



The Effectiveness of the Aboriginal Heritage Act 1972

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For the Hon Robin Chapple MLC

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EXECUTIVE SUMMARY

The purpose of this report is to review the effectiveness of Western Australia's Aboriginal Heritage Act of 1972. It was a product of a Parliamentary Internship, an arrangement between the Parliament of Western Australia and Murdoch University. Research was undertaken into the systems and inner workings of the Department of Aboriginal Affairs, the submissions made by relevant people, organisations and companies, and Parliamentary records. Section 18 of the Act occupies a large majority of the report, as it is the origin of many of the problems to do with Aboriginal heritage protection.

The main findings of this report are that:

- The responsible authorities do not seem to be consulting with the relevant people in order to provide Aboriginal sites with the appropriate protection.
- The appeals process involved is not effective enough in order to maintain an efficient system within the Department.
- Section 18 is the most contentious part of the Act, and the Department has time and again approved the majority of Section 18 applications that are sent to them, regardless of the recommendations made by the Aboriginal Cultural Materials Committee.
- The ACMC has a complicated job, which is complicated further by its lack of membership.
- The Site Recording Forms used by the ACMC are no longer effective, as they can actually inhibit the registration of Aboriginal sites.
- Problems within the Department have been shown to come down to Ministerial discretion, as well as the staff and their possible lack of relevant qualifications.
- The DAA does not effectively monitor or enforce the Act.
- The use of the 'Special Defence of Lack of Knowledge' can be reduced with increased accessibility to the Act's Due Diligence Guidelines.

The conclusions made after this research was conducted and these findings were made, were that the Aboriginal Heritage Act is in fact, not effective in providing Aboriginal heritage sites within Western Australia with appropriate protection.

Recommendations to remedy these problems are:

1. More resources need to be put into the Department of Aboriginal Affairs in order for it to improve its appeals, monitoring and enforcement processes.
2. The Site Recording Forms need to again be amended so that they are simpler to use, and no longer inhibit the registering of Aboriginal sites.
3. Decisions regarding Section 18 applications need to involve the Department, and not just the Minister. These decisions should also be made after detailed consultations with the relevant groups of people have been sought and carried out.
4. The Aboriginal Cultural Materials Committee needs to increase its membership as recommended by Dawn Casey, especially to statutorily include at least one Specialist Anthropologist, as the Aboriginal Heritage Act dictates.
5. Senior positions within the Department that deal with Aboriginal sites and their assessments should have the relevant qualifications in the fields of Archaeology and Anthropology.
6. The Aboriginal Heritage Act's Due Diligence Guidelines should be more widely distributed and promoted.

BACKGROUND INFORMATION

According to the Western Australian Hansard of 1972, the Aboriginal Heritage Act was designed to provide a means to protect and preserve Aboriginal sites by creating an appropriate authority with adequate powers to enable it to fulfil its purpose. This independent authority was aptly named the Aboriginal Cultural Materials Committee (ACMC).

In evaluating the importance of places and objects, the committee must have regard to any existing or former use or significance attributed to it under relevant Aboriginal custom, tradition, historical association, or sentiment. Other criteria include potential anthropological, archaeological, or ethnographical interest and aesthetic values. Associated sacred beliefs and ritual or ceremonial use is to be the primary consideration when evaluating sites.

It was said that the Act will apply to any place connected with the traditional cultural life of the Aboriginal people-past or present-and any place, including any sacred, ritual or ceremonial site, which is of importance or of special significance to persons of Aboriginal descent; any place which in the opinion of the trustees is or was associated with Aboriginal people and which may be of historical, anthropological, archaeological, or ethnological interest; and any place where objects of sacred, ritual, or ceremonial significance are stored.

Protection is also given to natural or artificial objects-irrespective of where they are found in the State - which are or have been of sacred, ritual, or ceremonial significance or which were used for any purpose connected with the traditional or cultural life of the Aboriginal people, past or present, but excluding objects which have been made especially for the purpose of sale and are not of sacred significance or capable of being mistaken for same (11th April 1972 Hansard - Willesee).

