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For the attention of:

Chief Heritage Officer
Heritage & Culture Branch
Government of Western Australia
Department of Indigenous Affairs
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AACAI Submission on Proposed Changes to the Aboriginal Heritage Act 1972 of Western Australia

The Australian Archaeological Consultants Association Inc (AACAI) and its members are deeply concerned about the current proposed changes to the *Aboriginal Heritage Act 1972*. Provided below is AACAI's response to the discussion paper 'Seven proposals to regulate and amend the *Aboriginal Heritage Act 1972* for improved clarity, compliance, effectiveness and certainty' (April 2012).

AACAI's position regarding the proposed amendments to the *Aboriginal Heritage Act 1972* (the AHA) is summarised as follows:

- The seven proposals are not in keeping with the original spirit and intent of the AHA which is to preserve and protect all Aboriginal sites beyond just 'significant' sites;
- The seven proposals do not meet national or international standards nor best practice for cultural heritage management;
- The seven proposals will result in substantially reduced protection for Aboriginal sites, in particular archaeological sites;
- The effect of the proposals will be to expedite development to the detriment of Western Australia's unique cultural heritage; and
- There will be a substantial reduction in the role that Indigenous people play in the management of their heritage, which will have significant social and cultural impacts.

Further, AACAI questions whether the reform process has followed procedural fairness given the very limited consultation with heritage professionals, Indigenous stakeholders and other sectoral stakeholders. AACAI are also very concerned that these proposals may breach Sections 9 and 10 of the Commonwealth *Racial Discrimination Act 1975*, as they appear to substantially reduce or remove the rights of Indigenous Australians to maintain, protect and determine what is valued in their cultural and heritage. While AACAI made every effort to respond in the short, five-week period for public consultation, it is concerning that many other stakeholder organisations, including Native Title Representative Bodies and their various working parties, would not have had time to disseminate information and convene committees and boards in this period, and that very few of these organisations appear to know anything of the reform process. The Discussion Paper suggests consultation has been one-sided. It lists the organisations consulted prior to the current period of public comment as various industry bodies and government agencies not directly responsible for heritage. The list of organisations consulted does not include any Aboriginal representative organisation (e.g. the five NTRBs in the state), any agency responsible for heritage (e.g. DIA, Heritage Council, EPA, NTWA) nor any professional association (e.g. AACAI, the Australian Archaeological Association, the Australian Anthropological Society).

AACAI further questions the lack of documentation other than the brief Discussion Paper. It would be a very positive step to have the opportunity to review Dr John Avery's detailed arguments and findings in order to better understand and comment on the seven proposals.

AACAI does support improvements to the application of the AHA in order to streamline the process of Aboriginal cultural heritage management and protection. We agree with the premise of the Discussion Paper that stronger guidelines for identifying and recording Aboriginal sites are required, providing proponents with the certainty of process they desire. This will not be achieved necessarily through wholesale acceptance of the seven proposed changes.

AACAI strongly believes that such improvements can be made, not through legislative changes as currently proposed, but rather through the provision of adequate funding and support to the Department of Indigenous Affairs to improve, develop and maintain the AHA's administrative processes and tools including the Register of Aboriginal Sites. These improvements specifically should include funding an adequate level of professionally qualified staff to manage the workload; higher remuneration for these Officers; better information flow to the members of the Aboriginal Cultural Materials Committee; and greater inter-departmental cohesion and advocacy for a proactive approach to planning and heritage.

Specific comments on proposals

Proposal 1: Prescribe the manner and form of the Register

The new regulations should aim to improve the quality of information about sites on the register through encouraging the standardisation of recording forms and provision of a secure interface with access to spatially accurate site data. The proposed system will allow culturally appropriate access to information.

Issues

The Register lacks authority now, and under the proposed changes will continue to lack authority.

Due to inherent limitations of past heritage assessments, including the extent of Aboriginal disclosure to DIA and of the scientific knowledge base, and the lack of previous survey in many areas of the State, the Register can only be used as a guide or an indication of the extent of current knowledge of Aboriginal heritage in a given area.

