



REVIEW OF THE *ABORIGINAL HERITAGE ACT 1972*

CONSULTATION PHASE 1
2018

KEY THEMES AND SUMMARY OF ISSUES

MARCH 2019

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INTRODUCTION

On 9 March 2018, the Hon. Ben Wyatt MLA, Minister for Aboriginal Affairs initiated a review of the *Aboriginal Heritage Act 1972* (the AHA) with the publication of a Consultation Paper that posed a series of questions on how the AHA currently operates, to understand its effectiveness from stakeholders' points of view. The Paper also sought to identify any gaps in the legislation and encourage ideas for improvements.

The Department of Planning, Lands and Heritage held workshops throughout Western Australia, which drew the attendance of 550 people to discuss the issues raised in the Consultation Paper. More than 130 written submissions were also received by the time public comment closed on 1 June 2018.

The department has captured all the comments received to inform the development of a Discussion Paper that sets out proposals for new Aboriginal heritage legislation. This document is a synthesis of the issues, arranged in themes, that were raised in both written feedback and during the workshops conducted in the first phase of consultation.



KEY THEMES AND ISSUES

The scope and purpose of the *Aboriginal Heritage Act 1972 (AHA)* need to change and new legislation is needed

1. Users of the current legislation are frustrated

Aboriginal people are frustrated by the system that is failing to protect their heritage places, and the commercial sector is frustrated about the high costs and risks associated with trying to comply with the *Aboriginal Heritage Act 1972* (the AHA).

“The current system by which heritage is identified, assessed and registered is difficult for Aboriginal people to understand without referring to heritage and legal professionals”.

Aboriginal Cultural Material Committee

“Over the last decade or more, the Association of Mining and Exploration Companies (AMEC) has regularly been advised by industry members of their overall frustration with the current cultural heritage approvals process, to the point where some exploration companies have abandoned their tenements and turned away from Western Australia and invested in other jurisdictions. This is in the face of increasing global competition for mineral exploration investment”.

Association of Mining and Exploration Companies

2. The AHA represents outdated concepts of the rights of Aboriginal people, their heritage and heritage management practices

Although the legislation was groundbreaking in its day, developments in national and international standards in cultural heritage management and the legal rights of Aboriginal peoples have overtaken an old Act which is focused on ‘museum-like cataloguing and acquisition processes’.

“The AHA needs to reflect the advancement of Aboriginal peoples’ rights in the 46 years since it was enacted”.

Nyamba Buru Yawuru

“The AHA does not reflect the significant changes in the social, political and economic landscapes since it was enacted. For example, it does not account for development in native title, nor does it reflect fundamental shifts in heritage management principles and practices as exemplified in the...Burra Charter 2013”.

Australian Association of Consulting Archaeologists Inc.

“The AHA is now embarrassingly out of kilter with modern standards...it may be more practical to write an entirely new Act”.

Stevens Heritage Services

“There should be a statement that recognises that Aboriginal people have primary rights over their heritage and that this status shall guide how the Act is applied”.

University of Western Australia

Feedback from the *My Heritage, My Voice* workshops consistently called for “protection for places deemed to be important by people whose heritage it is” (*My Heritage, My Voice - Broome*). Strongly consistent examples across the State were stories and song lines, Dreaming tracks, Law grounds, burials and reburials of ancestors, massacre sites, birthing places, traditional hunting grounds and sources of plants and animals used in traditional foods and medicines, waterways, etc. It is clear that Aboriginal peoples across the State want better protection for their intangible heritage, cultural landscapes and intellectual property.

“It is no longer acceptable to focus purely on physical manifestations of Aboriginal cultural heritage. Intangible Aboriginal cultural heritage must be acknowledged in the AHA”.

Nyamba Buru Yawuru

“The current Act’s narrow focus on artefacts and sites is badly out of step with the last 30 years’ development in our understanding and management of heritage. Globally, heritage is moving to a more dynamic and values-based understanding and management of both ‘tangible heritage’ (e.g. artefacts and sites) and ‘intangible’ heritage (e.g. cultural landscapes, intellectual property, etc)”.

University of Western Australia

“Heritage Act needs to cover song and story lines, not just physical features”.

My Heritage, My Voice – Warburton

“Focus being on landscapes, not just the site”.

My Heritage, My Voice – Bunbury

“Protect cultural corridors for travel by spiritual being – cultural corridors also need to be used during Law – may be seasonal”.

My Heritage, My Voice – Broome

“...there should also be provision for protection of Aboriginal stories and songs which is not currently addressed”.

Shire of Toodyay

“...water, plants, animals (should be covered). Has been a focus of land use planning - needs to be a focus on broader heritage and needs to be resourced”.

My Heritage, My Voice – Leonora



Not everyone agrees:

“Trees should not be sites”.

Working with Our Aboriginal Heritage – Kalgoorlie

The majority of submissions and comments at workshops made it clear that Aboriginal people wish to protect their cultural knowledge from inappropriate use and being used by others for profit.

“Legislation needs to make it an offence to publicise on the Internet any culturally confidential images”.

My Heritage, My Voice – Warburton

“There are by and large no real attempts to address intellectual property or repatriation in the current Heritage Act and again, it is a relic of its time...the Act...should include protections for the stories, songs and rituals that frame the relevance of any such objects”.

Terra Rosa Heritage Consultants



3. The AHA does not adequately cover ancestral (skeletal) remains

Where this point was covered in submissions and workshops, the overwhelming majority supported the expansion of legislation to provide for ancestral remains.

“Skeletal remains to be included in the Act”.

My Heritage, My Voice – Bunbury

“The proper acknowledgement and care of deceased ancestors and Aboriginal ancestral remains is an important part of Aboriginal culture. The AHA should include specific provisions that cover the discovery and management of Aboriginal ancestral remains as determined by the relevant traditional owners/native title holders”.

Nyamba Buru Yawuru

“Aboriginal ancestral remains, wherever they are, are Aboriginal heritage and should be protected (with expert assistance where required) and returned to the appropriate custodial group”.

Dr Joe Dortch

4. The AHA is inconsistent with the principles of the United Nations Declaration on the Rights of Indigenous Peoples

After initially voting against its adoption in 2007, Australia became a signatory to the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* in 2009. However, the AHA arguably allows activity that is in breach of Articles 8, 11, 12, 25: “Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship

with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard”. And Article 31: “Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage...”.

“...the AHA should be consistent with the minimum standards prescribed by international law and regulations, including but not limited to UNDRIP, which was endorsed by the Australian Government in April 2009”.

Nyamba Buru Yawuru

“...the UNDRIP and other key international instruments confirm that the Aboriginal people should not merely be consulted in such processes but have the right to participate in the decision-making”.

Paul Sheiner, Director, Roe Legal Services

“The GLC holds the view that the AHA being from a pre-native title and pre-racial discrimination legislation era, is fundamentally flawed and should be repealed and replaced by a statute that is consistent with the United Nations Declaration on the Rights of Indigenous Peoples, the Native Title Act 1993 (Cth) and the Racial Discrimination Act 1975 (Cth)”.

Goldfields Land and Sea Council

These Articles highlight the concept of strengthening and developing cultural heritage. This is particularly relevant in areas where evidence of cultural heritage exists in the landscape, but the stories and significance have been lost through historical dispossession of the land by the original peoples.

5. The AHA allows ancient and significant Aboriginal heritage places to be lost

Archaeologists raised the issue that evidence to prove a place is a site under the AHA may not be visible on the surface and there is no requirement under the AHA to assess the potential for sub surface archaeological deposits prior to developments. In addition, recent changes in policy have meant that archaeologists have been unable to obtain permits to test sub-surface potential unless the site is registered under section 5 of the AHA. If sub-surface investigations proceed without a permit and the place is subsequently deemed a site, the archaeologists are guilty of an unauthorised site disturbance. If sub-surface investigations do not proceed, artefacts are lost to development because they have not received the protection afforded to registered sites. As a result:

“...there has been a massive loss of ancient and significant sites across this state over the last six years”.