INTRODUCTION

The Aboriginal Heritage Act of 1972 is the foremost legislation in the protection of Aboriginal heritage within the Western Australia (WA). This report will take the intent of the Aboriginal Heritage Act and compare it to the implementation and internal systems and workings within the appropriate authorities. It will look at the most problematic section of the Act, Section 18, which is responsible for the destruction of Aboriginal sites. It will delve into the inherent administrative problems within the responsible departments, namely the Department of Aboriginal Affairs (formerly the Department of Indigenous Affairs) and the Aboriginal Cultural Materials Committee.

It will also analyse recent changes to the forms and processes used within the Department, and how the effectiveness of both of these and the Act may have been altered because of it. This report will then briefly examine the prosecutions involved in the Act, and will analyse the effectiveness of the penalties and deterrence systems within the Act itself. A major part of the paper will examine Section 18 of the Act, and the problems involved with it. Other issues within the Act related to the registering of Aboriginal sites will also be analysed in order to determine the effectiveness of the Act as a whole. By examining these factors, it will become clear to see just how effective the Aboriginal Heritage Act is when it comes to providing Aboriginal sites with protection.

1. ADMINISTRATIVE PROBLEMS WITHIN THE AHA

Research carried out by former Registrar and Chief Executive Officer of the Western Australian Museum, Dawn Casey (2007: 83), shows that, while the processing and approvals system is important and indeed in need of review, it is in fact the actual preservation of the Aboriginal heritage sites themselves that need to be given the higher priority. “Interestingly, several industry submissions shared the concerns of Aboriginal people that the preservation and promotion of Aboriginal heritage has been neglected while other areas such as processing and approvals are given higher priority. They point to the need for additional funding and staffing to address these shortcomings” In order to effectively do this though, the administrative problems within the authorities who deal with the Act need to be remedied.

The inequitable nature of the appeals process under the current Act is highly unacceptable, as the applicant can appeal any decision by the Minister, whereas Aboriginal custodians cannot. The importance of Aboriginal heritage sites, artefacts, objects and areas is not a decision that can be made by a ‘state’. The significance of these places to Aboriginal people is not a determination that can be ‘catalogued’ as a matter of public record or ‘archived history’. Should the state wish to make determinations on what cultural heritage is of value to it, then it should also allow the Aboriginal people to have the same autonomy over determinations they make of the value of sites, recognise their decisions on the importance and sacredness of sites as a matter of respect, and privilege these determinations over the vested interests of industry. This lack of consultation with the relevant people is just one problem within the DAA.

In 2012, the Department of Aboriginal Affairs proposed certain changes to the Aboriginal Heritage Act and invited submissions from relevant people and organisations in the field of Aboriginal heritage. This proposal assumes that Aboriginal heritage will be adequately addressed by processes under the AHA, and that the Act alone will be sufficient to protect Aboriginal heritage. As previously expressed, the current AHA is inadequate and provides a very low standard of protection when compared with other Australian jurisdictions and against international standards. According to politician Robin Chapple, the proposed

amendments do nothing to address this issue and in fact would appear to be deliberately decreasing the capacity of the Act to provide such limited protection as it currently affords (2012).

The discussion paper states that 'it is proposed to investigate options to amend both the EP Act and the AHA to streamline and align approval processes by removing the requirement for the EPA to consider Aboriginal heritage in environmental impact assessment when these matters are properly addressed in another process of Government' (DAA 2013). Currently, taking into account a very pro-development government, notions of streamlining approval decisions on industry proposals conceptually equate to a decrease in protection for Aboriginal heritage. According to Robin Chapple (2012), this proposal is designed to facilitate the mining industry while sidelining Aboriginal heritage issues.

Accordingly, the Aboriginal Heritage Act does not provide for an effective appeals process. Tracy Chaloner (2004: 262) believes that this lack of appeal rights under the AHA means that Aboriginal people must first prove their standing in relation to the matter before it will be heard. This is yet another problem within the Department and within the application of the AHA. One other major problem of the AHA is that it is not as inclusive of Western Australia's Aboriginal people as it could or should be. There has been an extreme lack of consultation with Aboriginal people regarding the application of the Act. For example, in his paper, *Trashing Heritage*, David Ritter (2003: 195) said that the Act both disempowers and colonises Aboriginal people, reducing their social powers and stultifying political aspirations. According to Chaloner, the AHA needs to be amended to be inclusive, not exclusive, of Western Australia's Aboriginal peoples (Chaloner, 2004: 242). Ritter (2003: 199) believes that the legislation does not create a right on behalf of Aboriginal people to have Aboriginal heritage protected that is enforceable by Aboriginal people as having a special interest under the Aboriginal Heritage Act. "The Act creates nothing more than an illusion of rights".

