

## REFORM AND RESISTANCE:

# AN INDIGENOUS PERSPECTIVE ON PROPOSED CHANGES TO THE *ABORIGINAL HERITAGE ACT 1972* (WA)

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Earlier this year, the Western Australian Government released the Review of the Aboriginal Heritage Act 1972 Discussion Paper: ‘Seven proposals to regulate and amend the Aboriginal Heritage Act 1972 for improved clarity, compliance, effectiveness, efficiency and certainty’ (‘the Paper’).<sup>1</sup> While improvements to the *Aboriginal Heritage Act 1972* (WA) (*WA Act*) are long overdue, the changes seem likely to weaken legislation that is already arguably failing to protect Aboriginal heritage, and which is archaic when compared to Aboriginal heritage laws elsewhere in Australia.

This article provides a critical analysis of some of the proposals. Reference is made throughout to Aboriginal heritage legislation in other Australian jurisdictions. We do not mean to suggest any of this legislation is ideal, as we are aware that Indigenous people throughout Australia have concerns about the level of protection being given to their heritage. We are seeking to show, however, that many of the measures that have been introduced in other jurisdictions—some of which have been criticised as being inadequate by the local Aboriginal people—do not exist at all in Western Australia (‘WA’).

### DEFINING HERITAGE

The *WA Act* adopts a narrow, site-specific approach to Aboriginal heritage, couched in the language of anthropology and archeology, that remains largely reflective of its origins in the 1970s. While other Australian jurisdictions have updated and expanded their Indigenous heritage legislation over the years, the *WA Act* has remained fairly static:

Despite developments in some States, in other jurisdictions heritage legislation has changed little, although reviews of legislation and progress towards change are occurring in most circumstances. However, Western Australia’s *Aboriginal Heritage Act 1972*, the Tasmanian *Aboriginal Relics Act 1975* and the Commonwealth’s *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* all remain in force, largely in their original formats, despite several reviews and inquiries.<sup>2</sup>

The current proposals do nothing to address the outdated approach taken by the *WA Act*. For example, one change

relates to the functions of the Aboriginal Cultural Materials Committee (‘ACMC’). The ACMC is an advisory committee that performs a number of roles under the Act, including evaluating the importance of Aboriginal places and objects. It is proposed to prescribe a list of criteria that will ‘assist the ACMC [to identify] Aboriginal sites of State heritage importance that should be preserved for the benefit of current and future generations’ and ‘guide consultants and others using the Act on these matters’.<sup>3</sup> The suggested criteria include, among other things, that a place:

- has the potential to yield important information that will contribute to an understanding of Aboriginal prehistory or history;
- demonstrates the principal characteristics of Aboriginal prehistoric and historic places or environments; or
- has special association with the life or works of an Aboriginal person or persons of historical importance.

This criteria reflects and reinforces the overall failure of the *WA Act* to recognise Aboriginal heritage as an integral part of an ongoing, living culture, rather than as a relic of the distant past. The Act is replete with references to such things as ‘ritual’, ‘anthropology’, ‘archaeology’ and ‘ethnography’, including in the definitions of places and objects to which the Act applies.<sup>4</sup> A useful contrast can be made with definitions relating to Aboriginal heritage in other jurisdictions. Under the *Aboriginal Heritage Act 1988* (SA) Aboriginal sites include sites that are ‘of significance according to Aboriginal tradition’, and allowance is made for traditions to evolve or develop post-colonisation.<sup>5</sup> Under the *Heritage Act 2004* (ACT) the term ‘Aboriginal place’ is defined to mean a place of particular significance to Aboriginal people because of Aboriginal tradition, and/or the history, including contemporary history, of Aboriginal people.<sup>6</sup> ‘Aboriginal tradition’ is further defined to include traditions that have evolved or developed since the European colonisation of Australia.<sup>7</sup> The *Aboriginal Cultural Heritage Act 2003* (Qld) sets out fundamental principles that underlie the purpose of the Act, which include:

- that the recognition, protection and conservation of Aboriginal cultural heritage should be based on respect for Aboriginal knowledge, culture and traditional practices; and
- that Aboriginal people should be recognised as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage.<sup>8</sup>

It is clear that most other Australian jurisdictions have moved beyond the ‘museum mentality’ that characterised original heritage legislation. Comments made in the context of the current South Australian Aboriginal heritage law reform process are relevant here:

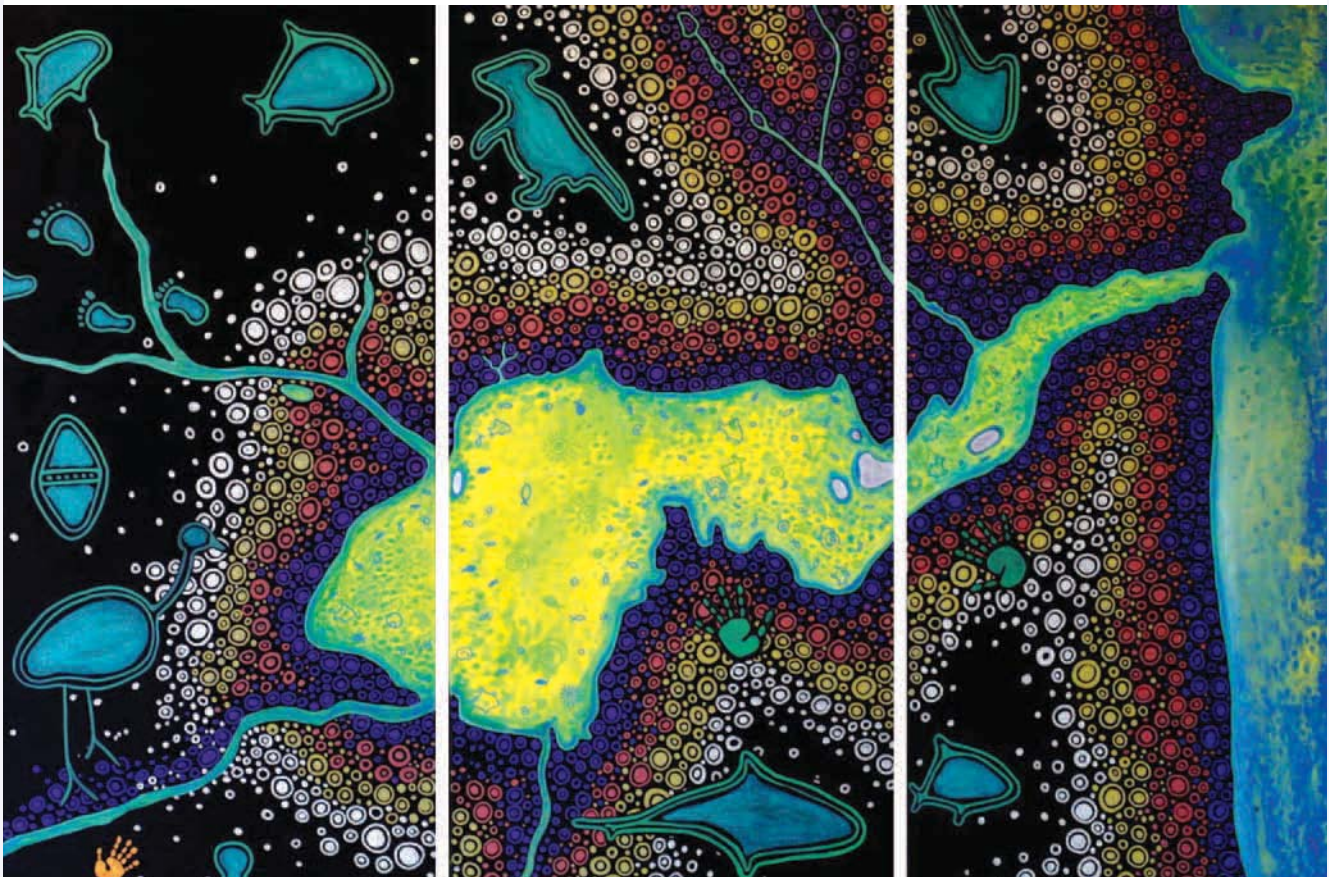
It has become apparent that Aboriginal heritage encompasses very much more than sites, objects and remains, however important these may be. Heritage is currently being discussed by the Aboriginal community as encompassing a far broader scope, with concepts such as hunting grounds, campsites, intellectual property, stories, songlines and dreaming trails, waterholes, landscapes and skylscapes all being considered as part of the Aboriginal heritage. As our appreciation of Aboriginal heritage has become more subtle and more detailed it has become more apparent that there is an urgent need to

reassess the concept of heritage, and an equally urgent need to ensure that Aboriginal heritage is adequately defined, and then protected.<sup>9</sup>

