



AUSTRALIAN ASSOCIATION OF CONSULTING ARCHAEOLOGISTS INC

c/o Cindy Shadiack
Box 196
585 Little Collins Street
Melbourne VIC 3000
aacai_sec@yahoo.com.au
www.aacai.com.au

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For the attention of:

Chief Heritage Officer
Heritage & Culture Branch
Government of Western Australia
Department of Indigenous Affairs
PO Box 7770 Cloisters Square, Perth WA 6850

AACAI Submission on the Draft Aboriginal Heritage Amendment Bill 2014

The Australian Association of Consulting Archaeologists Inc. (AACAI) is an organisation for professionals working in all fields of contract and public archaeology. Many of its members are archaeologists and heritage professionals with extensive experience in Western Australian Aboriginal cultural heritage and have worked expansively within the operation of the *Aboriginal Heritage Act 1972*.

AACAI and its members have reviewed the proposed amendments to the *Aboriginal Heritage Act 1972* (AHA) and provide the following comments further to our previous submission on the discussion paper 'Seven proposals to regulate and amend the *Aboriginal Heritage Act 1972* for improved clarity, compliance, effectiveness and certainty (April 2012)'.

AACAI reiterates its concerns with the overall process and lack of consultation and engagement regarding the AHA reform. We strongly believe that the following principles **must** be enshrined within the AHA.

- Aboriginal heritage is non-renewable and therefore blanket protection should be provided for all heritage places.
- All decision making regarding the fate of heritage places must be transparent and sufficiently justified.
- Aboriginal people should have primacy in the decision making processes under the AHA and the ability to contest decisions about site determinations and section 18 permits.

Section 4 Terms used in this Act

We are concerned that the terms ‘importance’ and ‘significance’ are still not defined within the draft bill as these two terms add ambiguity to the application of section 5. ‘Significance’ in particular has a very specific technical meaning within the cultural heritage field and therefore standard dictionary definitions are inadequate. We argue that the concepts and definitions of ‘importance’ and ‘significance’ should be in line with those included in the *Australia ICOMOS Burra Charter* (Australia ICOMOS, 2013) and the *Heritage of Western Australia Act 1990*, so that clear parameters are set for the interpretation and assessment of these terms.

Section 5 Application to places

We note that only one minor change has been proposed for section 5(c) comprising the replacement of ‘ACMC’ with ‘CEO’. As outlined in our previous submission we believe that section 5 still does not offer a broad enough application so that a full range of places concerned with Aboriginal peoples, not just one particular class, are protected. Protection under the AHA should include all aspects of contemporary Aboriginal traditions, inclusive of archaeological and traditional sites (Evatt, 1996: Annex VI).

Section 7(a) Evaluating a Place or Object

AACAI consider it appropriate that section 39(2) has been relocated to section 7(a) as it improves the visibility of this section.

As argued in our previous submission (May 2012) this section needs a further provision to consider *potential* significance of a place in addition to its ascribed significance, as an inability to determine significance does not in itself indicate insignificance. There is a danger that sites could be removed or prevented from being placed on the register due to insufficient information or significance assessments.

AACAI strongly advocates that section 7(a) be brought in line with national best practice standards for assessing the cultural heritage significance of sites, such as those outlined in the *Australia ICOMOS Burra Charter* (2013) and *Significance 2.0* (Russell and Winkworth, 2009). AACAI are also concerned that section 7a(2) in its current form will lead to the marginalization and non-protection of archaeological objects or finds that cannot be ascribed sacred or ritual use. We believe that section 7a1(c) could also be improved by replacing ‘interest’ with ‘values’.

Section 12(a) Functions of CEO

AACAI have serious concerns regarding section 12(a). Section 12(a) gives the CEO the power to determine the status and significance of all Aboriginal heritage sites in Western Australia, what information appears or does not appear on the Register and, according to section 50b(4), has the power to overrule the ACMC in relation to Register information.

We are greatly concerned that one person (the CEO) will have the power to determine the significance of sites on behalf of the Western Australian community, yet that person is not required to be appropriately

qualified or experienced in these matters, nor compelled to consult with Aboriginal people and other interested parties in the process of determining a site's significance. There are also no apparent safeguards to prevent a political appointment to this position which could introduce a biased agenda into the significance assessment process. The decision making process therefore **must** be made explicit, transparent and open to public scrutiny.

Further, we are concerned that the CEO's role combines the determination of significance with decision making about land use, particularly the power to make declarations that no Aboriginal Sites occur within an area of land. Combining these two functions has the potential to introduce considerable bias into the process. We strongly support the Evatt Report recommendation that decisions about site significance should be undertaken separate to, and by Aboriginal groups, decisions about land use (Evatt, 1996).

AACAI strongly recommend that the process for site assessment be regulated. As a minimum the regulations should require the CEO to:

- Make a reasonable and good faith effort to identify the Aboriginal peoples that should be consulted, provide these people with a reasonable opportunity to share their views about these places and incorporate these views into decisions.
- Take into account: the degree to which the Aboriginal heritage of an area is documented and included in publically available material; previous criteria used for significance assessment of places in the area; comparability of places with those already on the Register; and the potential significance of a place in addition to its ascribed significance.
- Publish a list of all places that are deemed **not** to be preserved under the AHA, including a detailed description and geographic location, justification for the decision not to register the place and a list of the development activities that may have directly and substantially impacted the place.
- Seek and publish annual feedback from the wider Western Australian community on the list of decisions regarding places not deemed to be preserved under the AHA and the CEOs reply.

AACAI also note that the current proposed amendments, particularly in relation to the role of the CEO, will require significant additional resourcing for the Department of Aboriginal Affairs. If the Amendment Bill is passed through parliament, AACAI strongly urges the Government to provide sufficient resourcing so that the Department of Aboriginal Affairs can deliver its mandate in a timely and effective manner.

