that it will take several decades to work through this backlog. This issue is a result of the high threshold that has been recently applied to place sites on the Register and the requirement for the ACMC to make these decisions. If we returned to the original intent of the AHA where all heritage places were registered, then higher order assessments would only be required in the event of development that may conflict with the heritage values of the place.

The need for minimum standards

There is also a need for the Department to develop and enforce 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.

The need for positive promotion of Aboriginal heritage

Whilst we acknowledge that the DPLH is focused upon improving their regulatory status and compliance monitoring in line with the Auditor-General's report findings (Murphy 2011), the Department also needs to balance this with the positive conservation, management, promotion and valorisation of Aboriginal heritage. DPLH thus needs to reorient their organizational culture from compliance to proactive management and promotion. Such an agenda needs to be set by the Minister in the Department mandate, embedded into policy, and enacted by Departmental leaders and staff.

Conclusion

AACAI would like to commend the Minister and DPLH on undertaking a more open, transparent and thorough review of the AHA than the previous reform. We appreciate the opportunity to meet and engage with DPLH and to have our views heard. We believe that we can make a substantial contribution to help shape either a new Aboriginal heritage act or improve the existing Act and we look forward to working with you further on this.

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