Australian Association of Consulting Archaeologists Inc

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

Australian Archaeological Association

In addition, the intended purpose of the AHA to protect Aboriginal cultural heritage can easily be subverted by the politics of those in statutory decision-making roles. There is a need to “diminish the potential for decisions being circumvented by political or economic pressures,” (Nyamba Buru Yawuru).

6. Protection, conservation and change are not properly considered

The AHA does not consider the effects of incremental change and damage on Aboriginal heritage.

“It is important that the Act clearly sets out how Aboriginal heritage is not only protected and conserved but how change, if determined appropriate, can be suitably managed”.

National Trust of Western Australia

“The new heritage legislation should specifically deal with the issue of the cumulative effects of multiple development on sites particularly along significant waterways like the Fitzroy River”.

Kimberley Land Council

7. Standards for heritage consultants and enforceable timeframes for surveys

A high number of respondents, particularly heritage consultants, suggested that the profession should be regulated or accredited with standards imposed.

“What is missing from the Act?... 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”.

Australian Archaeological Association Inc.

“There are no standards or criteria for reporting the identification of heritage, consulting with Traditional Owners, nor assessing the significance of impacts. This creates an environment where project proponents are able to engage heritage consultants who align their conclusions and recommendations within reports to the relevant development’s agenda”.

Yamatji Marlpa Aboriginal Corporation

“...Land councils and native title bodies often select people to carry out surveys that have had no connection to the land they are looking at. This is perceived as a successful attempt to bolster support and ensure loyalty to the leader of the NTC/TO party. The survey suffers as a result and heritage items and locations are often missed by those that ‘don’t know this country’. In turn, this leads to a loss of credibility in the heritage processes and outcomes”.

Amalgamated Prospectors and Leaseholders Association of Western Australia

“There is also a need for the Department to develop and enforce minimum standards for heritage consultancy work...such guidelines will not only improve the quality and outcomes of heritage work but also give all parties certainty”.

Australian Association of Consulting Archaeologists Inc.

“Many of the calamitous situations that arose in the recent mining boom were the result of inexperienced and otherwise underqualified ‘professionals’ attempting heritage consultation”.

Dr Guy Wright, Managing Director, Big Island Research (and former public servant servicing the Aboriginal Cultural Material Committee in the 1990s)

“Many places identified by professionals are not sites, but end up delaying process and adding costs...there should be a register of heritage professionals that are accountable to standards – and can be struck off - fined”.

Working with Our Aboriginal Heritage – Kalgoorlie

“Act to include schedule of costs for consultation and surveys”.

Working with Our Aboriginal Heritage – Kalgoorlie

Small miners and prospectors suggest that the AHA lacks the provisions that are available in other State legislation that they can rely upon when surveys, reports and appeals take ‘far too long’. They also noted that they cannot buy their way out of delays.

“This is often caused by native title claimants and traditional owners having no regard for commercial or procedural realities. This contrasts starkly with the WA Mining Act or the Environmental Protection Act both of which have numerous provisions for timely procedure compliance combined with strict and enforceable punitive measures for lack of compliance”.

Amalgamated Prospectors and Leaseholders Association of Western Australia

8. Lack of parity with the Heritage of Western Australia Act 1990 (now Heritage Act 2018)

This has been highlighted by multiple stakeholders as a signal that Aboriginal heritage is valued less than the heritage buildings and places that are important to non-Aboriginal Australians. The sentiment extends beyond the penalties to the principles of decision-making.

“On the other hand, the Heritage of Western Australia Act (1990) (and the new Bill before Parliament) distinguishes between those things of State significance on which the Heritage Council of Western Australia provides advice and those things of local significance which are dealt with by local governments. A similar process could be considered with Land Councils and other recognised Aboriginal Entities performing this local/regional function”.

National Trust of Western Australia

9. Rights afforded to manage sites under the Native Title Act 1993 (Cth) are not respected in the administration of the AHA

“There is no recognition of native title rights and interests of Traditional Owners in the AHA”.

Central Desert Native Title Services

“A concerted effort to incorporate the values often recognised under native title (use and knowledge of medicines, ochre, secret and public ritual performances, access to land etc.) needs to be built into the new Act”.

Stevens Heritage Services

“Although native title provides for the right to access, protect and conserve sites or significant places, it does not necessarily protect the sites themselves. The native title system can occasionally protect heritage through its processes, agreements or conditions, but where future acts are granted, the situation then reverts to the AHA, which places the burden of protecting heritage on the traditional owners by requiring them to seek injunctions to prevent site disturbance. These injunctions are rarely successful...”

Yamatji Marlpa Aboriginal Corporation

10. The AHA does not provide a process for de-registering sites or give Aboriginal people a right of appeal against such a decision

Under the AHA, there is a presumption that all heritage sites are protected, whether they are registered or not, but if a place was on the Register of Aboriginal Places and Objects (the register) and is deregistered, it loses that presumptive protection. This could be premature if a place has been deemed ‘not a site’ before a licence to excavate has been granted.

“The issue of de-accessioning or de-registering a site is of particular cause for 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; Vaughan 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...De registration should be subject to independent oversight”

Australian Association of Consulting Archaeologists Inc.

11. There is no clear mandate in the AHA to celebrate, conserve and manage Aboriginal heritage

A number of respondents pointed to the fact that this essential part of successful heritage protection is mandated in the *Heritage of Western Australia Act 1990* and the new *Heritage Act 2018* as a function of the Heritage Council, but there is no equivalent in the AHA.

“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”

Australian Association of Consulting Archaeologists

“Educate the public - brochures”

My Heritage, My Voice – Carnarvon



In addition, the emphasis of the current regime is protection or destruction. There is no incentive to reach agreements to avoid an area containing heritage value or conserve and manage it.

“There should be provisions in the Act requiring land users to make attempts and demonstrate efforts to avoid sites before they are able to lodge a section 18 application.

Consultation must result in an agreed outcome before the proponent can progress to a section 18 application”.

Geraldton Native Title Negotiation Team

12. Under the current system, heritage values of a site are assessed in the context of a request to destroy or impact it in the ‘general interest of the community’

“In its current form, the Act prioritises the rights of the general community over Aboriginal people”.

“Deciding the significance of a place in the context of the impending destruction can open the process up to conflicts of interest and potentially biased decision making”.

Australian Association of Consulting Archaeologists

“Separate processes for assessing significance and decisions concerning land use. An independent Aboriginal heritage body should determine whether a site is significant and should make recommendations or set conditions concerning its protection”.

“Any decisions that allow the impact upon Aboriginal heritage must have regard to the wishes of Aboriginal people, supported by compelling reasons of public interest

beyond just a simple economic argument and taking the social and cultural effects into consideration and be subject to accountability”.

Goldfields Land and Sea Council

13. The AHA does not cater for the changing nature of a living heritage

A number of stakeholders reflected that to be relevant to the oldest living culture, new legislation must allow for its adaptation and growth.

“Current Act takes a ‘frozen in time’ approach to heritage. Needs to protect living culture”.

My Heritage, My Voice – Kalgoorlie

“Changing the language in the Act for living, alive Aboriginal Law and Custom. Not in the past”.

My Heritage, My Voice – Karratha

“...there is no time limit on a section 18 notice. Once it is received, it is currently held in perpetuity. This also needs to change as the sites’ values change – whether they are cultural, scientific or spiritual”.

Snappy Gum Heritage Services

“Legislation should ensure it is inclusive of Aboriginal culture that is both pre and post European Arrival”.

Geraldton Traditional Owner Negotiation Team

14. Language in the AHA is broad, and important terms are ill-defined or missing

The absence of clear definitions of pivotal terms has created confusion and permitted interpretations that have been counter to the original stated purpose of the AHA.

“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”.

