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# OPPORTUNITY LOST

## CHANGES TO ABORIGINAL HERITAGE LAW IN WESTERN AUSTRALIA

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### INTRODUCTION

The Aboriginal Heritage Amendment Bill 2014 ('Bill') is currently before the West Australian Parliament.<sup>1</sup> It contains a set of amendments to an Act that has long needed reform: the *Aboriginal Heritage Act 1972* (WA) ('AH Act'). However, the changes do nothing to bring the legislation in line with modern cultural heritage law and practice and are likely to result in less heritage protection than is currently the case. Our ultimate assessment of the Bill echoes that expressed by many of the submissions made to the Department of Aboriginal Affairs ('Department') on the changes: this is an opportunity lost.<sup>2</sup>

**The changes do nothing to bring the legislation in line with modern cultural heritage law and practice.**

### THE CHANGES

The changes address three broad areas: enforcement and compliance; streamlining of processes; and the creation of a more comprehensive register. Amendments aimed at increasing penalties and strengthening enforcement have largely drawn support from Aboriginal people (although changes to confidentiality provisions have raised concerns).<sup>3</sup> The rest of the amendments and the consultation process have been subject to considerable criticism. Issues identified include:

- The eight week comment period on the Draft Bill was insufficient and the process, as a whole, failed to meaningfully involve Aboriginal people.<sup>4</sup>
- Important aspects of the changes are to be spelled out in regulations which have not been drafted.<sup>5</sup>
- The changes fail to bring the AH Act in line with modern Indigenous heritage law and practice<sup>6</sup> or even with the protection afforded to non-Indigenous heritage,<sup>7</sup> and constitute a backwards step for an already outdated Act.<sup>8</sup>

The reforms were further criticised for the disjunction between the purported aims of the changes and the changes themselves. As the Law Society of WA succinctly observed, the 'draft Bill is not compliant with the objectives of the amendments which are cited by the Department.'<sup>9</sup> And in the words of the Kimberley Land Council:

The cumulative effects of the Bill are contrary to the stated aim of giving "a stronger voice for Aboriginal People". It also appears contrary to the long title to the Bill which states that the Act is to "make provision for the preservation on behalf of the community of places and objects customarily used by or traditional to the original inhabitants of Australia...". We submit that this Bill has the opposite effect and will adversely impact on Aboriginal cultural heritage in Western Australia.<sup>10</sup>

The majority of the 150-plus submissions received on the Draft Bill were critical of aspects of the changes but these submissions have had little impact. When the comment period on the Draft Bill was closed in August 2014, the WA Government committed to further consultation,<sup>11</sup> but when the final Bill was introduced into Parliament in November 2014, it was not substantially different to the Draft Bill.<sup>12</sup>

Our analysis of the Bill will be limited to the crucial section 18 process, which is where most of the 'streamlining' is occurring. However, anyone wishing to understand the far-reaching impacts of these changes can do no better than read the submissions, which include considered comments from Aboriginal peoples and representative bodies as well as legal and heritage experts.

### ABOUT THE AH ACT

The existing AH Act is surprisingly short (a mere 68 provisions) given that its concern is the protection of heritage across a vast geographic area containing numerous Aboriginal groups with a diverse wealth of cultural heritage. But then, unlike heritage legislation elsewhere, the AH Act:

- contains no provisions relating to repatriation of Aboriginal remains or secret/sacred objects<sup>13</sup>

- does not take account of the links between heritage and environment or even heritage and native title<sup>14</sup>
- fails to mandate consultation with Aboriginal custodians<sup>15</sup>
- does not allow for any proactive or holistic management of heritage through (for example) the use of management plans.<sup>16</sup>

In essence, the key provisions of the AH Act are section 17, which prohibits (among other things) destroying or damaging an Aboriginal site or object, and section 18. Section 18 allows the Minister to consent to uses of land which would otherwise breach section 17, and it is the section 18 process where much of the administration of the Act lies. An 'Aboriginal site' is defined as 'a place to which this Act applies' under section 5.<sup>17</sup> The categories of places contained in section 5 are characterised by reference to archaeological and anthropological criteria (as are objects to which the Act applies—see section 6). Unlike other jurisdictions, there is no recognition that Aboriginal people are 'the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage';<sup>18</sup> or that protection of heritage should be 'based on respect for Aboriginal knowledge, culture and traditional practices.'<sup>19</sup> Nor is there any acknowledgment of dynamic, living nature of Aboriginal culture.<sup>20</sup> As was noted by Wintawari Guruma Aboriginal Corporation: 'There is very little in the [Act] which provides any 'voice' for Aboriginal people ... It maintains the 'museum' ethos that Aboriginal heritage is something dissociated from Aboriginal people...'<sup>21</sup>