The ACMC is ill-equipped, nor has the expertise, to maintain authority of the Register and no regulations have been suggested to address this issue.

Many legitimate sites may be removed from the Register if taken in consideration with Proposal 2 is followed.

Items to be removed from the Register may include legitimate sites, e.g. if all 'insufficient information' sites are simply removed.

An inability to determine significance does not in itself signify insignificance, and therefore such sites should not be removed from the Register. Rather, but the ascribed and potential significance of sites must be evaluated on a case by case basis.

Public availability of precise geographical data will threaten sites

Sites will be vulnerable to disturbance or culturally inappropriate use if precise geographical location of all sites is made available to all 'land users'. 'Land users' are not defined and nor is there a discussion of the levels of protection that comes from obscuring site locations.

Using modern technology, the Register could be designed to identify its users, to "aid compliance with the AHA" but this new capability would not stop anyone from damaging a site, nor would it prove that someone who had downloaded information had destroyed a site.

AACAI Recommends

Due to the issues surrounding 'completeness' and 'authority' of the Register, the Interim and Stored components of the Register must be kept and made available to the public. This

information is essential for understanding and informing site significance and our understanding of Indigenous peoples' use of different landscapes in the past.

Improvements that can be made to the Register that will facilitate the process in a timelier manner and which can be achieved without legislative change include:

- Improving the quality of information added to the Register;
- Improving the quality of consulting reports and site recording through implementation of approved minimum standards on a region by region basis;
- Improving the detail of information included in the Register – as this will allow for more timely and accurate assessments of significance;
- Ensure that the format of the Register meets all three basic purposes of a heritage sites register: for research, for conservation management and for safekeeping information on sites and Aboriginal culture for transmission to future Aboriginal custodians (after Sullivan 1989 in Brown 2008:23);
- Provide better regional context information and access to information on cumulative impacts on heritage across the state; and
- Consult further with all stakeholders to determine the manner and form of the Register.

Proposal 2: Additional criteria pertaining to the Aboriginal sites of state importance

The definition of a site under s.5c of the AHA is clarified.

Issues

The proposed criteria for definition of a site are too narrow.

There is a focus on registrations under s.5c at the possible expense of sites classified under s.5a. The document is silent on s.5a and has the potential to exclude values attributed by other valid stakeholders.

A narrow definition of s.5c which requires that the site benefits Western Australians ("benefit" is not defined) will result in lack of protection for many culturally and scientifically significant sites, and in combination with removal of such sites from the Register and the recent DIA Due Diligence guidelines, may result in further destruction of Aboriginal heritage.

AACAI Recommends

The definition of heritage should be as broad as the Commonwealth legislation and should extend expressly to include historic and archaeological sites. Regional significance of sites should also be considered, as not all sites will be attributed state significance, but may be regionally significant or significant to a specific Indigenous group or area. Both the ascribed and potential significance of sites should be evaluated.

Assessments relating to the significance of sites and areas must be separated from decisions concerning land use. The former should be the responsibility of Aboriginal communities, heritage consultants and other stakeholders, the latter the responsibility of the APMC.

Proposal 3: Stronger compliance measures including civil penalties and remediation orders and adjustment to the onus of proof provisions

There need to be stronger deterrents to disturbing or damaging Aboriginal sites.

Issues

Protection of heritage will be weaker, not stronger, because unregistered sites will not be afforded the same level of protection as registered sites.

This proposal removes the blanket protection for Aboriginal heritage in this state. This will mean that there is no legal deterrence to destroying Aboriginal heritage if it has not been placed (and maintained) on the DIA register.

This proposal would deter proponents from undertaking any cultural heritage assessment, as onus of proof would mean that without a formally registered site there is no potential for legal prosecution for destruction or disturbance of a site.