Australian Association of Consulting Archaeologists

“The use or misuse of heritage terminology in the current Act has only ever added confusion and frustration for all concerned. For example, ‘significance’ is said to mean ‘importance’, but later it means something a bit different. ‘Interest’, ‘profoundly significant’, ‘special significance’ are all poorly defined, if defined at all.”.

Stevens Heritage Services

There is no scope for a ‘tiered’ approach to impact assessment, which means activities that have ‘low impact’ on the heritage values are subject to the same level of scrutiny as those that will certainly affect heritage values. This creates “unnecessary use of Department, Aboriginal Cultural Material Committee (ACMC) and Ministerial resources” (Rio Tinto Iron Ore Pty Ltd) and contributes to administrative backlogs.

“The broad language in section 18 may capture low impact activities that are unlikely to affect Aboriginal heritage values”.

Rio Tinto Iron Ore Pty Ltd

15. The AHA is inconsistent with other legislation

Since the AHA was enacted, there have been significant changes in the legislative context at both a State and Commonwealth level – as discussed above, the *Native Title Act 1993* (Cth) (NTA) is the most notable example. Other legislation that affects Aboriginal heritage has been introduced since the AHA and the lack of alignment across the intersections creates confusion and unnecessary regulatory burden, or in the case of land use planning, gaps. This was highlighted by many stakeholders in feedback and workshops.

“Currently the AHA operates in isolation from and in division with the NTA”.

Nyamba Buru Yawuru

“At present there is no clear statutory connection between the NTA and the Act. Registered native title claimants and registered native title holders should have a defined role under the Act, but there needs to be a recognition that other Aboriginal people may need to be consulted”.

Paul Sheiner, Director, Roe Legal Services

“...the AHA must better align with the NTA. This would ensure Aboriginal people are recognized as having ownership rights over their heritage. Explicit requirements for proponents to consult and negotiate with Traditional Owners will provide more certainty regarding their involvement in the project development process”.

Yamatji Marlpa Aboriginal Corporation

“The principles of the Aboriginal Heritage Act 1972 (AH Act) are generally not integrated into the Planning and Development Act 2005 (PD Act) and, by extension, the land use planning system.....This means that there is

no requirement for planning proposals to be referred to an expert authority or knowledge holder/s on Aboriginal heritage, or for planning decision makers to consider the potential impact of a proposal on an Aboriginal heritage site.”

Western Australian Planning Commission

“Local government laws shouldn’t restrict cultural practices eg fires, camping, Aboriginal business...”

My Heritage, My Voice – Roebourne

“...the heritage approvals process needs to have a better interface with the environmental planning and approval process for developments”.

Paul Sheiner, Director, Roe Legal Services

16. Lack of statutory protection to mitigate heritage being traded away

Feedback suggested that some mining companies routinely require native title parties to accept restrictions on their right to be involved in decision-making around heritage matters as a pre-condition to native title settlements so that, for example, the native title holders agree not to object to an application to destroy Aboriginal heritage.

“...statutory protection against contractual silencing clauses, similar to unfair contract legislation which recognizes the unequal bargaining position of native title holders and developers, should be considered to protect Aboriginal people’s rights to participate in the heritage process and improve government decision making”.

Paul Sheiner, Director, Roe Legal Services

17. No obligation to disclose Aboriginal sites creates uncertainty

Land users highlighted this omission as a particular problem.

“Not obliged to disclose presence of sites when selling land”.

Working with Our Aboriginal Heritage - Esperance

“Land users should be advised of the presence of sites whether they are registered or not”.

Working with Our Aboriginal Heritage – Kalgoorlie

“[Act needs to have] mandatory reporting of sites and surveys”.

Working with Our Aboriginal Heritage – Kalgoorlie

18. Protection mechanisms inadequate or missing

Areas given ‘Protected Area’ status under section 19 of the AHA are not permanently protected under the Act.

“Current section 19...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”.

Australian Association of Consulting Archaeologists Inc

A number of mechanisms were suggested as missing from the AHA that would offer better protection for Aboriginal heritage, the most common one being creating a role for Aboriginal

rangers in the monitoring and management of sites. Others included improved tenure regimes; ‘stop work’ orders; ‘dial before you dig’ requirements; education and mandatory training for land users and government employees; remediation training for offenders and penalties being payable to fund restitution where damage has been done.

“AHA to include Rangers with due authority same as CALM Act and Local Government”.

My Heritage, My Voice – Busselton

“Heritage awareness training – this needs to be mandatory for land users – Remediation/ Education courses for offenders”.

My Heritage, My Voice – Carnarvon

“Penalties need to be paid towards rehabilitation and protection of area damaged”.

My Heritage, My Voice – Busselton

“Memorials on titles disclosing existence of sites”.

My Heritage, My Voice – Bunbury



Decisions under the AHA lack cultural authority

19. No-one can speak for another person's Country

It is a fundamental principle of Aboriginal culture, which the current Act does not recognise, that 'no one can speak for another person's Country'. It was a strong and consistent theme from the workshops and feedback, which makes the position of ACMC members and the Minister as decision-makers under the AHA untenable, whether they are of Aboriginal descent or not.

"ACMC may not have knowledge of country, so how can they decide?...Perth committee shouldn't make decisions about other country".

My Heritage, My Voice – Port Hedland

"Don't want people from other country talking about our country".

My Heritage, My Voice – Jigalong

"ACMC should be broken into regional committees".

My Heritage, My Voice – Bunbury

"It is not and has never been fair for Aboriginal members of the ACMC to be asked to consider matters concerning places outside their own traditional country, even with expert professional assistance".

Peter Gifford

20. Decisions on heritage matters are not being made by those who have cultural authority

The most frequently raised issue is that, too often, when Aboriginal people are consulted about the importance of their heritage places, cultural protocols are not observed, resulting in bad decisions, conflict and ineffective 'consultation' processes.

"It is culturally offensive and paternalistic for the Government or proponents to purport to have the requisite knowledge to assess whether or not Yawuru cultural heritage will be impacted on pre-conceived notions about what types of activities can impact Aboriginal cultural heritage".

Nyamba Buru Yawuru

"Mining companies consult with the wrong people – divide and conquer".

My Heritage, My Voice – Port Hedland

There is a strong consensus among Aboriginal people that decisions on heritage matters should be made 'on Country' with or by local people who have cultural authority, not a committee in Perth or even Aboriginal people if they do not have that status.

"Men decide for men's places, women decide for women's places – needs to be culturally appropriate".

My Heritage, My Voice – Port Hedland

This is also supported by some in industry.

“Consultation regarding heritage matters should be with Aboriginal stakeholders who have the right to speak for country”.

Rio Tinto Iron Ore Pty Ltd

While there is an accepted cross-over between the established rights of Traditional Owners under the NTA and cultural authority in some areas, this is not the case everywhere. The current members of the ACMC make a clear distinction between Traditional Owners (TOs) and Knowledge Holders. The community of Looma is a good example where the people express that they have a strong cultural bond to the area, but are not the Traditional Owners for native title purposes as their families were moved there from pastoral stations and reserves in 1970.

21. Aboriginal people do not accept State ownership of their heritage

The AHA is predicated on the assumption that the Minister for Aboriginal Affairs is the custodian of Aboriginal heritage and that only ‘he’ has the authority to trade off a heritage site if ‘he’ considers it to be in the general interests of the community. The majority of Aboriginal people consulted do not accept this.

“No self-determination (acknowledgement, protection) for Aboriginal people in relation to our own heritage culture and land. Who knows our heritage better than us! Why should others who don’t know our heritage make decisions on our behalf re our heritage”.

Kathleen Musulin

“Currently Aboriginal people are not recognised in the law as having any interest in Aboriginal heritage, and are not perceived as being the intended main beneficiaries of the AHA”.

Yamatji Marlpa Aboriginal Corporation

“Our roles are token”.

My Heritage, My Voice – Port Hedland

“Aboriginal heritage isn’t something that belongs to all people of the State in the same way that built heritage is”.

Tyson Mowarin

There is broad acknowledgement across other stakeholder groups that Aboriginal people are the rightful custodians of their own heritage.