Section 15 Report of findings

AACAI do not support the new proposed penalties for the non reporting of potential Aboriginal Sites. Our key concern is that this proposed measure may lead to Aboriginal people being fined for not reporting or providing information on sites. It undermines Traditional Owners rights to control and protect their own heritage and will force third parties to potentially contravene Traditional Owners wishes and obligations contrary to Aboriginal rights, law and tradition.

AACAI therefore strongly insists on the removal of the penalties from section 15 of the Bill.

Section 18(a) Application for permit to do act that might contravene s.17

One of the weaknesses of section 18 that has not been addressed by the draft Bill is that there is still no avenue for a third party, such as an Aboriginal group or representative body, to contest a permit. This again undermines Aboriginal people's rights and power to control and manage their own cultural heritage.

We also note that section 18 also does not include any auditing mechanism to determine whether permit conditions have been met.

Section 19(d) State Administrative Tribunal may review certain decisions about declarations and permits

AACAI are greatly concerned that section 19(d) denies natural justice to Aboriginal people and Traditional Owners, as there is a serious lack of mechanisms for Aboriginal people and Traditional Owners to appeal a CEO decision regarding either the significance of a site or a land use decision. Further, other key heritage stakeholders within the Western Australian community should also be able to contest a CEO decision if such a decision lacks due consideration in preserving the State's heritage.

Section 28(3) Aboriginal Cultural Material Committee

We disagree with the proposed repeal of the requirement for a specialist anthropologist to be a member of the ACMC, as it substantially decreases the diversity and specialist resources available to the ACMC which will negatively impact upon the ability of the ACMC to make fully informed decisions. The ACMC should comprise a committee of people with a broad range of qualifications in heritage including Traditional Owners and Aboriginal custodians, anthropologists, archaeologists, historians and other cultural heritage specialists, who are able to comprehensively understand and discuss site significance and importance so that their decisions on site disturbance and land use will be effectively informed.

Section 50(b) CEO decides what goes on or is removed from ASO register

As identified above, we have serious concerns regarding the apparent power of the CEO. This includes the power of the CEO to delete or deregister Aboriginal Sites. We are greatly concerned that the CEO will be able to delete sites on a whim, without consulting the appropriate Aboriginal people or Traditional Owners or other interested parties, or providing clear justification.

We strongly urge the government to include additional mechanisms within this section, or associated regulations, that oblige the CEO to:

- Publicly advertise the intent to change site registration status, including detailed justification, prior to any Aboriginal Sites being deregistered or have their status changed.
- Consult with Traditional Owners and incorporate their views into the decisions making process prior to changing an Aboriginal Site's status.

- Seek public comment and consider feedback in decision making process prior to changing an Aboriginal Site's status.

Section 50(c) Register of declarations and permits

AACAI supports the publication of the Register of declarations and permits. To ensure transparency, we advocate that the Register needs to publish the decision making criteria and justifications and not simply the outcome of decisions.

Section 57 Penalties

AACAI supports stronger penalties and enforcement for the illegal and unpermitted destruction and disturbance of Aboriginal Sites. We also support the requirement under section 57(5) for a person convicted under the AHA 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 strongly recommend that this section should include additional disincentives for people not to disturb **potential** Aboriginal Sites.

Section 68 Regulations

AACAI note the proposal to prescribe regulations under the AHA relating to section 18 and 19 applications, departmental fees and charges and other matters. Further to those regulations identified in section 68(2), AACAI believe that it is essential that, as a minimum, detailed and explicit regulations be developed for CEO decision making under sections 5, 6, 7(a), 50(b) and 50(c). Public review periods for these proposed regulations **must** be substantially longer than the review periods given for the Amendment Bill (which was inadequate) so that the regulations can be properly debated.

AACAI requests to not only be consulted but thoroughly involved in the development of any regulations relating to cultural heritage management processes including, but not limited to, regulations for the assessment of places under sections 5 and 7(a), assessment process for section 18s, section 16 processes and register development.

Conclusions

AACAI is disappointed that more of the content of the original submissions made to DAA in response to the Avery report in 2012 was not included in the draft Amendment Bill as there was an opportunity to update and modernise the AHA, to base it on modern cultural heritage management principles and to bring it in line with contemporary practice, such as that encapsulated by the *Australia ICOMOS Burra Charter* (2013). We remind the Government of our position that the AHA should comply with the minimum standards for cultural heritage legislation, as outlined in the Evatt Report (1996), in particular:

- The definition of heritage should be as broad as the Commonwealth legislation and should extend expressly to include historic and archaeological sites;
- Legislation should provide automatic/blanket protection to areas and sites;
- Assessments relating to the significance of sites and areas to be separated from decisions concerning land use. The former should be the responsibility of Aboriginal heritage bodies, the latter the responsibility of the executive;
- An independent Aboriginal heritage body should determine whether a site is significant and should make recommendations concerning its protection;
- Decisions overriding protection should have regard to the wishes of Aboriginal people, should be supported by compelling reasons of public interest and be subject to accountability;
- The opinion or conclusions of the independent Aboriginal heritage body as to the significance of a site should be binding on the Minister; and
- Site protection legislation should take into account the basic principle that Aboriginal people should be given control over the day to day functioning of those aspects of the legislation which affect their interest in Aboriginal sites.

We urge the Government to further revise the AHA prior to submission to Parliament and request that the Government demonstrate impartiality and a willingness to engage with Aboriginal people and cultural heritage professionals in this process. AACAI further requests to be included in all further consultation regarding AHA amendments and regulation development.

Yours sincerely,

Jo Thomson

On behalf of

The Western Australian Chapter of the Australian Association of Consulting Archaeologists Incorporated

References

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