Currently, section 18 applications are made to the Aboriginal Cultural Materials Committee ('ACMC'),<sup>22</sup> an advisory committee established by the AH Act.<sup>23</sup> It has Aboriginal membership but is not required to.<sup>24</sup> The ACMC evaluates the importance and significance of any Aboriginal sites on the land, before making a recommendation to the Minister.<sup>25</sup> The Minister is bound to consider (but not follow) the recommendation before deciding whether to consent to the use of land.<sup>26</sup> There is a right of appeal for the applicant, but none for the Traditional Owners.<sup>27</sup> In practice, a section 18 application requires a heritage survey, which will include some consultation with Traditional Owners. However, non-Indigenous consultants are inevitably required to assess the significance of sites and/or objects, because the AH Act frames significance and importance in terms of anthropological and archaeological criteria.<sup>28</sup>

## THE NEW SECTION 18 PROCESS

Under the proposed new process, any person wishing to do an act which may contravene section 17 can apply for a permit.<sup>29</sup> The application is dealt with by the CEO of the Department (rather than the current section 18 decision (described above) being made by

the Minister after considering the advice of the ACMC).<sup>30</sup> Once an application is made the CEO can:<sup>31</sup>

- issue a declaration that there is no Aboriginal site on the land (or decide not to issue such a declaration)
- issue a permit to do the act, provided the CEO is satisfied that:
  - the activity would not destroy, significantly damage or alter any Aboriginal site or object
  - that there is no significant risk that the proposed act would adversely affect the importance and significance of any Aboriginal site<sup>32</sup>
- refer the application to the ACMC, provided the CEO is of the opinion that there is an Aboriginal site on the land. This provision is phrased as 'may refer' which means, at least on the face of the legislation, that the CEO can, but does not have to, refer the application<sup>33</sup>
- refuse the application.

This process vests a breathtaking degree of power in the CEO, particularly given the following:

- A declaration can be issued on the CEO's own initiative (so without an application being made by anyone).<sup>34</sup>
- The existence of a declaration is a defence to a charge under section 17.<sup>35</sup> Interestingly, the amendments to the Act themselves appear to contemplate that a declaration could be mistakenly issued in relation to land which does contain a site, because a declaration automatically expires if the land to which it applies is registered as a site.<sup>36</sup>
- While increased appeal rights are given to proponents, there are no rights of review for Aboriginal people whose heritage is adversely affected by a decision.<sup>37</sup> Further, the issuing of a declaration cannot be appealed by anyone (although its cancellation can be appealed by the person who originally applied for it).<sup>38</sup> The only mechanism to make Aboriginal people aware of a declaration is its publication in the *Government Gazette*, which does not have a high level of readership.<sup>39</sup>
- The CEO is in effect empowered to conduct a form of risk assessment, as permits can be issued where there is no 'significant' risk of harm.<sup>40</sup>
- Permits can be issued in perpetuity and are transferable.<sup>41</sup>
- The functions of the ACMC have been largely transferred to the CEO.<sup>42</sup> Their remaining substantive role in the section 18 process is to give advice when and if the CEO refers a permit application to them.<sup>43</sup>

There is therefore no real provision made for Aboriginal involvement. There remains no statutory guarantee of Aboriginal membership of the ACMC, besides which the ACMC's role is severely reduced. Nor has there been much attempt made to align the AH Act with native title requirements. The ACMC may consult a relevant registered

native title body corporate ('RNTBC') in certain circumstances,<sup>44</sup> although as the Law Society of WA noted 'since the ACMC would no longer have an evaluative function ... there does not appear to be anything which the ACMC would be empowered to consult a RNTBC about'.<sup>45</sup> The only occasion when a registered native title claimant or RNTBC must be invited to comment is when the CEO recommends to the Minister that an Aboriginal site be declared a protected area.<sup>46</sup> This is the highest level of protection provided for by the AH Act and so, oddly, the only occasion when native title claimants or holders must be consulted is when it is proposed to protect rather than damage or destroy a site.

## These changes will weaken or silence, rather than strengthen, Aboriginal voices.

### CONCLUSION

In the Second Reading Speech, the Hon Dr Kim Hames MLA asserted:

The requirement for the CEO to assess the information provided against criteria outlined in section 7A and any matters prescribed in the regulations ... means that the decision-maker, whether the minister or the chief executive officer, will be required to have regard to the views of whichever Aboriginal people are entitled to speak for the land that is the subject of the decision-making process.<sup>47</sup>

With respect, it is difficult to ascertain why this would be the case (nor is it clear exactly what having 'regard to the views' means). The criteria included in the proposed section 7A is currently contained in section 39(2) and (3) of the AH Act, and includes, among other things, use or significance under relevant Aboriginal custom.<sup>48</sup> The provision does not in and of itself require consultation. This is particularly so given there have been no substantive changes to section 5, which means significance, in relation to Aboriginal sites, is still framed in terms of anthropological and archaeological expertise rather than the living knowledges of Aboriginal peoples.