In "Trashing Heritage", Ritter (2003: 199) mentioned that in order to enjoy such protection of their cultural materials as the Aboriginal Heritage Act offers, Aboriginal people must

'respect the forms and norms laid down by those in power'. It has been said that protection of Aboriginal cultural materials 'bestowed upon the powerless by the powerful' remains at the mercy of the colonising power, and is left ultimately 'within the control of those with authority to interpret or rewrite the sacred text from which they derive' (Freeman in Upston Hooper: 712).

2. SECTION 18 APPROVALS & OTHER HINDRANCES TO THE AHA

Section 18 is the most contentious of all the sections in the Aboriginal Heritage Act, and is the primary focus of the amendments to the Act to date. According to Chaloner (2004: 258), this is because Section 18 originally enforced blanket protection of Aboriginal heritage, whereas the Trustees of the Museum could only make one of two decisions when recommending an application, to consent to the use of an area or to recommend that the area be protected. She believes that, under the duty of care provisions in Section 12, the Trustees would have no choice but to recommend protection if there was Aboriginal heritage in the area. Chaloner (2004: 241) believes that protection under the Aboriginal Heritage Act has been the exception and not the rule, with significant detrimental impacts on Aboriginal peoples.

Section 18 was inserted into the Aboriginal Heritage Act during the amendments of 1980. It was amended again in 1995. During this process, the word "Trustees" was deleted and substituted for the word "Committee". The Act then further amended any subsequent articles to allow for the new terminology. Section 18 was subject to one of the biggest amendments made to the Act in 1995. It is also called "Consent to Other Uses". It is responsible for the destruction of Aboriginal heritage sites in order for people, organisations or companies to use it for other purposes, such as mining.

2.1 Section 18 in Detail: Subsections

Subsection 1 deals with the terminology relating to land owners. "The expression the owner of any land includes a lessee from the Crown, and the holder of any mining tenement or mining privilege, or of any right or privilege under the Petroleum and Geothermal energy Resources Act 1967, in relation to the land". It goes on to say that an owner of any land can also be someone who has authority under s7 of the Petroleum Pipelines Act 1969 to enter upon the land, or someone who is the holder of a distribution licence under part 2A of the Energy Coordination Act 1994 (Aboriginal Heritage Act 1972: s18). Nowhere in this subsection does it say anything about the rights of Aboriginal people, land or heritage.

Subsection 2 deals with the processes that occur within Section 18 when an application is received. “Where the owner of any land gives to the Committee notice in writing that he requires to use the land for a purpose, ... the Committee shall, as soon as it is reasonably able, form an opinion as to whether there is any Aboriginal site on the land, evaluate the importance and significance of any such site, and submit the notice to the Minister together with its recommendation in writing as to whether or not the Minister should consent to the use of the land for that purpose, and, where applicable, the extent to which the conditions upon which his consent should be given” (Aboriginal Heritage Act 1972: s18).

Subsection 3 deals with the Ministers decision to either consent to the use of the land and/or its conditions, or to wholly decline to consent to the use of the land for that purpose. According to subsection 3, the Minister shall consider the recommendation with regard to the general interest of the community, and shall then inform the owner in writing of his decision (Aboriginal Heritage Act 1972: s18).

Subsection 4 involves the Minister making decisions when the Committee has not given its notice or recommendation regarding an application to use a site. “Where the owner of any land has given to the Committee notice pursuant to subsection (2) and the Committee has not submitted it with its recommendation to the Minister in accordance with that subsection the Minister may require them to do so within a specified time, or may require the Committee to take such other action as the Minister considers necessary in order to expedite the matter, and the Committee shall comply with any such requirement” (Aboriginal Heritage Act 1972: s18).

Subsection 5 handles the review process of Section 18. It allows the land owner to apply to the State Administrative Tribunal for a review of the decision if the land owner is aggrieved by it (Aboriginal Heritage Act 1972: s18).

Subsection 6 did handle appeals and the ability of a Judge to overrule a Ministers decision, however, this subsection was repealed in 2005 (Aboriginal Heritage Act 1972: s18).

