
AUSTRALIAN ARCHAEOLOGICAL ASSOCIATION INCORPORATED

ABN 13 110 628 970



Australian Archaeology Association Inc.
C/o Scarp Archaeology
PO BOX 191
TERREY HILLS, NSW., 2084
Australia
president@australianarchaeology.com.au
www.australianarchaeologicalassociation.com.au

31 May 2019

Assistant Director General
Heritage Services
Department of Planning, Lands, and Heritage

Re: Australian Archaeological Association Submission regarding the Review of the Aboriginal Heritage Act 1972 stage 2 consultation paper

On behalf of the Australian Archaeological Association I would like to thank you for the opportunity to comment on the proposals regards the review of the Aboriginal Heritage Act (1972). I note that there is little detail concerning each of the proposals at this time and that they are largely aspirational statements. The views of AAA are therefore general at this stage, and we will welcome public consultation concerning the detail of specific proposals at a later date.

Yours sincerely

Dr Michael Slack
President, Australian Archaeological Association.

General Comments

The desired outcome of the new legislation is that the legislation is “sensitive to the culture it is designed to protect and therefore more effective and trusted by Aboriginal people” (Consultation Paper: 4). We note that in order to meet this desired outcome, the new legislation must account for and be inclusive of Aboriginal heritage beyond the narrow confines of Native Title. In order for the determination of native title provision it has required that Aboriginal people demonstrate a continuous link between a sovereignty date of 1829 and the present. Aboriginal people and groups that are not able to meet this requirement are not afforded native title rights and interests. Many Aboriginal groups and people are not represented by Native Title representative bodies or corporations, however they still have traditional rights and interests that are protected nationally and internationally. Whilst it is important that the new proposed legislation aligns with not only the Native Title Act but other state and federal legislation it is equally important that this alignment does not erode the rights and interests of Aboriginal people in relation to heritage.

The proposals outlined in the Phase 2 consultation paper will require considerable resourcing in both the development of guidelines, standards and procedures and in the administration of the new legislation. It is essential that these additional costs are identified and resourced prior to and during the implementation of the new legislation.

It is also essential that the guidelines and standards that are developed to support the proposed legislation are subject to consultation with heritage professionals, industry and Aboriginal stakeholders to ensure that they are robust, workable and effective.

Proposal 1 – Repeal the Aboriginal Heritage Act 1972 and deliver new Aboriginal heritage legislation

The proposal to draft new legislation is welcomed. Since the inception of the Aboriginal Heritage Act 1972, the social and legal landscape in Western Australia has considerably changed. In particular, the introduction of the Native Title Act 1993 has changed the way in which Aboriginal people are consulted and engaged in relation to Aboriginal heritage and more broadly the potential impacts of development on their country. Native title rights and interests have now been recognised throughout much of Western Australia and Native Title claimants and holders have a far greater involvement in managing their heritage. The native title process has however also caused considerable irreparable social damage in many Aboriginal communities and in some severe cases has resulted in senior Aboriginal knowledge holders and lore holders being left out of the heritage and development consultation process. As such, it is essential that new legislation that recognises and respects the role of Aboriginal people in Western Australia in managing their own heritage and that the discrepancies

between the native title and Aboriginal heritage process are resolved in both a legal sense as well as a practical sense.

Proposal 1a aims to provide for the culturally appropriate identification and documentation of Aboriginal heritage places and objects including their tangible and intangible aspects, however the State of Western Australia is a large state with a range of different cultural practices that must be considered. It is essential that the new legislation and its associated administrative mechanisms consider how these cultural differences can be appropriately managed.

The objectives of the new legislation are to be applauded, however the detail in relation to how these objectives will be achieved is required. It is vital that Aboriginal people and heritage professionals continue to be consulted in relation to how the new legislation can be developed and drafted to ensure that its intended goals are met.

Proposal 2 – Update scope and definitions of new Aboriginal heritage legislation

It is pleasing to see that the proposed new legislation will continue to protect Aboriginal heritage places whether registered or not. Many Aboriginal communities for cultural reasons do not want their sites registered with the Department. The proposal to ensure a greater range of intangible heritage is protected and managed under the new Aboriginal heritage legislation is also applauded. However, as has been demonstrated by several of the recent legislative appeals in relation to the Aboriginal Heritage Act it is essential that criteria and minimum information requirements for the types of heritage sites that are protected under the new legislation are developed in consultation with Aboriginal people and heritage professionals. The establishment of criteria will ensure that there is consistency in relation to how Aboriginal heritage sites are recorded in the field as well as how they are managed during the approvals process.