The overall view of Aboriginal culture as a historic relic, rather than as an ongoing part of Aboriginal existence which is vital to Aboriginal well-being, is reinforced by other provisions in the *WA Act*—or, rather, by a lack of the kinds of provisions which feature in legislation elsewhere. For example, Aboriginal heritage legislation in Queensland and Victoria includes repatriation measures which apply to human remains, and to secret/sacred objects held by state entities.<sup>10</sup> In WA, while a burial place would qualify as a site under the *WA Act*,<sup>11</sup> there are no provisions dealing with repatriation of remains or objects. In fact, objects held by the West Australian museum are specifically excluded from the operation of the *WA Act*.<sup>12</sup>

There are also no provisions in the *WA Act* that mandate the involvement of Aboriginal people in heritage protection. While the ACMC does have Aboriginal membership, it is not a requirement of the *WA Act*. On the contrary, the Act specifically states that members

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of the ACMC need *not* be Aboriginal.<sup>13</sup> This can be contrasted with legislation elsewhere, which requires that committees involved in Aboriginal heritage processes have Aboriginal membership.<sup>14</sup> Further, there is no provision in the *WA Act* for the involvement of relevant Aboriginal groups or custodians in the management of their own heritage. Again this can be compared to arrangements elsewhere—with, for example, the role of registered Aboriginal parties under the *Aboriginal Heritage Act 2006* (Vic).<sup>15</sup>

## PROTECTING HERITAGE

The protection of Aboriginal places of significance under the *WA Act* is primarily achieved through section 17, which makes it an offence to ‘excavate, destroy, damage, conceal or in any way alter’ an Aboriginal site. However, this protection is far from absolute. Section 18 allows owners of land (including mining tenement holders) to obtain consent for a use of the land that would otherwise result in a breach of section 17. Section 18 applications are initially considered by the ACMC, which makes a recommendation to the Minister for Indigenous Affairs as to whether or not the application should be granted. The Minister must consider the recommendation, but does not have to follow it, and must also have regard to ‘the general interest of the community’.<sup>16</sup>

According to the most recent Annual Report of the Department of Indigenous Affairs, there were 107 section 18 applications received in 2010/11, 84 of which were approved.<sup>17</sup> A survey contained in the 2007 West Australian ‘State of the Environment Report’ reveals similarly high rates of approval in the years 2001 to 2006.<sup>18</sup> There is no avenue for traditional custodians who object to the treatment of their sites to challenge decisions made under section 18. In contrast, section 18 applicants aggrieved by the Minister’s decision can request a review of the decision by the State Administrative Tribunal.<sup>19</sup>

The Paper includes a number of suggestions that seem likely to weaken heritage protection. The first is the introduction of ‘site impact avoidance certificates’ to ‘provide a more flexible and cost effective alternative to section 18 consent’.<sup>20</sup> This introduces a less rigorous method for obtaining approval to impact an Aboriginal site, and, as with many of the proposals in the Paper, there is a lack of detail as to how these certificates will function.

A second change relates to onus of proof. Currently, in any proceeding under the Act, the onus is on the accused to show that the relevant place or object is one to which the Act does not apply.<sup>21</sup> The Paper states that:

the current onus on persons accused of breaching the Act to prove that places and objects...are not Aboriginal sites or objects to which the Act applies would be more effective and fair if confined to places and objects that have been included on the Register. Prosecutors would have reason to be more confident that the standard of evidence would be in accord with the onus.<sup>22</sup>

From the information provided, it is difficult to understand exactly what this change entails, or why it is being made. The ‘Questions and Answers’ document associated with the Paper offers the following explanation:

*Won't limiting the current onus of proof on accused persons to prove that the Act does not apply to places and objects to Registered sites and objects weaken protection of Aboriginal sites not on the regulated Register?*

There have been very few proceedings under the Act while the current provision has been in effect. The proposed change will not prevent the Department prosecuting offences when it has evidence that a place is an Aboriginal site. It should become easier for prosecutors to commence proceedings in relation to sites registered under the regulated Register process than it is in relation to places on the current Register.<sup>23</sup>

This seems to suggest the current arrangements are in some way hindering prosecutions, although it is unclear why a provision which places an onus of proof on the accused would have this effect. If, as the Paper seems to suggest, the onus of proof provision is to be confined to registered sites, the most obvious likely impact is to make it more difficult to establish a breach of the Act in relation to unregistered sites. This approach can be contrasted with the ‘cultural heritage duty of care’ under the Queensland *Aboriginal Cultural Heritage Act 2003*, where ‘a person who carries out an activity must take all reasonable and practicable measures to ensure the activity does not harm Aboriginal cultural heritage’.<sup>24</sup> Whether someone has searched the Queensland Aboriginal cultural heritage database and register is simply one factor that a court can take into account in determining whether someone has complied with the cultural heritage duty of care.