“Aboriginal people are the custodians of their heritage”.

Chamber of Minerals and Energy

22. There is no requirement to consult Aboriginal people on their heritage

Although it is current practice of the department to endeavour to find the right knowledge holders to consult on the heritage values of objects and places, it is not a mandatory requirement. This was highlighted by multiple stakeholders as a key failing of the AHA.

“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.... Aboriginal people should not only be consulted, but [should be] actively involved in the management of their heritage”.

Australian Association of Consulting Archaeologists Inc.

“Aboriginal people do not want to stand in the way of whitefellas so called progress so at least give us the opportunity to be part of the process that satisfies both parties in the first instance, not just let the act be the Miners Act that it is now”.

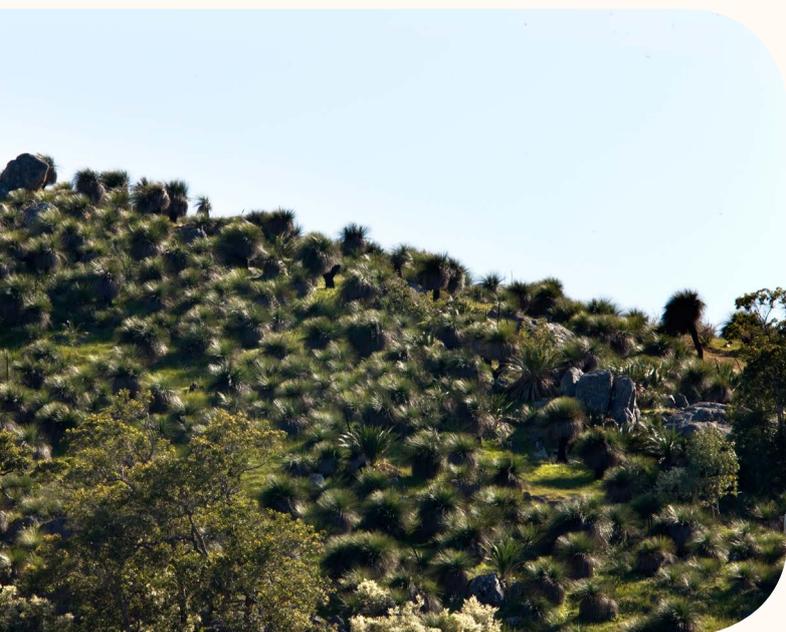
Tyson Mowarin

“...the AH Act and its Regulations are silent on Stakeholder engagement and what constitutes adequate Aboriginal Stakeholder consultation for the purposes of a notice application pursuant to section 18 of the AH Act”.

Department of Mines and Industry Regulation and Safety

“ACMC to be scrapped – consult with Traditional Owners”.

My Heritage, My Voice – Roebourne



23. There is not a unanimous view on who should be consulted or how to find the right people to speak for Country

Views ranged from land councils or prescribed bodies corporate (PBCs) being bodies that can speak for Country, or being responsible for finding who can, to not land councils or PBCs. There was a strong theme from the My Heritage, My Voice workshops that community Elders or ‘Law Bosses’ should be consulted.

“Heritage overrides native title”.

My Heritage, My Voice – Leonora

“The resources industry has encountered difficulty at times in identifying who has the right to speak for country”.

Chamber of Minerals and Energy

“Land Councils should not have ultimate say, should be Elders”.

“Traditional Owners – different family groups – 6-8 skins”.

“The right language group for the place”.

My Heritage, My Voice – Warmun

“Recognise in the Act that there are boundaries and tribes/language groups that are different to native title”.

My Heritage, My Voice – Balgo

“Need to be consulted about activities that impact local water sources, even if the activity is located far away”.

My Heritage, My Voice – Ardyaloon

“Problem with wrong people putting in forms to register sites, then them becoming informants for that site even though they are not the custodians”.

My Heritage, My Voice – Meekatharra

“Those engaged to conduct the consultation process need to be sufficiently distanced from the NTRB and/or PBC so as to be able to offer a broadly scoped and yet targeted consultation process to prevent bias”.

Human Terrains Anthropological Consultancy

24. One size does not fit all

Western Australia is a state the size of Western Europe, with multiple language groups of Aboriginal peoples, with different customs and protocols. A single, rigid methodology for consultation is not appropriate.

“Consultation with Aboriginal people should be explicitly required by the AHA. However, in terms of providing a ‘one size fits all’ mechanism to prescribe how consultation should be undertaken, that is flexible enough to be applied broadly, is a challenging proposition and one likely to fail if attempted”.

Hon Robin Chapple MLC

“Telstra’s concern is that the Act provides for a ‘one size fits all’ approach to decision making when the situations vary substantially”.

Telstra

25. ACMC membership requirements are not culturally appropriate

Under the AHA the only stipulated position is an anthropologist who has been approved by the university sector. There is no requirement for an Aboriginal person, regional representation or gender balance. Aboriginal people do not understand how such a committee can make decisions or recommendations on the value of objects and sites (particularly men’s and women’s sites) on their Country. This was a strong theme of the workshops in particular.

“Current ACMC system is culturally inappropriate”.

My Heritage, My Voice – Geraldton

“ACMC: [should have] more Aboriginal members, [should] respect gender sensitive info, needs to be cultural people on the ACMC, [should have] proper regional representation by Aboriginal people with cultural expertise and knowledge”.

My Heritage, My Voice – Ardyaloon

“ACMC not [being] representative [is a] problem”.

My Heritage, My Voice – Warburton

“The continuing role of the ACMC needs to be reviewed. It is inappropriate under traditional law and custom for anyone other than the traditional owners of country to be making statements about the cultural values that attach to sites and areas in that country”.

Kimberley Land Council

Westminster Law and Dreaming Law don't align

26. Westminster Law and Dreaming Law don't align

For Aboriginal people, their cultural connection to land is deeply spiritual. To protect their sacred places, Aboriginal people must try to explain their spirituality in terms of criteria that non-Aboriginal people can understand and form an opinion on. A number of stakeholders pointed out that, as no other people in Australia have to justify or prove their spiritual beliefs in this way, this is a form of discrimination.

“How do we prove spiritual connection?...Does a Christian person have to prove their beliefs”.

My Heritage, My Voice – Perth

“It's like Christianity”.

Aboriginal Cultural Material Committee Member

“More importance needs to be placed on the Mythological sites as it is argued Mythology is as important to Aboriginal people as Christianity and Churches are to the broader community”.

Western Australian Museum

“The Dreaming should occupy an important place at the heart of the Act if it is to reflect Aboriginal cultural values in any way, shape or form. Otherwise it is just another ‘whitefella’ piece of Colonial legislation protecting non-Aboriginal interest to the detriment of Aboriginal interests”.

Human Terrains Anthropological Consultancy

Further, the AHA is based on European concepts of land that are very different to those of Aboriginal peoples whose traditional relationship with land is one of custodianship rather than ownership. Aboriginal people consider they are custodians of the land they belong to and Dreaming Law is practiced by Elders who have the cultural responsibility to care for that Country. Many non-Aboriginal people struggle with the concept.

“Mythological sites should not be protected – can't protect something that doesn't have physical representation”.

Working with Our Aboriginal Heritage – Broome

“The Act does not reflect any real attempt at understanding of the nature of Aboriginal people's continuing relationship with places and objects”.

Aboriginal Cultural Material Committee

“For many Aboriginal groups, all places are of equal value regardless of how they are constituted. It is only processes such as heritage destruction regimes that force them to create hierarchies of significance”.

Yamatji Marlpa Aboriginal Corporation

27. Destruction of sacred sites and places being described as ‘not sites’ has a negative effect on community well-being

The senior law men and women of Aboriginal communities are custodians of the traditional and ecological knowledge associated with their Country. The ability to practice and pass on law and culture associated with the Dreaming is central to the health and well-being of Aboriginal communities. Aboriginal people and heritage professionals pointed out that the destruction and mismanagement of their Country and sacred heritage is having serious consequences for people.