The recognition of cultural landscapes and the interconnectedness of Aboriginal cultural places is essential to ensure the alignment of the new legislation with Aboriginal cultural values. However, it is also important that the new legislation also consider how such cultural landscapes can be managed in the context of development and ensure that the cultural features and components are managed in a culturally appropriate way. The proposal aims to achieve this, however further detailed consideration needs to be given the cumulative and indirect impacts of development on cultural landscapes.

The proposal to adopt a broader definition of place is welcomed and the Burra Charter definition is a useful starting point; the proposal does not respond to one of the objectives which is to reduce further legal challenges. Any proposed changes to the definition of a place under the new legislation must consider all types of Aboriginal cultural heritage including tangible and intangible heritage as well as potential sub-surface heritage.

- Proposal 2(iii) to continue to protect Objects consistent with the current Act requires further consideration particularly in relation to the management of Objects. The role

of the WA museum and the Minister as being ultimately responsible in this area are no longer appropriate and the role of Aboriginal people in managing objects that are salvaged from their country prior to development impacts as well as managing cultural material that is repatriated to them from Museums and private collections needs further consideration here.

- Proposal 2(iv) proposes that the new Act will include culturally appropriate procedures for the management of ancestral remains. Whilst the principles of this are commended the variability of Aboriginal cultural practice across the State needs to be considered. Such procedures also need to differentiate between the management of ancestral remains identified during a development versus the repatriation of ancestral remains.

Proposal 3A – Local Aboriginal Heritage Services

This proposal aims to ensure that Aboriginal people are incorporated in the decision-making process, provide mechanisms to ensure that the ‘right people to speak for country’ are involved in research and decision making, empower people to economically benefit from their cultural heritage.

The proposal appears to default to the prescribed body corporates or native title representative bodies as being the agencies that would fill the role of the Local Aboriginal heritage services, however this is not always culturally appropriate and many of these organisations lack the funding or capacity to take on this additional role. Whilst in some regions Local Aboriginal Corporations are effectively managing heritage, in other cases across Western Australia Aboriginal cultural knowledge holder do not trust these agencies to manage their heritage information.

Furthermore, the proposed role of the State Government overseeing and authorising Local Aboriginal Heritage Services requires further consideration, particularly in relation to those PBCs that already actively function in this role and have already gone through a considerable process to enable their registration.

Native Title provides for common law recognition of traditional rights and interests of a group of people. Native Title does not remove or restrict traditional rights and interests of other Aboriginal people in an area. The rights of non-Native Title holders also protected under International Covenant and need to be considered within the proposed legislation.

The consultation process in relation to proposed impacts to Aboriginal heritage places needs particular consideration. Whilst the proposal calls for a process that ensures that the right people that speak for country are consulted about impacts, this is not the current reality. There needs to be further guidance on how the right to speak for country is identified to ensure that it not only considers ancestry and connection to country but also cultural knowledge in relation to the area being impacted. In particular it needs to ensure that the identification of parties to be consulted is done in line with cultural practice within the region. The administration of the native title process and the implementation of native title

agreements has meant that in many cases nominated representatives for consultation are identified through a Westminster style legal administrative process rather than by one that is in line with cultural law.

It is essential that the development of guidance in relation to Aboriginal heritage councils includes Aboriginal people and heritage professionals as well as native title and legal professionals.

Capacity and resourcing are key issues for many existing PBCs and native title representative bodies and the establishment of new Local Aboriginal Heritage Services (LAHS) needs to ensure that adequate consideration of the resourcing they may require is given. In order to effectively manage the role these organisations need to take on they will require support in the management of cultural information, heritage data, and heritage survey co-ordination.

- Proposal 3A ii identifies the LAHS as playing a major role in the negotiation and implementation of heritage management and land use agreements. This process is currently driven by the Native Title Act and in many cases agreement making results from the application of the future act process. It is essential that any processes set out under the new legislation are consistent with the native title legislation and that the new processes do not duplicate the types of heritage agreements that are already negotiated under this process.