Subsection 7 manages the removal of any objects from land that is going to be used for other purposes. “Where the owner of any land gives notice to the Committee under subsection (2) the Committee may, if it is satisfied that it is practicable to do so, direct the removal of any object to which this Act applies from the land to a place of safe custody” (Aboriginal Heritage Act 1972: s18).

Finally, subsection 8 involves the actions of a person who has consent to use the land but does not. “Where consent has been given under this section to a person to use any land for a particular purpose nothing done by or on behalf of that person pursuant to, and in accordance with any conditions attached to, the consent constitutes an offence against this Act” (Aboriginal Heritage Act 1972: s18). In other words, consent can only be given to someone when it is definite that the land will be used, otherwise it is an offence to obtain consent but then do nothing with it. This helps to show that Section 18 consent is not given freely to just anyone, at any time. Records and data though, prove otherwise (Hansard 2013). This will be discussed later in the report.

2.2 Complications of Section 18

In response to the proposed amendments to the AHA, Robin Chapple (2012) believes it is clear that the intent is to expedite the Section 18 process and to enable claims from any claimant / proponent to seek approval to undertake acts regardless of their negative impacts on heritage sites. Given the current standing of Aboriginal people in the Act, this is likely to further privilege mining claims over lands at the expense of heritage values and Aboriginal interests.

Under the provisions of this proposal a holder of a mining lease over land is termed a ‘landholder’, while the rights of native titleholders of the land in question are not recognised in either the AHA or the proposed amendments. According to Chaloner (2004: 241), the bipartisan and pro-development agenda is likely to ensure that the AHA is further amended to privilege non-Aboriginal land use and fast track development.

The Act no longer protects Aboriginal sites as it now permits wholesale destruction of them without any enforcement of prior recording and salvage or any other method of protection offered to even a few token site types remaining in an area. Linda Villiers (2013) believes that the ACMC is regularly pressured to ignore the recommendations of the surveying archaeologists and the local Aboriginal people retained to consult on surveys, regarding the significance of sites. Development approvals are given without regard to the effect and ramifications of the wholesale destruction of the archaeological record which after all is a national resource and heritage.

In 1983, the Australian Government commissioned an inquiry into Aboriginal land rights. The appointed Commissioner was Paul Seaman QC. In response to the 1980 amendments of the Western Australian Aboriginal Heritage Act, he said in his Aboriginal Land Inquiry that the government of the day can decide in the interests of the broader community what Aboriginal sites should be destroyed or damaged, no matter how sacred or important or special their significance to Aboriginal people may be (Seaman 1984: 144).

With the use of Section 18 being so accessible, the question arises as to whether or not the intent of the Act is actually being followed, and carried out. All Aboriginal sites are vulnerable to Section 18 processes, and the majority of them will get authorisation. For example, as of 2002, the Aboriginal Cultural Materials Committee had processed 957 applications since the Aboriginal Heritage Act came into force. Of these 957, 702 were recommended for approval (Hansard, 2002 Parliamentary Questions). Between the period of 1 January 2008 – 14 June 2013, a further 646 Section 18 applications were made. Of these 646, only one was refused by the Minister. This clearly indicates that Section 18 is becoming more accessible, and that legitimate protection for Aboriginal sites is no longer guaranteed under the Aboriginal Heritage Act of 1972. Ritter (2003: 199) believes that the registering of a site 'loans' protection to it that is readily recoverable under the Section 18 process. The Act is not being carried out in a way that reflects its previously expressed intent.

2.3 The Effect of Changes to the Site Recording Form

Chaloner (2004: 243) believes that the Act has only ever achieved the purpose of requiring developers to go through a series of procedures before consent to use the land is granted. One of these procedures is the Aboriginal Site Recording Form, which changed in format in February 2013. The Aboriginal Site Recording Form used from 2006 - 2012 was a two page document that included 6 questions. The new Site Recording Form is 24 pages long and contains roughly 20 parts to fill in, *without* appendices. It also comes with a further 12 pages of instructions on how to fill out the form. This new form can, in some ways, actually inhibit, obstruct and discourage the registration of Aboriginal sites for many reasons.