The potential impact of the change to onus of proof extends beyond evidentiary matters to the role of the Register of Aboriginal Sites itself. As is noted by the Western Desert Lands Aboriginal Corporation<sup>25</sup> in their submission:

The Register currently operates primarily as a form of notice that places may be of Aboriginal heritage significance. The proposed amendments to the onus of proof provisions will fundamentally modify the nature of the Register and the effect



of registration, and remove the incentive for landowners, miners or developers to carry out surveys before using the land for particular purposes. Essentially, the proposed amendments would remove any protection of sites not on the Register, without any indication of how it will address the many issues that will likely result.<sup>26</sup>

The Register is by no means a complete record of Aboriginal places of significance. In WA, as in other jurisdictions, Aboriginal people have been reluctant to reveal information about sites for fear of losing what little control over heritage still remains, and because of uncertainty over the level of protection for sensitive information. While the Paper proposes improving confidentiality so as to ‘give Aboriginal informants sufficient confidence to provide essential site information to the Department’, this is to be done through regulations and minor amendments to the Act.<sup>27</sup> It is submitted that more substantial changes than this are required to protect Aboriginal cultural knowledge. At present, for example, the only offence relating to divulging confidential information in the *WA Act* does not concern knowledge about heritage, but information about trade secrets, or about mining or prospecting operations.<sup>28</sup>

### ISOLATING HERITAGE

The Paper proposes to:

align approval processes by removing the requirement for the EPA [Environmental Protection Authority] to consider Aboriginal heritage in environmental impact assessment when these matters are properly addressed in another process of Government.<sup>29</sup>

This proposal appears to assume that Aboriginal heritage will be sufficiently protected by processes under the *WA Act*. However, even leaving aside the adequacy of these processes, it is extremely difficult, if not impossible, to protect a site without also protecting the surrounding environment. Not only that, but there is a link between the preservation of cultural and biological diversity:

[Indigenous peoples] represent as many as 5,000 different indigenous cultures, and the indigenous peoples of the world therefore account for most of the world’s cultural diversity, even though they constitute a numerical minority. The areas they inhabit often coincide with areas of high biological diversity, and a strong correlation between areas of high biological diversity and areas of high cultural diversity has been established.<sup>30</sup>

Indigenous knowledge is tied to the environment, and particularly to the sacred places where the spirits of country reside. These places cannot be protected without adequate cultural heritage laws, and without a recognition of the

inevitable inter-relationship between cultural heritage laws and environmental protection laws. The need for this has been acknowledged elsewhere. In New South Wales (‘NSW’), one of the objectives of the current heritage law reform process is to ‘link Aboriginal culture and heritage protection with NSW natural resource management and planning processes’.<sup>31</sup> Similarly, one of the guiding principles of South Australia’s reform of their Aboriginal heritage legislation is ‘embedding Aboriginal heritage considerations into the development and land management process’.<sup>32</sup>

### CONCLUSION

Submissions on the proposed changes closed in June, 2012, and it remains to be seen how the Government will respond to the comments received. For now, the last word belongs to the Dambimangari Aboriginal Corporation:

[W]e are very strong about what should happen for our country and the country of our Wanjina Wunggurr communities. The changes that are being suggested do not recognise the importance of the determinations of native title for our land and country and the recognition of our laws and customs for looking after our land and sea country...We are saddened to see that the changes seem to be to help developers and other stakeholders who want to access our country and not to help Traditional Owners protect their heritage and sites of significance. It is also sad that the Government believes that the citizens of WA would want to see the *Aboriginal heritage of their State threatened and not protected*.<sup>33</sup>

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- 1 The Paper and submissions on the changes are available online at: <<http://www.dia.wa.gov.au/en/Heritage-and-Culture/Heritage-Act-Reform/>>.
- 2 National Native Title Tribunal, *Commonwealth, State and Territory Heritage Regimes: summary of provisions for Aboriginal consultation* (Report prepared for the New South Wales Aboriginal Land Council, August 2010) 5 <<http://www.nntt.gov.au/Mediation-and-agreement-making-services/Research-services/Pages/Specific-Issue-Reports.aspx>>.
- 3 WA Department of Indigenous Affairs (‘DIA’), ‘Seven proposals to regulate and amend the *Aboriginal Heritage Act 1972* for improved clarity, compliance, effectiveness, efficiency and certainty’ (Discussion Paper, 2012) 4.