Because of the remoteness of many projects, the lack of public access to mining tenements, and the fragile nature of Aboriginal heritage, it may be difficult to establish disturbance of a site after the event and allow proponents to exclude heritage stakeholders from assessing ground-disturbing activities. In some cases it may be difficult to prosecute for disturbance or destruction of unregistered sites. This proposal would therefore encourage proponents to disturb unsurveyed areas potentially destroying archaeological and other cultural heritage. This is not consistent with the principle of (legal) certainty.

The Discussion Paper fails to address limitations of current knowledge arising from the lack of previous survey over much of Western Australia, which means that surveys are often advisable (these limitations should have been considered at this late stage in the review process). However the proposal provides little incentive to conduct surveys to identify heritage sites.

Land owners who may be considering future developments on their land may be discouraged from allowing Aboriginal custodial groups and heritage practitioners access to land because if such groups were to find new sites and successfully have them registered, other land users' future activities might be restricted. Again the process is confused and lacks clarity and effectiveness.

The proposal implies a re-writing of s.17 and does not meet national and international heritage obligations and responsibilities.

This proposal cannot be achieved without a significant re-writing of section 17 of the AHA which may, result in a dramatic reduction in the scope of the protection it provides in its current form. The AHA needs to protect all Aboriginal Heritage, not only places recorded in the Register.

Australia and its States have national and international obligations regarding the protection and management of Indigenous heritage and this proposal would substantially weaken those commitments.

The provision for remediation orders for damaged sites is unrealistic as once damage is done, most if not all heritage sites cannot be re-made or easily repaired.

AACAI Recommends

We support stronger penalties and enforcement for the illegal and unpermitted destruction and disturbance of Aboriginal sites.

The onus of proof will not allow protection of non-registered sites. This change should be a duty of care toward Aboriginal heritage, thereby allowing protection for those sites that are currently undiscovered.

Proposal 4: Site Impact Avoidance Certificates

The proposal for the DIA to issue certificates, given appropriate frameworks and safeguards, has the potential to enable a faster turnaround for development applications. While certificates should normally require a survey to establish the (non)existence of sites, there are some cases (such as urban areas) where a survey may be unnecessary. Even in this case sub-surface investigation may be highly advisable given many sites will not manifest themselves on modern land-surfaces yet nevertheless be extremely significant and uncovered during earthworks.

Issues

The process for issuing certificates will not include heritage surveys or comprehensive consultations

The reference to “provisions to ensure appropriate consultation and fair decision-making and to enable the Department to promote agreement between applicants and traditional custodians to enable certificates to be issued” means that such certificates can be issued after consultations (or negotiations) without the necessity to conduct Aboriginal heritage surveys for as yet unidentified sites on the land in question.

This proposal excludes any reference to negotiations with Aboriginal representative bodies and land councils, removing the involvement of legal representation for Indigenous people during these ‘negotiations’. The proposed amendment refers to Traditional Custodians rather than Native Title Claimants (or Holders). This proposal appears to be a return to the 1970s, when mining companies could make ‘deals’ with any available Indigenous people and not consider their adequate counsel. This could be a risky and unethical approach.

If certificates were to be issued for development applications involving ground disturbance, a re-writing of s.17 would be required. In any case, sites may be disturbed.

Under this proposal certificates can be issued to proponents of developments on or in the vicinity of sites that “will not result in significant impact on the importance and significance of any Aboriginal sites and would not constitute an offence under section 17”. Section 17(a) states that any person who “excavates, destroys, damages, conceals or in any way alters any Aboriginal site” commits an offence. This proposal would require a significant re-write of section 17 of the AHA resulting in a dramatic reduction in protection for heritage sites. Very few development activities may be construed as leaving no impact on sites. Currently if a proposed activity does not involve ground-disturbance then DIA routinely advises that no Section 18 process is required. If a higher level of indemnity is required the question is raised, what activities is certification required for? What other activities would constitute a significant impact and require s.18 approval? The proposal is silent on this issue.

If certifiable activities resemble the so-called low-impact activities under the recently-promulgated Due Diligence guidelines, disturbances to sites are inevitable.