Ironically, it was further noted in the Second Reading Speech that the requirement for the ACMC to have anthropological membership was being removed because 'Aboriginal people are more than able to speak on behalf of themselves without perpetuating previous policies of having someone speak on their behalf'.<sup>49</sup> But there is nothing in the changes that either empowers Aboriginal people to speak or requires them to be heard, although it is possible that Aboriginal involvement will be prescribed in the regulations. But even if this were the case we submit that, consistently with

heritage legislation elsewhere, Aboriginal involvement should be statutorily entrenched. Notwithstanding government rhetoric to the contrary, it is hard to escape the conclusion drawn by many of the submissions on the Bill: that these changes will weaken or silence, rather than strengthen, Aboriginal voices.<sup>50</sup>

We conclude with the words of the Goolarabooloo Millibinyarri Indigenous Corporation:

Goolarabooloo are disappointed that the State of WA, in reviewing the AHA [AH Act], has missed a valuable opportunity to amend the Act for the genuine benefit of Aboriginal people as is consistent with the objectives of the Act. We request that the Department take this opportunity to reform the AHA for the genuine benefit of Aboriginal people and in line with the spirit and intention of the act which is to preserve Aboriginal heritage places and objects within this state. We hope that these submissions will be taken into account and look forward to seeing the AHA reformed to genuinely include Aboriginal people and their interests, an aim which these proposed amendments had totally failed to achieve.<sup>51</sup>

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- 1 As at 27 November 2014 it had reached Second Reading in the Lower House of the WA Parliament. For the current progress of the Bill see: <<http://www.parliament.wa.gov.au/parliament/Bills.nsf/BillProgressPopup?openForm&ParentUNID=E863020A2E318B6A48257D9D000BC478>>.
- 2 Organisations expressing this sentiment in their submissions include: the South West Aboriginal Land and Sea Council, National Native Title Council, Central Desert Native Title Services, Yamatji Marlpa Aboriginal Corporation, the National Trust of Australia (WA), and the International