Proposal 3B Aboriginal Heritage Council

The proposed Aboriginal Heritage Council aims to provide centralised oversight. The proposal to ensure that the Aboriginal Heritage Council comprises members who have knowledge, experience, skills and qualifications that are relevant to the functions of the legislation and the governance of a board is welcomed. However, it is also essential that Western Australian Aboriginal people are members of the AHC to ensure that strategy and decision making of the AHC is culturally appropriate and whilst there is recognition in the proposal that Aboriginal membership will be encouraged there is no requirement that these members will be Western Australian Aboriginal people.

- Proposal 3B i and ii also aims to have the Aboriginal heritage council set the standards for and provide guidance for best practice in the identification, conservation and management of Aboriginal heritage places as well as setting the standards for services provided by heritage professionals and LAHS providers. The development of these standards is welcomed, however it is essential that such standards are also subject to review and input by the professional peak bodies and key stakeholders to ensure they are aligned with best practice and current methodological approaches in the identification, conservation and management of Aboriginal Heritage.
- Proposal 3B iii proposes that the Aboriginal Heritage Council will have a role in administering the Aboriginal Heritage Register, however it is unclear as to what this

role will actually be including what will constitute a site under the Act and if any criteria for registering places onto the Aboriginal Heritage Register. The current administrative processes applied by DPLH for the assessment of sites under the Act has been subject to a number of inconsistencies over time in the way in which sites are managed on the Register.

- Proposal 3B iv – No concerns this is consistent with the current Act.
- Proposal 3B v – Conceptually this appears to be ok however it is unclear what is meant by strategic direction and how this role will integrate with the administrative role of the department
- Proposal 3B vi – It is unclear what criteria will be used to manage the appointment and performance of Local Aboriginal heritage services. It is essential that the capacity of Local Aboriginal heritage services is considered as part of the assessment process. In addition, it is essential that the Department is sufficiently resourced to ensure that LAHS
- Proposal 3B vii – Further clarity is required in relation to how this would operate. The capacity of LAHS to respond to ongoing and regular requests for information also needs to be considered.
- Proposal 3B viii – It is unclear as to how this proposal will be implemented and what the exact role of the AHC will be in this process. It is also unclear as to how this proposal will apply to areas that already have agreements in place. There are numerous existing heritage and native title agreements in Western Australia under which good faith negotiations have been conducted.
- Proposal 3B ix – agreed in principle.
- Proposal 3B x – agreed in principle
- Proposal 3B xi – agreed
- Proposal 3B xii – agreed in principle however there needs to be a better alignment of the various legislation and approvals processes to ensure that where Aboriginal heritage matters relate to other approvals such as environmental approvals that there is due process so as to adequately consider heritage risks but not delay other approvals timelines.
- Proposal 3B xiii, xiv, xv, xvi, xvii, xviii and xix – it is welcomed that these important roles will be taken on by the AHC. However, it is important that all regions of the State are adequately represented and sufficient department capacity and resourcing is dedicated to achieve these outcomes.

Proposal 3C – The Minister’s Role

The proposal to delegate decision making on land use proposals and projects that are not of State Significance to the AHC is welcomed however further clarity on the administrative process and transparency of information related to the AHC recommendations to the Minister on State significant projects is required. The requirement to publish reasons for decisions is welcomed as this will enable all stakeholders to have greater transparency over the decision-making process.

The introduction of stop work orders by the Minister is welcomed however further development of guidelines and standards as to how these would operate is required including what information would be required prior to the issuing of a stop work order.

Proposal 3D – The role of the DPLH

At this early stage we support the proposal but look forward to the detailed information in the next stage of consultation. We see that the DPLH will necessarily have a key role in supporting the AHC and providing advice to the Minister. However, we are concerned that in the absence of, or issues concerning an AHS that the DPLH would act in that capacity point 4). This is not a preferred method of managing Aboriginal cultural heritage.

Proposal 3E – Heritage Professionals – improving qualifications and experience

We support this proposal in principle, and strongly that the directory be supported by creating the system of standards, protocols and ethics for heritage work. We recommend that this should be done by a panel of experts from the Disciplines with input from academic University Departments and not internally. We support the remaining key points of this proposal.