“Following our Law is like abiding by the Ten Commandments”.

Aboriginal Cultural Material Committee Member

“If they tear down the Globe Hotel, people will be sad. If they destroy our country, we get sick”.

My Heritage, My Voice – Perth

ACMC decisions:“...outcomes can affect the well-being of the associated Aboriginal custodians and communities”.

“We would also like to highlight that the perception of heritage places as ‘not sites’ can be particularly hurtful to Aboriginal people”.

Australian Association of Consulting Archaeologists Inc.

“Many sites have what are currently known as ‘intangible’ heritage characteristics. How do you measure impacts upon people’s feelings or emotional wellbeing? Why is this considered unimportant? The constant ‘Sorry Business’ of saying goodbye to Country must leave people in various stages of Post-Traumatic

Stress Disorder. Surely this is measurable and extremely important to the mental and physical health of the affected Aboriginal people. Social Impact Assessments, as part of a full Environmental Impact Assessment, should be enacted to understand the full raft of repercussions, including impacts on health and well-being”.

Human Terrains Anthropological Consultancy

28. Lack of understanding leads to lack of value of Aboriginal cultural heritage

The majority of non-Aboriginal Australians do not understand the Dreaming and regard it as folklore rather than religion. The fact that Aboriginal law is referred to in terms of Dreaming stories, lore and song lines and is not written down makes it hard for non-Aboriginal people to accept as equivalent to forms of religion they understand.

“It’s intuitive that the proposition that one party should be paying for another’s ideological or cultural beliefs will fail to gain support in that discussion from a financing party that simply does not share those same beliefs...The issue then creates racial disharmony and mistrust”.

“It’s a case of the small miner and prospector not understanding Aboriginal culture and Indigenous people not understanding the Western business model”.

Amalgamated Prospectors and Leaseholders Association of Western Australia

“Comparison with what would happen if someone knocked over a 100-year-old statue of an ANZAC”.

My Heritage, My Voice – Leonora

“Aboriginal cultural heritage is often seen as the bane of development. This is a serious image problem that is not helpful to Western Australia, as well as interfering with rational land management practices”.

Stevens Heritage Services

29. The stories and meanings of places are not fixed and are not the same for everyone

Like other belief systems and cultures, Aboriginal culture is open to different interpretations and adaptations over time. This can make it difficult to provide the certainty and boundaries preferred by people who want to access the land. Variations in stories and boundaries can bring into question their integrity by non-Aboriginal people.

“...Aboriginal heritage belongs to living communities; is dynamic and added to in an ongoing chain of cultural practise and custom”.

Stevens Heritage Services

30. Aboriginal cultural heritage can cover large landscapes across multiple cultural boundaries

The creation stories of the Dreaming can cover large landscapes with boundaries that are often only understood by Elders of the communities. Waterways (rivers and creeks) and Dreaming tracks often extend through different cultural boundaries. In a state like Western Australia, which relies on prospectors and miners being able to access land efficiently, there is inevitable

conflict between Aboriginal and Western systems of land mapping and ownership on such a large scale. The AHA focuses on objects and sites rather than cultural landscapes and boundaries.

“Currently, the AHA views Aboriginal sites through a standardised Western lens that focuses on physical manifestations of cultural heritage”.

“...the Yawuru Community considers all of Yawuru Country to be a ‘significant site’ as it is part of their living cultural landscape... environmental values are often inseparable components of Yawuru cultural heritage and greater protection must be afforded to those significant cultural and environmental sites”.

“Yawuru is [however] cognisant of the fact that it is not practical to register all of Yawuru Country as a site...”.

Nyamba Buru Yawuru



“The focus on the definition of a Site obscures the fact that any such definition, which requires finite boundaries to be drawn around places, is fundamentally inconsistent with Aboriginal conceptions of country, which are holistic and in which acknowledge the connections between places, animals and the living environment within a broader landscape”.

Paul Sheiner, Director, Roe Legal Services

“[Need to] acknowledge the boundaries of tribes and language groups and for there to be a register”.

My Heritage, My Voice – Leonora

“Law grounds need buffers to protect their integrity – applies to all sites, not just law grounds”.

My Heritage, My Voice – Broome

Waterways present a particular challenge as they can cross the countries of numerous people and are highly significant to the local Aboriginal people in terms of spiritual beliefs, personification of the waterway and the cultural obligation to care for it.

“The importance of place to Aboriginal people needs to be taken into account, e.g., consider the notions of rivers as person; rivers and waterways play an important aspect in Aboriginal culture, especially in the Creation time. The dismissal of places as of generalised significance needs to be avoided”.

Western Australian Museum

“Need to be consulted about activities that impact local water sources, even if the activity is located far away”.

My Heritage, My Voice – Ardyaloon

“[Act needs to cover] changes to rivers – waterflow, bed, banks, changes to water sources”.

My Heritage, My Voice – Carnarvon

“Recognition of cultural water flows as part of the legislation”.

Goldfields Land and Sea Council

“...the AHA needs to better consider and refer to waterways”.

Western Australian Local Government Association

“Indirect impacts – water drawing away from a site affecting a site further away”.

My Heritage, My Voice – Fitzroy Crossing

31. Mandatory disclosure of places by Aboriginal people is culturally inappropriate

Being certain of clearly defined areas that cannot be disturbed is important to land users in project planning and viability assessments. However, in Aboriginal culture there are places that can only be known to initiated individuals or specific genders.

“Consideration also needs to be given to the fact that Aboriginal people are, at times, reluctant to divulge sensitive cultural information to a government agency that has a history of providing information on a public platform, or to a proponent who wants to exploit the land”.

Western Australian Museum

Economic development is impeded when access to land is uncertain

32. Economic development is impeded when access to land is uncertain

A strong theme from industry stakeholders was that a potentially viable project that could create jobs and revenue for the State can be rendered uneconomic by uncertain approvals processes, exorbitant fees or protracted survey processes. The AHA fails land users by not giving clear definitions of what will be assessed as a site that will receive ‘protection’ or predictable outcomes of requests to destroy those sites in the ‘general interest of the community’. The absence of a clear process with timeframes for consultation and who should be contacted creates uncertainty and inefficiency.

“The current long heritage approvals process and increasing costs to industry are unsustainable and have become a significant barrier to the development of resource sector projects”.

Association of Mining and Exploration Companies

“The cost associated with the consultation process is problematic”.

Perth Airport Corporation Pty Ltd

Further, the current reactive approach to heritage management means that land developers will have received other planning and environmental approvals before considering Aboriginal heritage, which can result in delays and increased holding costs if Aboriginal heritage is identified in the area of the project.

“The due diligence approach does not provide certainty in the land development process and results in proponents carrying the following risks: risk of project delay or termination due to the late identification of an Aboriginal heritage site, and the risk of unintended damage to an Aboriginal heritage site, as knowledge holders have been reluctant to reveal information about sites for fear of losing control”.

“It is noted that other jurisdictions in Australia require land development proponents to prepare a Cultural Heritage Management Plan as part of the planning process, with the relevant Aboriginal group having a decision-making responsibility. This provides increased certainty in the land development process and reflects the greater level of Aboriginal custodianship over heritage matters afforded to Aboriginal people in other jurisdictions, particularly Queensland and Victoria”.

Western Australian Planning Commission

33. Economic opportunities being lost to other jurisdictions

Some industry respondents stated that the costs and uncertainty of planning resource projects in this State had resulted in investment being lost to other national and international jurisdictions.

“Over the last decade or more, AMEC has regularly been advised by industry members of their overall frustration with the current cultural heritage approvals process, to the point where some exploration companies have

abandoned their tenements and turned away from Western Australia and invested in other jurisdictions. This is in the face of increasing global competition for mineral exploration investment”.

Association of Mining and Exploration Companies

34. Economic opportunism has damaged the integrity of some survey processes and outcomes

A number of submissions highlighted the practice of charging high fees to a captive market.