- Council on Monuments and Sites (ICOMOS Australia). Submissions are available at: <<http://www.daa.wa.gov.au/en/Heritage-and-Culture/Aboriginal-heritage/Aboriginal-Heritage-Legislative-Changes/Submissions-recvied/>>.
- 3 With respect to confidentiality, see for example the submission of Ben Wyatt MLA. Though we note that clause 15 of the Bill has been amended compared to the draft Bill to remove the specific penalty. The draft Bill is available at: <<http://www.daa.wa.gov.au/Documents/HeritageCulture/Aboriginal%20Heritage%20Legislative%20Changes/Aboriginal%20Heritage%20Amendment%20Bill%202014%20-%20public%20consultation%20draft.pdf>>.
  - 4 See for example the submissions of the Aboriginal organisations and representative bodies identified at above n 2. The Hon Ben Wyatt MLA presented a petition to Parliament with 659 signatures which, among other things, asked the Legislative Assembly to 'form a Select Committee to facilitate the development of a new framework for reform' which should involve Aboriginal peoples 'in their capacity as custodians of Aboriginal heritage, not mere stakeholders': Western Australia, *Parliamentary Debates*, Legislative Assembly, 25 November 2014, 8680c-81a (Ben Wyatt). A similar petition was also presented by the Hon Brendan Grylls MLA with 700 signatures.
  - 5 This concern was shared by both Aboriginal and industry groups; see for example the submissions listed at above n 2 and those of Iron Ore Holdings and AMPLA (the Resources and Energy Law Association).
  - 6 See for example South West Aboriginal Land and Sea Council, National Native Title Council, Central Desert Native Title Services, Yamatji Marlpa Aboriginal Corporation and ICOMOS Australia.
  - 7 See for example the submissions of the South West Aboriginal Land and Sea Council and Yamatji Marlpa Aboriginal Corporation.
  - 8 See for example the submissions of ICOMOS Australia, Yamatji Marlpa Aboriginal Corporation and the National Native Title Council.
  - 9 Law Society of Western Australia, Submission to the WA Department of Aboriginal Affairs draft Aboriginal Heritage Amendment Bill 2014, 31 July 2014. Refer to pp 12-13 for a summary of inconsistencies between the objectives of the changes and the changes themselves.
  - 10 Kimberley Land Council, Submission to the WA Department of Aboriginal Affairs draft Aboriginal Heritage Amendment Bill 2014, 5 August 2014.
  - 11 The Hon Peter Collier MLC, 'Aboriginal people to guide heritage regulation' (Media Statement, 11 August 2014) <<http://www.mediastatements.wa.gov.au/pages/StatementDetails.aspx?listName=StatementsBarnett&StatId=8533>>.
  - 12 See above n 3 for one difference. While there has been some changes of wording throughout the Bill, the only other changes which we deem of significance are the change to the 'mandatory' nature of clause 18A(3) (the CEO 'must deal with'), the deletion of s51(3) (which related, broadly, to occupiers being required to furnish assistance and information to the Department) and the additions to s68 ('Regulations').
  - 13 See, for example, *Aboriginal Heritage Act 2006* (VIC) ss 12-23; *Aboriginal Cultural Heritage Act 2003* (QLD) ss 15-19.
  - 14 Compare, for example, *Aboriginal Cultural Heritage Act 2003* (QLD) ss 34, 35, 86, 87.
  - 15 Compare, for example, *Aboriginal Heritage Act 1988* (SA) s 13.
  - 16 Compare, for example, *Aboriginal Cultural Heritage Act 2003* (QLD) Pt 7.
  - 17 AH Act s 4.
  - 18 *Aboriginal Heritage Act 2006* (VIC) s 3(b) and *Aboriginal Cultural Heritage Act 2003* (QLD) s 5(b).
  - 19 *Aboriginal Cultural Heritage Act 2003* (QLD) s 5(a). Also see *Aboriginal Heritage Act 2006* (VIC) s 3(a).
  - 20 Compare for example, *Aboriginal Heritage Act 1988* (SA) s 3 (definition of 'Aboriginal tradition'), *Heritage Act 2004* (ACT) s 4 and Dictionary (definition of 'Aboriginal tradition') and s 9.
  - 21 The Wintawari Guruma Aboriginal Corporation, Submission to the WA Department of Aboriginal Affairs draft Aboriginal Heritage Amendment Bill 2014, 2014, 12.
  - 22 AH Act s 18(2).
  - 23 Ibid s 28(1).
  - 24 Ibid s 28(4). Compare *Aboriginal Heritage Act 1988* (SA) s 7(2) and *Aboriginal Heritage Act 2006* (VIC) s 131(3).
  - 25 AH Act s 18(2).
  - 26 Ibid s 18(3).
  - 27 To the State Administrative Tribunal; see AH Act s 18(5).
  - 28 See particularly AH Act ss 5 and 39(2).
  - 29 Bill cl 9 (proposed sections 18A(1) and (2)).
  - 30 Ibid (proposed section 18A(3)).
  - 31 Ibid (proposed section 18A(3) and also note s18A(4)).
  - 32 Interestingly, this provision is phrased so that the CEO can exercise this power 'whether the CEO is of the opinion that there is an Aboriginal site on the land or that there is *no* Aboriginal site' [emphasis added]: cl 9 of the Bill (proposed new section 18A(3)(b)). It is not clear in what circumstances the CEO would choose to exercise this power rather than issuing a declaration where the CEO did not believe there was a site on the land.
  - 33 Consistent with s 56 *Interpretation Act 1984* (WA), 'may' imports a discretion, although a court could conceivably interpret the provision as requiring referral to the ACOMC notwithstanding the use of 'may'. If a referral is made to the ACOMC than it must give the Minister a written report and the Minister must make their decision 'after considering it': cl 9 of the Bill (proposed section 18B(1) and (4)).
  - 34 Bill cl 9 (proposed section 18C(2)(b)).
  - 35 Ibid (proposed section 17(3)(c)).
  - 36 Ibid (proposed section 19B(1)).
  - 37 Ibid (proposed section 19D).
  - 38 Ibid (proposed section 19D(2)(a)).
  - 39 Ibid (proposed section 18C(4)(b)).
  - 40 Ibid (proposed section 18A(3)(b)).
  - 41 Ibid (proposed section 18(2) and 19A(3) - (4)).
  - 42 Bill cl 7 (proposed section 12A) and cl 25 (changes to existing section 39).
  - 43 Bill cl 9 (proposed section 18A(3)(c)) and see comment in above n 33. The ACOMC also retains a general advisory function; see cl 25 (changes to existing section 39).
  - 44 Bill cl 20 (proposed section 30(4) - (5)).
  - 45 Above n 9, 5.
  - 46 Bill cl 10 (proposed section 19(2A)(f)(ii) and (iii)).
  - 47 Western Australia, *Parliamentary Debates*, Legislative Assembly, 27 November 2014, p8995b-8997a (Dr Kim Hames).
  - 48 Bill cl 6.
  - 49 Above n 47.
  - 50 For example the submissions of ICOMOS Australia, the Kimberley Land Council, the Anthropological Society of Western Australia, Friends of Australian Rock Art and Ben Wyatt MLA.
  - 51 Goolarabooloo Millibinyarri Indigenous Corporation, Submission to the WA Department of Aboriginal Affairs draft Aboriginal Heritage Amendment Bill 2014, 5 August 2014.