AACAI Recommends

Until the above uncertainties are resolved, AACAI cannot support this proposal, and strongly urges the government to set clear and transparent definitions for low impact activities in consultation with all heritage stakeholders. These definitions must not follow the current guidance on low impact activities as per the DIA’s *Due Diligence Guidelines* as the definitions contained in the guidelines are grossly inadequate and open to misuse. The Victorian guidelines provide what seem to be a robust series of distinctions about the effect of different forms of ground disturbance on archaeological deposits / features and we encourage the Government to review these.

Proposal 5: Enable the department to levy fees and recover costs for survey and other services

Current funding to the DIA is inadequate, and the proposal will allow DIA to levy fees to recover costs.

Issues

Conflict of interest

The DIA is contemplating undertaking Aboriginal heritage surveys itself. Officers of the DIA would undertake and charge for their own heritage surveys for other Government agencies and then, as the regulatory authority, assess and evaluate those same surveys and issue section 18 consents. As the ACMC would be left out of the certification process (Proposal 4) there would be little check on DIA power over heritage, use or abuse of that power.

Lack of detail in the proposal

More detail on what the fees will be, who will pay them and what the levy would relate to is required to comment further on this point.

AACAI Recommends

AACAI strongly supports significantly increase funding to the DIA to allow it to adequately administer the AHA.

Proposal 6: Remove risk that Section 18 consents may be technically invalid because of the definition of “the owner of any land”

Currently Section 18 applications must involve the consent of the land-owner, which may be a cumbersome process for complex land parcels.

Issues

AACAI supports the proposal to take out the definition of owner of the land from the current Section 18 process. Were all the other proposals to be accepted, this proposal will speed up the Section 18 process in those few instances when section 18 applications would still be required.

Proposal 7: Investigate options to amend the *Aboriginal Heritage Act 1974* and the *Environmental Protection Act 1986* to streamline decisions about Aboriginal heritage.

Streamlining the decision making process between the two agencies is a suitable proposal. Nevertheless there should remain a check and balance approach in the EPA to Aboriginal heritage to ensure that Aboriginal heritage issues do not fall through the cracks or get overlooked.

Issues

No safety net

This proposal will effectively remove the current safety net of the right to appeal using the provisions of the EPA legislation if the AHA fails to adequately protect Aboriginal heritage sites. It also removes another check on developers to recognise heritage concerns.

General comments on the discussion paper

We offer the following general comments and critiques regarding the discussion paper. Each of the seven individual proposals is addressed in detail further below.

Lack of substantive detail

AACAI are concerned that the discussion paper lacks substantial detail and contains unclear definitions of the terms used within the proposal, which has led to different interpretations of the intent of the proposals.

Proposals not in keeping with the original spirit and intent of the AHA

AACAI strongly believe that these proposals are not consistent with the original spirit and intent of the AHA. The second reading speech to Parliament in April 1972 indicates that the AHA was intended to provide a 'means to protect and preserve Aboriginal sites' (Hansard WA Legislative Council 11 April 1972: 472). The inclusion of both preserve and protect is indicative of the intention that these are separate objectives and signals a broader duty of care than simply looking after the 'significant' sites, as is implied by the proposed changes. Responses to the second reading speech reinforce this and further point to the archaeological record as being of material importance for humanity in sustaining a record of Aboriginal occupation and capable of being preserved despite wide scale development (see Hansard WA Legislative Council 11 April 1972: 472, Hansard WA Legislative Council 20 April 1972:837, Hansard WA Legislative Council 5 September 1972:2969).

We would stress further the fact that both the government and the opposition in the 1972 debates saw all aspects of the Indigenous use of the landscape as the only record that would remain to document pre-white 'history' and acknowledged that Indigenous peoples

would, over time, look at this record differently and hold different values for this resource. In 1972 it was anticipated that significance to Indigenous peoples will change over time and this must be accommodated by the principles and exercise of the elements incorporated in the AHA. The Act, therefore, should not be changed in its expression or 'implementation' of values under Section 5.