Four archaeologists either belonging to or affiliated with the Australian Association of Consulting Archaeologists Inc. and Archae-Aus all believe that the new forms actually discourage the reporting of sites and heritage information. In a submission that they drafted together, Fiona Hook, the President of AACAI, Phil Czerwinski, the AACAI WA Chapter President, Jim Rhoads of both AACAI and Archae-Aus, and Caroline Bird of Archae-Aus all expressed deep concern over the then proposed changes. The Site Recording Forms alone are responsible for assessing whether or not a site is significant, and *how* significant. Currently, the duty of assessing significance lies with an independent body, the ACMC. It is therefore unnecessary to lodge site information with the DAA, who are open to manipulation by those submitting heritage information with differing interests, such as mining. Evatt however, argued that "assessments relating to the significance of sites and areas" should be separated from "decisions concerning the use of land" (in Chaloner : 247).

Because the new Aboriginal Site Recording Forms have changed the criteria and the way in which the significance of a site is assessed, Aboriginal heritage sites and the Register have now been adversely affected. This means that sites which did not meet any of the criteria at the time of recording, but which might well meet the criteria if further information were to be gathered, could now be lost. This again shows the devolution of the protection process, and the ineffectiveness of the Aboriginal Heritage Act.

According to AACAI WA Chapter President, Phil Czerwinski, in the draft submission, there is nothing in the Act that requires any person to report a site or object using any kind of form (Czerwinski et al 2012). Because of this, Aboriginal sites are not being recorded or registered in the capacity that they should be. It raises the question of whether or not something should be done about this in order to be able to register Aboriginal sites when needed.

Question 6 on the new form specifically requires the informant to set out in full all confidential information, and further more requests a summary of the information that will be published and made freely available. The draft submission by the previously mentioned archaeologists, *AACAI Member Feedback: Proposed DIA Site Card Amendments*, states that this is either incredibly naïve, or a deliberate ploy to discourage important and significant sites from being registered in the first place (Czerwinski et al 2012).

One major downfall of the new Site Recording Form is that it only pertains to the significance of an Aboriginal site to *living* Aboriginal people. According to Czerwinski et al (2012), the old form allowed for sites to be registered if they were of significance to *deceased* Aboriginal people as well. According to AACAI, many sites on the Register (before the new form was in place) were of importance and special significance to deceased individuals. They go on to say that this new form fails to allow for that possibility.

Question 10 of the new form allows “heritage values which change over a period of time to be recorded”. In the submission by AACAI, it is argued that this may facilitate the down grading and even de-registering of sites when, for example, the principle informant dies and the site is no longer of importance and significance to any living Aboriginal person (Czerwinski et al 2012).

Questions 9 and 10 on the new form allows for other views on the site to be recorded. This normally would be a positive thing for a community but not when conflicting views on the significance of an Aboriginal site are involved. This means that if the importance and significance of a site are in any way in doubt, the site cannot be registered for protection.

Moreover, DAA staff are under instruction to canvas the views of any other individuals or organisations whose rights and interests in the land may be affected by the registration of the place as a site. This process can have negative effects on the site as, under current standing orders, this effectively means that the place cannot be registered as a site.

Phil Czerwinski (2012) believes that the new forms are just one more step in the direction of the ongoing devolution of the protection of legitimate Aboriginal heritage sites in Western Australia. It will produce a Register which is vastly reduced in scope and ambit in order to promote a better, smoother and more streamlined process that delivers “clarity, effectiveness, efficiency and certainty” of Heritage approvals for mining interests.

Jim Rhoads and Caroline Bird also believe that there is a real need for improvement in the recording of sites and the development of standardised and rigorous methods. This form, by adopting such an open ended approach, effectively abdicates responsibility for providing leadership and setting standards. Rhoads and Bird also believe that standardised and centrally registered / housed site information is essential to progressing our understanding of WA’s cultural heritage (Czerwinski et al 2012). “For Aboriginal people, participation in cultural activities is associated with those places and objects that are of cultural value or significance. If Aboriginal heritage is destroyed, their ability to participate and enjoy participation in associated cultural activities is diminished.” (Anderson v DG, Department of Environment and Conservation 2006: 144 LGERA 43).

3. DEPARTMENTAL VS MINISTERIAL MANAGEMENT OF THE AHA

The DIA acknowledge that the result of their inability to effectively monitor or enforce the state's heritage protection regime has led to a distrust and lack of confidence by the Indigenous community in the DIA, and the state government generally. The DIA recognise that the agency is seen as facilitating the destruction of Aboriginal sites by developers and is incapable of monitoring their conduct (DIA review report, Dawn Casey).