“There are indications that withholding cultural heritage information after a heritage survey is completed is becoming increasingly prevalent as a means to extract further payments from resource companies”.

“The captive native title and Aboriginal heritage market is a substantial barrier to mineral and energy exploration in WA”.

Productivity Commission Report 2013 (quoted by the Association of Mining and Exploration Companies as still relevant in 2018)

“We are witnessing a huge escalation of demands by Land Councils and Heritage Groups that are causing a mass exodus from the small business sector”.

Amalgamated Prospectors and Leaseholders Association of Western Australia

“If an ideology or a culture is worthy of protections, then arguably it is worthy of protections without profit being the primary motivator”.

Amalgamated Prospectors and Leaseholders Association of Western Australia

“These financial expectations are undiluted, unconcerned and without mercy or consideration for our financial resources”.

Amalgamated Prospectors and Leaseholders Association of Western Australia

35. High costs of compliance with AHA/NTA will lead to the demise of regional towns

The trend of small prospectors and miners abandoning projects due to excessive costs was reported as impacting the viability of associated businesses and support services that are the lifeblood of regional towns. Many regional towns that are bypassed by the fly-in fly-out model used by larger corporate miners rely on business associated with small miners and prospectors for their survival.

“Lose the Prospectors and small miners and we damage our ability to support our own State and those that live in it”.

Amalgamated Prospectors and Leaseholders Association of Western Australia

36. Proponents have to bear the costs of the same site being surveyed multiple times

This issue was highlighted by a number of industry respondents as arising when a previous survey did not include a certain family, or the survey was conducted on a confidential basis, with the parties to the survey not willing to share the results.

“This just adds fuel to the fire of discontent but provides regular income that sustains and perpetuates the Land Councils, their clients and the heritage survey providers.

These clients include the legal profession, anthropologists, archaeologists and of course the Traditional Owners and Claimants themselves”.

Amalgamated Prospectors and Leaseholders Association of Western Australia

37. Land users obliged to seek consent for low impact activities

Land users have highlighted the costs and time associated with seeking consent for activities that involve little or no ground disturbing impact on cultural heritage sites, such as photography and surveys. The absence of a consistent approach across all Australian jurisdictions adds unnecessary complexity to land users with national operations, such as Telstra. AMEC and Telstra are among those industry bodies calling for a tiered approach to land use consents based on the significance of the heritage values in the area and the significance of the impact likely to arise when using the land for an approved purpose.

“The [section 18] process is problematic because it is too time consuming and cumbersome for land uses that have an insignificant impact on heritage values”.

“Telstra supports a tiered approach to land use decisions based on the significance of the heritage values and the significance of the impact of those heritage values from the proposed land use”.

Telstra Corporation



Inequality of rights and penalties and lack of enforcement

38. Perception of inequality between Aboriginal people and land users

There is a strong and consistent view across Aboriginal communities that their rights and interests are secondary to those of others.

“In a State whose economy is primarily dependent upon mining and resources development, with a strong and well-funded 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 returns generated by mining related activities leads to the perception that mining is of greater benefit to the general community than Aboriginal heritage”.

Australian Association of Consulting Archaeologists

“...the AHA fails to recognise native title holders and traditional owners’ rights in land. Conversely, the AHA elevates the holder of mining interest to ‘landowner’ status. Clearly, this process is discriminatory and needs to be remedied”.

Nyamba Buru Yawuru

“White rangers seem to have more power and support than Aboriginal rangers”.

My Heritage, My Voice – Esperance

“Any Government decision that allows an impact on Aboriginal heritage must consider and be accountable to the wishes of Aboriginal custodians. It should also be supported by reasons of public interest, including social and cultural factors and not merely the economic benefits of a proposed development”.

Joe Dortch PhD

“[The]Minister should have to demonstrate why development should proceed – change the burden of proof”.

My Heritage, My Voice – Busselton

39. No rights of appeal for Aboriginal people

Land users can appeal against a decision to refuse consent to impact or destroy an Aboriginal site, but Aboriginal people have no right to appeal against a decision that their sites have no value or that impact/destruction has been permitted. The inequality of this was strongly highlighted by many at workshops and in written submissions.

“The appeals process is inherently unfair to Aboriginal people and needs amendment. Only the applicant can appeal a decision by the Minister. Aboriginal people have no avenue to appeal the destruction of their cultural heritage”.

Nyamba Buru Yawuru

“The only avenue of appeal available to Aboriginal people is through Supreme Court action, which is difficult and prohibitively expensive. There needs to be an appeal process readily accessible to Aboriginal people”.

My Heritage, My Voice – Perth

40. Lack of enforcement/statute of limitations period too short

Many participants in the review suggested the statute of limitations period of 12 months that applies to offences under the AHA is too short to conduct investigations and prepare cases for prosecution and, as such, is an obstacle to prosecutions that should be removed. For Aboriginal people in particular it was considered that the special defence of lack of knowledge in section 62 should have limited applicability, with some suggesting that new legislation should include a requirement to ‘dial before you dig’ (My Heritage, My Voice – Perth).

“There should be no limitation period on the prosecution of offences because there is a high likelihood that offences will be committed in locations where it may be difficult to detect them within a short time frame”.

Greg McIntyre SC

“Extend the statute of limitations on prosecuting breaches of the Act. Potentially there should be a limitless statute on this”.

My Heritage, My Voice – Warmun

“In particular, the legislation made it an offence to damage an Aboriginal site, even if unregistered or unlisted as such. But while a number of such offences have occurred

over the years, there have been few if any prosecutions – partly because of the 12 month statute of limitations applying to the legislation, but mostly because of a lack of will among bureaucrats and politicians”.

Peter Gifford

“The defence of ‘did not know’ should be removed or restricted to exceptional cases – miners, developers, government and other professional entities should be expected to be aware that Aboriginal heritage is always a matter that needs to be addressed in any significant activity”.

Kimberley Land Council

A number of Aboriginal people considered government agencies to be among the regular offenders and that they should be prosecutable.

“Government needs to be prosecutable – 7 prosecutions in 42 years”.

My Heritage, My Voice – Derby

41. Penalties are too low to deter offenders

The fact that penalties are lower than those that apply for historic heritage under the Heritage of Western Australia Act 1990 was highlighted as a reinforcement of the overall impression of inequality Aboriginal people have about the value of their cultural heritage.

“Current penalties not enough – no disincentive. – Change Civil Liabilities Act to ensure compensation to Traditional Owners for damage to sites”.

My Heritage, My Voice – Esperance

“One of our major concerns is with the question of penalties for offences under the Act. The penalties stated in the Act are totally inadequate and should be substantially increased.they should at least have parity with the WA Heritage Bill 2017”.

History Council of Western Australia

“Should be stronger fines for people who disturb sites and steal artefacts – they sell and profit from it – current penalties mean nothing”.