These proposals do not appear to be within keeping with the original application of the AHA which was intended to include a full range of places concerned with Indigenous peoples, not just particular classes such as 'significant' sites. Moreover, the declared significance of places under the AHA does not solely reside with Indigenous peoples.

Proposals not in keeping with national and international cultural heritage management standards and best practice

AACAI do not believe that the proposed changes are in keeping with national or international standards for best practice cultural heritage management, such as the Burra Charter (The Australia ICOMOS Charter for Places of Cultural Significance 1999), and are contrary to the recommendations of the Evatt Report (1996), which the Commonwealth government is currently taking steps to implement. Such stark inconsistencies have the potential to damage both Western Australia's and Australia's reputation in relation to cultural heritage management and not the least human rights.

The AHA and its administration should be modelled on best practice cultural heritage management. Protection under the AHA should include all aspects of contemporary Aboriginal traditions, inclusive of archaeological and traditional sites, to provide an appropriately inclusive approach (Evatt 1996, Annex VI).

We strongly urge the WA Government to apply 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 Indigenous 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 the main consideration for the Minister; and

- Site protection legislation should take into account the basic principle that Indigenous 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 WA Government to initiate an accreditation process for heritage practitioners (such as Heritage Victoria) as part of best practice and the raising of standards of work. AACAI provides its members with details on standards, ethics, codes of conduct and professional consultation with Indigenous parties and have been used by Heritage Victoria as an accreditation organisation. .

Interaction of the proposals with the Due Diligence Guidelines significantly reduces the application and protection of Aboriginal sites

AACAI is concerned to note that when the proposals are considered in combination with the already released Due Diligence Guidelines, there are several serious issues that arise.

Firstly these proposals, in combination with Due Diligence Guidelines, principally concern a strict application of the definition of section 5 of the AHA. Such an application will effectively result in **greater than 90%** of all Aboriginal heritage sites in this State being **disqualified from legal protection under the AHA**. There are also no provisions to contemplate the identification and recording of sites that are not yet registered.

In combination with the Due Diligence Guidelines, these proposals further:

- remove the requirement in the vast majority of cases for developers to commission or undertake Aboriginal heritage surveys;
- enable the DIA to undertake and charge for their own heritage surveys for other Government agencies and then, as the regulatory authority, assess and evaluate those same surveys and issue section 18 consents; this appears to represent a direct conflict of interest;
- implicitly require a dramatic rewrite of section 17 of the AHA to produce a significant dilution of the protection currently afforded to sites of Aboriginal Heritage under the AHA; and
- appear to be constructed to devalue Aboriginal heritage to the extent that developers will be able to destroy sites without any legal impediment, thereby providing the well touted “clarity, certainty, effectiveness, and efficiency” – but only in terms of removing ensuring compliance requirements for developers.

Conclusion

In conclusion, we reiterate our deep concern about the lack of wide consultation throughout the AHA reform process. Had the consultation process been more comprehensive and inclusive of the viewpoints of professional heritage practitioners, the proposals in the Discussion Paper may have comprised more positive and practicable solutions to some of the issues currently being faced.

The seven proposals as a whole would appear to significantly dilute heritage protection in the state of Western Australia. They will effectively remove protection from any Aboriginal site that is not on the DIA register and at the same time reduce the number of sites listed there.

We urge you to reconsider the seven proposals outlined in the discussion paper. AACAI recommends a much more inclusive, collaborative and pragmatic reform process that focuses on achieving better results for the protection and preservation of Aboriginal heritage for all Western Australians and clarity and certainty for land-users and for future generations.

We recommend to the Government that changes to heritage protection and procedures are needed in Western Australia and that any changes will need to include:

1. Provision of comprehensive minimum standards for heritage practitioners;
2. Accreditation of heritage practitioners, such as the model used in Victoria; and
3. Provision via regulations of clear triggers for heritage surveys.

We look forward to participating in the next stage of heritage act reform and would like to request that AACAI is involved in any industry working groups and advisory panels, given our members long and extensive experience in the practice of heritage management across Australia.

Yours sincerely,



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National President



Phil Czerwinski
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