3.1 Problems of Ministerial Discretion

In a recommendation made by John Avery (2012), the issue arose about whether the protection, review and approval processes would be more efficient and streamlined if they were carried out on a departmental level, rather than at a ministerial level, as it is currently.

Originally, the Minister did not have any discretionary powers over Section 18. The Minister was, however, using the powers given to their position under Section 11(2) to direct the Trustees and other authorities to reverse their recommendations. Chaloner (2004: 258) believes that the Act was subsequently amended to "allow Ministerial discretion in the granting of consent under s.18. Since that time, it appears that consent has never been denied for a mining application". Whilst this has *generally* been found to be true, there *have* been cases in which it is not. During the Gallop Government of 2001 – 2004, one Section 18 application was refused (Hansard 2004), and since the 1st of January 2008, yet another Section 18 application was refused (Hansard 2013).

In 1984 Seaman discussed the discretionary powers of the Minister under Section 18 and under the Aboriginal and Torres Strait Islander Heritage Protection Act of 1984 (ATSIHPA), commenting that a system which allowed Ministerial discretion would not meet the reasonable aspirations of Aboriginal peoples in Western Australia (Seaman 1984). Chaloner (2004: 259) argues that Ministerial discretion under Section 18 and under ATSIHPA has been used repeatedly to allow for damage and/or destruction of important Aboriginal heritage areas. In her opinion, Ministerial discretion under Section 18 has rendered the entire Act ineffective. Whilst this may be slightly too extreme a statement, when examining the Western Australian Hansard over the past 10 years, it is clear to see that the amount of

Section 18 applications approved, or recommended for rejection but then approved by the Minister has grown proportionately with the amount of Ministerial power within the Department. From 1972 – 2002, only one application was recommended for rejection by the ACMC but was overridden by the Minister and approved (Hansard 2002). Between 2008 – 2011, the ACMC recommended a total of 13 Section 18 applications be refused but the Minister overrode this recommendation and approved 12 of them (Hansard 2011). Extend this time frame to June 2013, and the total number from 2008 becomes 17 (Hansard 2013).

3.2 The Aboriginal Cultural Materials Committee

The Aboriginal Cultural Materials Committee, according to Section 28 of the Act, must have an appointed member who is recognised as having specialised experience in the field of anthropology. According to the Minister for Aboriginal Affairs, the Hon. Peter Collier, the specialist anthropologist resigned in July of 2010 (Hansard 2011). As of the information obtained from the DAA website in October of 2013, there is still no specialist anthropologist within the ACMC (DAA Website). According to the Minister in 2011, the DAA had been processing Section 18 applications, although he did not believe that the Government had breached its obligations under the Act (Hansard 2011). In fact, as of October of 2013, the ACMC was comprised of 6 members, yet only 3 of them are full members and the other 3 are ex-officios (DAA Website).

According to the Department of Aboriginal Affairs' website (2013), the Aboriginal Cultural Materials Committee was established under the Aboriginal Heritage Act of 1972:

- To evaluate on behalf of the community the importance of places and objects alleged to be associated with Aboriginal persons;
- Where appropriate, to record and preserve the traditional Aboriginal lore related to such places and objects;
- To recommend to the Minister for Aboriginal Affairs places and objects which, in the opinion of the Committee, are, or have been, of special significance to persons of Aboriginal descent and should be preserved, acquired and managed by the Minister;
- To advise the Minister on any question referred to the Committee, and generally on any matter related to the objects and purposes of this Act;

- To perform the functions allocated to the Committee by this Act; and
- To advise the Minister when requested to do so as to the apportionment and application of moneys available for the administration of this Act.

One struggles to understand how these duties can be carried out effectively when there are only 3 people available to do them. In Dawn Casey's (2007: 27) review of the DAA, she recommended that there should be an increase in the membership of the ACMC, including two independent archaeologists. This recommendation was made in 2007, and should have been implemented, or at least considered thoroughly, as Aboriginal sites continue to be destroyed and productivity decreases.