My Heritage, My Voice – Jigalong

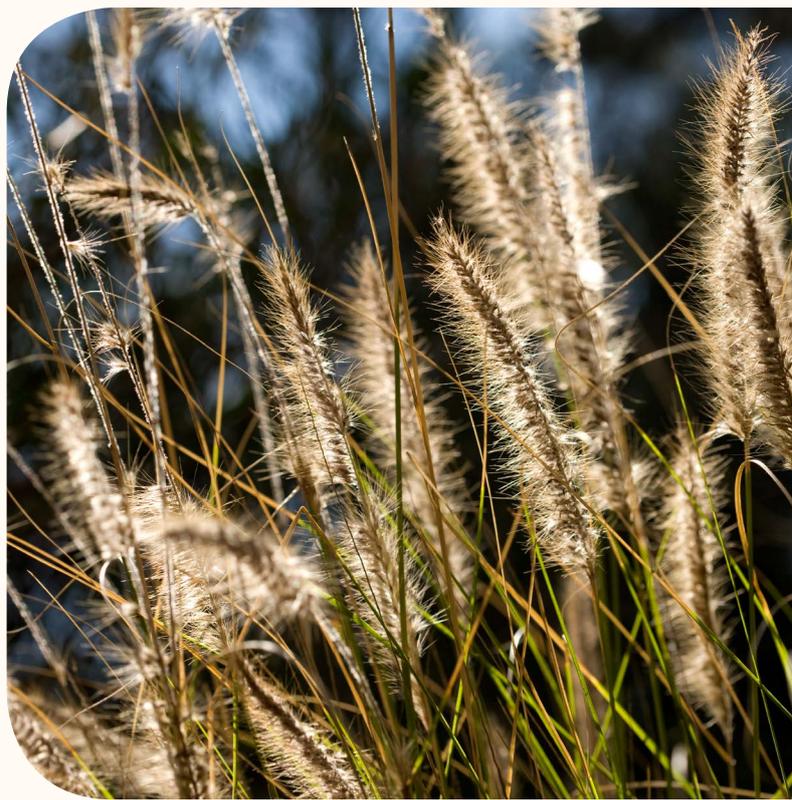
“Fines to be incremental for repeat offenders – needs to be a disincentive – money from fines go back to heritage – to local group”.

My Heritage, My Voice – Jigalong

“The absence of penalties for consistent and significant breaches of section 15 of the AHA will encourage continued abuse of it. Amendment of section 15 should attach penalties specifically to parties who willfully and repeatedly fail to report Aboriginal sites to the Registrar and allow for the seizure of material subject to the powers of inspection under section 51 of the AHA”.

Hon Robin Chapple MLC

The Amalgamated Prospectors and Leaseholders Association of Western Australia considers that penalties should be prescribed for false reporting of sites and objects and for false reporting or non-provision of surveys that have been paid for by proponents.



Universal lack of trust in an under-resourced system and its administration

42. There is a general mistrust of a system that has resulted in widespread destruction of Aboriginal heritage

Feedback from the My Heritage, My Voice workshops and reports from the independent facilitators confirmed that a mistrust of government, generally, and the 'system' for protecting Aboriginal heritage pervades:

"Lack of trust in the system".

My Heritage, My Voice – Esperance

"People are unhappy, so much damage has happened and gone unpunished – do not trust government".

My Heritage, My Voice – Warburton

43. Resources applied to the protection of Aboriginal heritage are inadequate

"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'." (Australian Association of Consulting Archaeologists) – Linked to the lack of resourcing is the current lack of a sufficient level of professional trained and

experienced staff in DPLH and on the APMC with deep knowledge and experience in Aboriginal heritage management".

Australian Association of Consulting Archaeologists

"We believe there is a significant skills gap within the Department that needs to be addressed as a matter of urgency."

Australian Association of Consulting Archaeologists

"DPLH site visits [are] insufficient".

My Heritage, My Voice – Derby

"The sheer volume, complexity and sensitivity of data and information that needs to be comprehended by individual Committee members is understood to be onerous. These circumstances would make decision making very difficult and challenging. It is assumed that decisions are made on information and recommendations made by DPLH. The Department should therefore be appropriately resourced by government".

"APMC is significantly under-remunerated. APMC members are required to undertake extensive workloads in reviewing section 18 applications and supporting material. APMC members are only remunerated for the time they spend at the meetings, not the copious amounts of time spent reviewing material. ...Better remuneration will facilitate

higher levels of expertise and familiarity with the content of section 18 applications, more efficient meetings and better decision making”.

Association of Mining and Exploration Companies

“The functionality of the ACMC is severely limited by its infrequent sitting. The nature and scale of development in the State has grown significantly since 1972 when the AHA was enacted. While the ACMC meets for 2 days a month, this is not considered adequate to fulfil the currently legislated responsibilities of that Committee”.

Rio Tinto Iron Ore Pty Ltd

“It is clear that the ACMC as it currently operates, is not resourced sufficiently to fulfill its role under the AHA. The ACMC’s systemic deficiencies have accelerated Aboriginal cultural heritage loss within the State”.

Nyamba Buru Yawuru

“The ‘Aboriginal Heritage Inquiry System,’ which is the public search tool for the register, is a slow and clumsy database that reflects 1980s technology.”

Hon Robin Chapple MLC

44. There is confusion on the status/value of the Register of Aboriginal Places and Objects and its role in protecting Aboriginal sites

Confusion over the status of the register was evident throughout the feedback. Over time, it has become practice to view the register as the marker of protection of a site, which has resulted in an arguably unnecessary reliance on the opinion of the ACMC before a site can be registered. Although this was pointed out in some submissions, in view of the widespread misconception of the register as having the same status as the State Heritage Register, which is the only means of affording protection to State heritage, the following is an explanation of why that view is inconsistent with the AHA.

Under the AHA, all Aboriginal cultural heritage is presumed to be protected until the Minister provides consent to a land use that could result in it being impacted or destroyed; it does not need registration in order to protect it from unauthorised and therefore, unlawful destruction. Rather, the register serves as notice of Aboriginal heritage existing in a general geographic location and is a mechanism for enabling the Minister to fulfill ‘his’ duties under section 10 of the AHA:

“It is the duty of the Minister to ensure that so far as is reasonably practicable all places in Western Australia that are of current sacred, ritual or ceremonial significance to persons of Aboriginal descent should be recorded on behalf of the community....”.

It is clear from this part of the clause that the register is an all-encompassing tool to record ALL sacred, ritual or ceremonial places; the duty to record is not reserved for places that have been evaluated to be ‘of special significance and importance’. The duty to evaluate the relative importance of places, described in the second

part of the sentence, is not for the purpose of giving 'protected status' by registration but to determine how to allocate government resources that may be 'available from time to time' to effectively preserve and protect such places: "... and their relative importance evaluated so that the resources available from time to time for the preservation and protection of such place may be coordinated and made effective".

The AHA delegates the function of recording all protected areas, all Aboriginal cultural material and all other places to which it applies (i.e. those that satisfy section 5) to the Registrar of Aboriginal Sites (the Registrar) by virtue of section 38.

The AHA also delegates the function of 'evaluation' of places and objects to the ACMC in two contexts:

- Section 39(1)(c) requires the ACMC to evaluate which heritage objects and places are of such special significance and importance that the Minister should take action so that they are 'preserved, acquired and managed by the Minister'.
- Section 18(2) requires the ACMC to form an opinion on whether there is a site where a landowner is seeking the Minister's consent to land use that may affect Aboriginal cultural heritage and, if there is, evaluate its importance and significance. This section can and does have the effect of a registered place losing its protection and being destroyed.

The ACMC has no power or function to determine what goes on the register, except for:

- Section 39(1)(b), which allows the ACMC to record and preserve, where appropriate, the traditional 'lore' related to places and objects alleged to be associated with Aboriginal people; and

- Section 5(c), which requires the ACMC's opinion of a place's importance and significance to the State to secure the application of the AHA and trigger the obligation of the Registrar to record it.

Section 5 is the clause for determining the places to which the AHA applies and should therefore be recorded on the Register:

- a) any place of importance and significance where persons of Aboriginal descent have, or appear to have, left any object, natural or artificial, used for, or made or adapted for use for, any purpose connected with the traditional cultural life of the Aboriginal people, past or present.
- b) any sacred, ritual or ceremonial site, which is of importance and special significance to persons of Aboriginal descent. (Note: the 'importance and special significance' criteria is to persons of Aboriginal descent – not what the ACMC considers important. Accordingly, if an Aboriginal person says a place is important to them, it is a site covered by the AHA, and the Registrar should record it.)
- c) any place which, in the opinion of the Committee, is or was associated with the Aboriginal people and which is of historical, anthropological, archaeological or ethnographical interest and should be preserved because of its importance and significance to the cultural heritage of the State. (Note: this is the only criterion for which the ACMC's opinion is required to support registration.)
- d) any place where objects to which this Act applies are traditionally stored, or to which, under the provisions of this Act, such objects have been taken or removed.