- 4 *Aboriginal Heritage Act 1972* (WA) s 5 (places) and s 6 (objects).
- 5 *Ibid* s 3.
- 6 *Ibid* s 9.
- 7 *Ibid* s 4.
- 8 *Ibid* s 5(a)-(b).
- 9 Sylvia Roughan, “‘It’s Not Just About Sacred Sites.’” *A qualitative analysis of the community consultation process of the 2009 Review of the Aboriginal Heritage Act 1988* (Rural Solutions SA, September, 2010) 8 <<http://www.aboriginalaffairs.sa.gov.au/resources/AHA%20Review%20Consultation%20Report.pdf>>.
- 10 *Aboriginal Heritage Act 2006* (VIC) ss 12-23; *Aboriginal Cultural Heritage Act 2003* (QLD) ss 15-19.
- 11 *AH Act 1972* (WA), above n 4, s 5.
- 12 *Ibid* s 6(2)(a).
- 13 *Ibid* s 28(4).
- 14 E.g. s 7 of the *Aboriginal Heritage Act 1988* (SA) and s 131 of the *Aboriginal Heritage Act 2006* (VIC).
- 15 For further information about Registered Aboriginal Parties see the relevant section of the Victorian Department of Planning and Community Development <<http://www.dpcd.vic.gov.au/indigenous/aboriginal-heritage-council/registered-aboriginal-parties>>.
- 16 *AH Act 1972* (WA), above n 4, s 18(3).
- 17 DIA, *Annual Report 2010/11* (2011) 31 <<http://www.dia.wa.gov.au/en/Publications/Annual-Reports/>>.
- 18 WA Environmental Protection Authority, *State of the Environment Report: Western Australia 2007* (2007) 234 <<http://www.soe.wa.gov.au/report/heritage.html>>.
- 19 *AH Act 1972* (WA), above n 4, s 18(5).
- 20 DIA, above n 3, 6.
- 21 *AH Act 1972* (WA), above n 4, s 60(2).
- 22 DIA, above n 3, 5.
- 23 DIA, ‘Questions and Answers document’ (2012) <[http://www.dia.wa.gov.au/Documents/HeritageCulture/AHA%20Review/Discussion\\_Paper\\_QandA.pdf](http://www.dia.wa.gov.au/Documents/HeritageCulture/AHA%20Review/Discussion_Paper_QandA.pdf)>.
- 24 *Aboriginal Cultural Heritage Act 2003* (QLD) s 23.
- 25 The Western Desert Lands Corporation is the Registered Native Title Body Corporate of the Martu people.
- 26 Submission on the Review of the *Aboriginal Heritage Act 1972* (WA) from the Western Desert Lands Aboriginal Corporation (DIA, 2012) 2 <<http://www.dia.wa.gov.au/en/Heritage-and-Culture/Heritage-Act-Reform/Submissions/>>.
- 27 DIA, above n 3, 4.
- 28 See *Aboriginal Heritage Act 1972* (WA), s 56; *Aboriginal Heritage Act 1988* (SA) cf. s 35.
- 29 DIA, above n 3, 7.
- 30 United Nations Permanent Forum on Indigenous Issues, *State of the World’s Indigenous Peoples*, (January 2010) 84 <[http://www.un.org/esa/socdev/unpfii/documents/SOWIP\\_web.pdf](http://www.un.org/esa/socdev/unpfii/documents/SOWIP_web.pdf)>.
- 31 See *Aboriginal heritage legislation in NSW: Public consultation on issues for reform* (NSW Government Environment and Heritage, 2011) 1 <<http://www.environment.nsw.gov.au/achreform/ACHmedia.htm>>.
- 32 See Government of South Australia Department of Premier and Cabinet, ‘Review of the Aboriginal Heritage Act 1988’ (Scoping Paper, December, 2008) 2 <[http://www.aboriginalaffairs.sa.gov.au/aha/scoping\\_paper.html](http://www.aboriginalaffairs.sa.gov.au/aha/scoping_paper.html)>.
- 33 Submission on the Review of the *Aboriginal Heritage Act 1972* (WA) from the Dambimangari Aboriginal Corporation (DIA, 2012) <<http://www.dia.wa.gov.au/en/Heritage-and-Culture/Heritage-Act-Reform/Submissions/>>.

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