Another issue related to the people involved in the decisions regarding the AHA is the possible lack of knowledge and/or qualifications on their behalf. A job vacancy advertised both on the Jobs WA Board, and on the Australian Archaeological Association website indicates that this may in fact be the case. The position was for a Senior Site Assessment Officer, at the high rank of a level 7 position within the Department of Aboriginal Affairs. Included in the job description was "please note, you do not need to be an anthropologist or archaeologist to apply" (DAA 2013).

Again, one would struggle to understand just how someone in such a high, senior level position could get away with no qualifications in the fields relevant to the job. Also, because the position was for a 'Senior Site Assessment Officer', one would assume that they would need at least a basic knowledge of, or a degree in either archaeology or anthropology. The fact that these are not necessary for the position indicates that the Aboriginal Heritage Act may not be taken as seriously as was intended in 1972.

4. PROSECUTIONS AND OFFENCES MADE UNDER THE AHA

Gaining a prosecution under the AHA has become very difficult. According to the Parliamentary Secretary representing the Minister for Indigenous Affairs in 2002, only 3 prosecutions had been laid since the Act came into force in 1972 (Hansard 2002/3). Only another 3 prosecutions have been laid from the period of 2004 – 2011. In an AHA review submission, Stephen Bennetts (2012), wrote that “between 1972 and 2002, there were three prosecutions by DIA for damage to sites under the AHA; zero between the time Gallop Govt took office in 2001 until 2004, and 3 prosecutions under AHA between 2004 – 2011”. Whilst it is indeed true that the number of prosecutions has increased with time, the question arises as to whether or not compliance is being monitored effectively within the Department of Aboriginal Affairs and if so, whether or not more can be done to enforce and/or follow up on possible cases. Enforcement is though, understandably, difficult in such a large state, especially one with such remote areas. This begs the question of whether or not more resources should be put into this area of the DAA.

4.1 Penalties Within the AHA

It has been argued that, although the penalties were substantially increased in 2003, they still aren't adequate when it comes to a corporate body violating Section 18. This was argued even in 1992, when they were proposed, by the ALS. It was said that “the penalty for an individual may be a significant deterrent, but the then proposed \$50,000 fine for a body corporate was inadequate”. Chaloner (2004: 254) added that some ten years later it would be little more than petty cash for a mining company who stands to gain hundreds of millions of dollars revenue.

Chaloner argues forcibly that the provision for mining tenements be forfeited for an offence by a mining company be brought back into an amended Aboriginal Heritage Act. This provision, included in Section 58 of the original 1972 AHA, was removed in the amendments of 1980. Chaloner (2004: 255) continues, this section allowed a court to order the suspension or forfeiture of: “any right, title or interest held by that person in or affected that land or anything on or under that land or any mining tenement or mining privilege

relating thereto”, if the offence was committed “knowingly; for the purpose of gain; and with intent to defeat the purposes of the Act”.

4.2 “Special Defence” vs Due Diligence Guidelines

Section 62 of the Act allows for a “Special Defence of Lack of Knowledge”, meaning that if someone is charged with disturbing an Aboriginal site, they can say that they did not know of its existence beforehand. However, the introduction of the Due Diligence Guidelines makes this “special defence” almost obsolete.

The purpose of the Aboriginal Heritage Act’s Due Diligence Guidelines is to assist land users to be more aware of how their activities could adversely impact an Aboriginal site. This may involve one of the following: assessing the landscape where an activity is to take place, assessing the proposed activity and the potential impact on the landscape, searching the Register of Aboriginal Sites and the Aboriginal Heritage Inquiry System, consulting with the relevant Aboriginal people, agreeing to an Aboriginal Heritage Survey, or other Heritage management strategies (AHA Due Diligence Guidelines). If these Guidelines were more easily accessible, there would be almost no excuse for disturbing an Aboriginal site without permission. This would increase the enforcement of Aboriginal site protection, as well as the prosecutions involved, while maximising the deterrents to site destruction.

CONCLUSION

The Aboriginal Heritage Act, as discussed in this report, has not been implemented in a way that reflects its intent. The responsible authorities do not seem to be consulting with the relevant people in order to provide Aboriginal sites with the appropriate protection. The general response to the Department of Aboriginal Affairs' proposed amendments clearly indicated that the Department does not have the same ambitions, opinions *or* understandings as the rest of Western Australia. This report revealed that the appeals process involved is not effective enough in order to maintain an efficient system within the Department. Section 18, the most contentious part of the Act, as has been discussed, is the section responsible for the destruction of Aboriginal heritage sites or for the use by other entities for purposes such as mining.