The effect of section 18(2) is that the ACMC evaluates the importance and significance of an Aboriginal site in the context of an application to affect it, not whether it should be registered. (Note that section 39(2) directs the ACMC to have regard to significance attributed under relevant Aboriginal custom or ‘Aboriginal sentiment’ when assessing the importance of a site in the context of a section 18 application and 39(3) makes sacred beliefs, ritual and ceremonial usage a primary consideration in the ACMC’s evaluation of importance. This suggests that the ACMC’s opinion of the importance and significance of a place when considering an application for its destruction, or for its acquisition and management by the Minister, is subject to the views of the relevant Aboriginal people, and should not supplant them.)

Further, the fact that the consents, offences and defences in sections 18, 17 and 62 respectively are not restricted to those sites that are recorded on the register reinforces the presumption of protection for any Aboriginal site, registered or not.

The above is affirmed in *Wanjina-Wungurr (Native Title) Aboriginal Corporation v Hard Rock Resources Pty Ltd and Another* [2016] NNTTA 5 at [34]:

- [34] A Registered Site recorded with the DAA means the site or place has been assessed as meeting s 5 of the Aboriginal Heritage Act 1972 (WA) (‘the AHA’). The AHA protects ‘Aboriginal sites’, as defined in s 4 of the AHA, *whether those sites are registered or not* (emphasis added).

Over time, practice has moved away from the original intent of the AHA to the assumption that a place is only protected if it is on the register and it only gets on the register if the ACMC assesses that the place meets the importance and significance criteria of section 5. This means that a great deal of resources and time are spent on either evaluating whether a place should be put on the register or waiting for

a decision on whether it will go on the register. In addition, efforts to determine boundaries that suit a Western mapping system without anyone being able to identify a site’s exact location mean that the register captures large areas of land that have no heritage value, while there are cultural landscapes that are unrecorded as such.

Because the register has been wrongly emphasised as the marker of protected status and the opinion of the ACMC has been deemed necessary to evaluate all sites in a State the size of Western Australia, an insurmountable backlog of places to be assessed has been created. This is exacerbated by the fact that the ACMC is being asked to impose its view over the ‘sentiments’ of the relevant Aboriginal people on the importance of their sites in cases where that view is not required in order for the AHA to apply.

“The role of the ACMC in determining whether sites should be placed on such a register by assessing their importance and significance is redundant and creates unnecessary backlog in the process”.

Australian Association of Consulting Archaeologists

45. The Register is inaccurate

The incompleteness and unrectified historical inaccuracies of the register was highlighted by many as creating a risk that Aboriginal heritage could be inadvertently destroyed because land users have relied on inaccurate data on the Aboriginal Heritage Inquiry System (AHIS). It also creates inefficiency for land users.

“Inaccuracies and omissions of data from AHIS can result in the wasting of time and resources by Land Users undertaking heritage surveys of areas that have been adequately investigated previously”.

Pilbara Ports Authority

46. Lack of transparency of decisions and information on sites

There was a strong call from many in industry for clear timeframes, quicker processes, transparency and the ability to track the progress of section 18 applications on line. Further, the absence of clear information that can easily be shared between regulatory agencies creates “unnecessary regulatory risk and burden” (Department of Mines and Industry Regulation and Safety).

“Minutes of ACMC [meetings] should be publicly available. There should be no part of government operating in such a secretive manner”.

Amalgamated Prospectors and Leaseholders Association of Western Australia

“The concept of buffers associated with areas of high sensitivity exist in other areas of Government, for example declared rare flora. In this context details about sensitive areas and specific location details are shared within government between interested parties to enable regulatory functional activities to be administered having proper regard to associated risk. However, the specific location details of Aboriginal heritage sites are not readily available to be shared openly across Government.”

Department of Mines and Industry Regulation and Safety

“S. 18 process does NOT work. No transparency.”

My Heritage, My Voice – Moora

47. Inadequate information

A great deal of time and resources are applied to providing information that is either too broad to be useful or lacks sufficient detail.

“...it is unfortunate that it is only on relatively rare occasions that the information given to the ACMC is sufficient for the Committee to make a judgement on the significance of a site”.

Aboriginal Cultural Material Committee

“The poor flow of information between different government agencies, proponents, and others, further impacts the ability of [the] ACMC to carry out its role”.

Aboriginal Cultural Material Committee

48. Perceived conflict of interest of the Minister

Some Aboriginal people see the Minister for Aboriginal Affairs as having a conflict of interest as the Minister charged with protecting Aboriginal heritage also being a member of government that relies on revenue from the resource sector.

“Minister for Aboriginal Affairs needs to be a stand-alone portfolio to avoid conflict of interest”.

My Heritage, My Voice – Moora

“Unfortunately, Section 18 applications have become heavily politicised and we are concerned that Ministerial approval of Section 18 applications has resulted in considerable damage to listed Aboriginal sites, whether through incremental change or damage or wholesale destruction...”.

History Council of Western Australia

49. Under-reporting of sites

For many Aboriginal people the AHA has become a license to destroy their sites, leading to a trend of attempting to protect their most important places by keeping them secret. Not only does this risk accidental destruction and make prosecution for deliberate destruction impossible, but it creates uncertainty for land users.

“Disincentive to register sites if locations are publically available...want sites registered but concerned about public access”.

My Heritage, My Voice – Warburton



50. Over-use of consent processes

The perception that the consent processes are overused was corroborated by at least one land use proponent. The issue is caused by a lack of certainty of the presence of sites in an area of proposed land use and risk aversion by some land users. This can result in unnecessary site destruction and missed opportunities for heritage management that would be compatible with land use proposals.

“One of the reasons so much of the Committee’s time is taken up with s18 matters relates to a lack of understanding by many in the system. This limited knowledge of available processes means proponents take a risk averse approach, almost automatically sending things to the ACMC that need not [go] to the Committee, but could be efficiently dealt with administratively”.

Aboriginal Cultural Material Committee

“As a precautionary nature, Perth Airport applies for Regulation 10 authorisation for low impact activities contributing to the backlog of assessment and approvals awaiting consideration by the ACMC”.

Perth Airport Corporation Pty Ltd

51. Perceptions of imbalance by both ‘sides’

Aboriginal people, as noted above, see the current system as heavily weighted towards the resources sector.

“The systemic discrimination against Aboriginal cultural heritage needs to be dismantled”.

Nyamba Buru Yawuru

However, the small miners and prospectors see it differently:

“...the prescriptions of the current act are heavily biased towards compliance and offence punishment of any proponents of surface disturbance. This contrasts heavily with practically no compliance requirements by those tasked with explaining the significance of such objects and sites”.

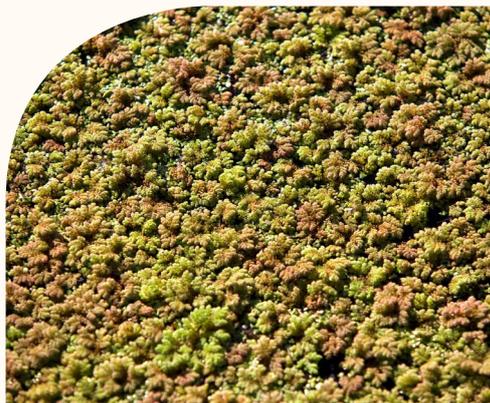
Amalgamated Prospectors and Leaseholders Association of Western Australia

52. Inconsistent administration of the AHA

Over the course of its implementation, the AHA has been subject to swings in its administration, which submissions and previous reviews suggested have had considerable impacts on its intended outcomes.

“Although there are certain aspects of the AHA which require revision and update, many of the perceived deficiencies of the AHA may relate to inconsistent approaches in its administration”.

Rio Tinto Pty Ltd



The Department of Planning, Lands and Heritage acknowledges the traditional owners and custodians of this land. We pay our respect to Elders past and present, their descendants who are with us today, and those who will follow in their footsteps.

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