Proposal 4 – Heritage Information – The Aboriginal Heritage Register

Proposal 4 indicates that an Aboriginal heritage place will be included on Heritage Register if a place is identified as culturally important to Aboriginal people, assuming through a Local Provider. It is unclear if Aboriginal people in an area that aren’t represented through a PBC/Local Provider can also nominate heritage places without knowledge/support of Local Provider. There have been instances in the past some occasions where PBCs have directly objected to site nomination by traditional custodians of Aboriginal heritage places on Register. This proposal has potential to encourage gate-keeping in relation to Aboriginal heritage protection which has been a criticism of RNTBCs in past. For many Aboriginal people this is unacceptable.

Proposal 5 – Managing Land use Proposals

Proposal 5 will introduce a tiered land use model that will provide a formal referral process to Local Aboriginal heritage services and the State with regards to how different types of activities may impact Aboriginal heritage and enable a risk based approach to heritage management. In principle this proposal will serve to manage Aboriginal heritage sites in accordance with the level of risk. It is unclear however as to how the proposed tiered model will operate and whether impacts from all types of activity will be considered. The introduction of additional permits and approvals for these activities may also add to the already existing regulatory burden of DPLH and will require additional staffing and resources to manage. Should additional permits be introduced it is recommended that for low impact activities that these are issued by Local Aboriginal Heritage Services. The mechanism to facilitate tiered assessment of proposed land uses does not appear to involve Aboriginal people determining level of ground impact. Instead it appears a land user determines level of disturbance and then begins consultation at some level. A lack of direct, initial input on level of disturbance by relevant Aboriginal people will likely result in more heritage places being adversely impacted. Better heritage management outcomes are more likely to be achieved if the categories of impact are defined through local input – category definitions may vary in different areas/regions.

Proposal 6 – Encourage and Recognise Agreement Making

Proposal 6 requires all heritage agreements regardless of when they were negotiated to require formal ratification under by the Aboriginal Heritage Council. The vast majority of heritage agreements in Western Australia have been triggered during the Right to Negotiate process under the Native Title Act. As such many heritage agreements form subsets of the wider native title or land access agreements under which they were negotiated. In some cases in Western Australia the terms under which these agreements have been reached have taken 10-20 years to negotiate are hundreds of pages (eg Pilbara) and include complex conditions and commitments that interlink heritage approvals to other benefits. In these cases it is unlikely that the parties will want to have the insecurity of the agreements being found to not comply with the Aboriginal Heritage Councils requirements. In other regions of WA heritage agreements relate to land access and include very simple consultation and engagement commitments. Whilst the intent of the proposal is positive, it is essential that the ratification process does not devolve the many positive heritage agreements that are in place across Western Australia. Furthermore, any guidelines developed for the ratification process of such agreements must take into account the complex relationship between the Native Title Act and the Aboriginal Heritage Act. In order to ensure that the ratification process takes not account these complexities it is strongly recommended that the Aboriginal Heritage Council include members with professional experience working in native title and Aboriginal heritage.

Proposal 7 – Transparency and Appeals

Proposal 7 aims to increase the transparency in the decision making process which is positive. However, it is essential that the guidelines and standards used to guide the decision making process are also made available. The State Administrative Appeals process is only available to proponents for appeals

Proposal 8 – Enforcement

The proposed amendments to enforcements are welcomed. In addition to these penalties it is recommended that due consideration also be given to applying stop work orders here also.

Compensation (or a proportion of a fine) for wrongful impact to a heritage place should be, at least in part, directed to the community or group of individuals who suffer as a result of the loss.

Is widely recognised that a longer period of statutory limitation has been sorely lacking in the AHA. A five year period should be adequate, however the threshold for proving guilt and intent still remains substantial and is likely to maintain the low number of successful prosecutions under the AHA.

The proposal should also include requirements to provide public, transparent and more accountable reasons for decisions and decision-making on not following through with seeking prosecution (similar to Proposal 7), along with a process to allow third party comment on the decision/natural justice before final decision.

Proposal 8 – Protected Areas

Protected Areas are currently the highest level of protection afforded under the AHA but significant limitations occur in relation to Native Title implications. It is unclear what would occur if a group other than Native Title group request an area be made a Protected Area and the NT holding group object; or if a NT holding group request an area be made a Protected Area and another group object. In addition, the state has a legacy of approving developments within Protected Areas by varying the area. If Protected Areas are to be continued in the new legislation it is essential that they are protected to the level that is intended and only agreed activities can occur.