It has been proven that the DAA has approved the majority of Section 18 applications that are sent to them, regardless of the recommendations made by the ACMC. This Committee, as was also discussed, has a complicated job, which is complicated further by its lack of membership. The Site Recording Forms used by the ACMC are no longer effective, as has been proven, as they can actually inhibit the registration of Aboriginal sites. As for the problems within the Department, these have been shown to come down to Ministerial discretion, as well as the staff and their possible lack of relevant qualifications.

Finally, this report looked at the ability of the DAA to effectively monitor and enforce the Act, the prosecutions made under it, and the 'Special Defence' being made obsolete by the Due Diligence Guidelines. This all indicated that the DAA is not doing enough to enforce the Act, and ensure protection of Aboriginal sites in Western Australia. By examining all of these factors of the AHA, it has become clear that the Act no longer guarantees the protection of Aboriginal heritage sites in WA. Because of the aforementioned reasons, the Aboriginal Heritage Act is no longer effective in Western Australia.

RECOMMENDATIONS

1. More resources need to be put into the Department of Aboriginal Affairs in order for it to improve its appeals, monitoring and enforcement processes.
2. The Site Recording Forms needs to be amended so that they are simpler to use, and no longer inhibit the registering of Aboriginal sites.
3. Decisions regarding Section 18 applications need to involve the Department, and not just the Minister. These decisions should also be made after detailed consultations with the relevant groups of people have been sought and carried out.
4. The Aboriginal Cultural Materials Committee needs to increase its membership as recommended by Dawn Casey, especially to statutorily include at least one Specialist Anthropologist, as the Aboriginal Heritage Act dictates.
5. Senior positions within the Department that deal with Aboriginal sites and their assessments should have the relevant qualifications in the fields of Archaeology and Anthropology.
6. The Aboriginal Heritage Act's Due Diligence Guidelines should be more widely distributed and promoted.

REFERENCE LIST

Aboriginal Heritage Act 1972. Western Australia 1972.

Anderson v DG, Department of Environment and Conservation, 144 Local Government and Environmental Reports of Australia 43, 2006.

Avery, J. 2012. Review of the Aboriginal Heritage Act 1972.

Bennetts, S. 2012. Submission on the Proposed Changes to the Aboriginal Heritage Act 1972 (WA).

Casey, D. 2007. Report of the Review of the Department of Indigenous Affairs.

Chaloner, T. 2004. The Aboriginal Heritage Act 1972: A Clash of Two Cultures; A Conflict Between Two Laws". Murdoch University

Chapple, R., Response to Discussion Paper on Review of WA Aboriginal Heritage Act 1972 (AHA), 2012.

Czerwinski, et al. 2012. "AACAI Member Feedback – Proposed DIA Site Card Amendments", Australian Association of Consulting Archaeologists Inc.

Department of Aboriginal Affairs. 2013. Available: <http://www.daa.wa.gov.au/>

Ritter, D. "Trashing Heritage", Studies in Western Australian History, 2003, 23, pp. 195-208

Seaman, P. 1984. Aboriginal Land Inquiry 1984. Australian Government.

Senior, C. M., 1992. "Resource Development and Aboriginal Heritage Protection Under State Legislation: Recent Proposals", Resource Development and Aboriginal Land Rights

Conference. Centre for Commercial and Resources Law, the University of Western Australia and Murdoch University.

Senior, C. M. 1995. "Review of the Aboriginal Heritage Act 1995", Western Australian Government, Perth.

Upston-Hooper, K. 1997. Slaying the Leviathan. Victoria University of Wellington.

Villiers, L, 2013, Email: Circumstances under which sites are assessed by the ACMC, 5th July 2013.

Western Australian Hansard, 1972 Parliamentary Debates. WA Parliament

Western Australian Hansard, 2002/3 Parliamentary Questions, WA Parliament

Western Australian Hansard, 2004 Parliamentary Questions, WA Parliament

Western Australian Hansard, 2008 Parliamentary Questions, WA Parliament

Western Australian Hansard, 2011 Parliamentary Questions, WA Parliament

Western Australian Hansard, 2012 Parliamentary Questions, WA Parliament

Western Australian Hansard, 2013 Parliamentary Questions, WA Parliament