

**Aboriginal
Heritage
Action
Alliance**

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The Hon Simon O'Brien MLC
Chair Legislative Council Standing Committee on Environment and Public Affairs
Parliament House
Perth WA 6000

Petition No 91 - Aboriginal Heritage Sites

Dear Hon Simon O'Brien MLC,

Thank you for this opportunity to provide a written submission to the Committee about AHAA's petition No 91 tabled in the Legislative Council by Robin Chapple MLC on 11 & 13 August 2015. AHAA has not submitted a complaint on this matter to the State Ombudsman, but petitions the Legislative Council to support the following actions:

- 1) Re-registration of the Burrup Peninsula (Murujuga) and 35 other registered sacred sites unlawfully deregistered by the WA Government's Aboriginal Cultural Material Committee (ACMC) using flawed legal advice on the definition of 'sacred site' under s 5b of the Aboriginal Heritage Act obtained by the Chair of the ACMC from the State Solicitor's Office,¹ subsequently overturned in Justice Chaney's 1 April 2015 WA Supreme Court ruling in *Robinson v ACMC*.²**

Following the Chaney decision on the unlawfully deregistered Port Hedland site, Minister Collier released to State Parliament a list of 36 other s 5b sacred sites which had also been deregistered by the ACMC using the legally (and anthropologically) flawed SSO definition of 'sacred site' under s 5b of the AHA and DAA Guidelines which Justice Chaney ruled were inconsistent with the AHA. Although Chaney J only referred the Port Hedland site back to the ACMC for reassessment, the Minister and DAA Executives have adopted a perverse misreading of the judgment, and interpreted it to require that all 36 unlawfully deregistered sacred sites be referred back to the ACMC for reassessment, in a process which they have stated may take many months to complete.³ It is AHAA's view that these 36 s 5b sacred sites were unlawfully deregistered by the ACMC in the first place, and should therefore revert to their original status before they were unlawfully deregistered by the ACMC. Given that 34 of these 36 sites are subject to actual or proposed development⁴ there is a danger that the sites may already have been or will be destroyed while DAA is pursuing its lengthy and legally redundant reassessment process. It is AHAA's view that the Legislative Council should take all necessary steps to uphold the legislative provisions of the AHA to protect Aboriginal sites, by seeking urgent advice from the Minister as to whether any of these sites have been damaged in the interim, and also taking urgent action to prevent any further destruction.

¹ <http://www.robinchapple.com/sites/default/files/2015-06-16%20QWON%20Gavin%20Fielding.pdf>

² <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/wa/WASC/2015/108.html?stem=0&synonyms=0&query=diana%20robinson>

³ [http://parliament.wa.gov.au/Parliament/commit.nsf/\(Evidence+Lookup+by+Com+ID\)/292BEE28748F585E48257E6E0025B2A9/\\$file/ef.ehw16.150623.tro.001.cw.pdf](http://parliament.wa.gov.au/Parliament/commit.nsf/(Evidence+Lookup+by+Com+ID)/292BEE28748F585E48257E6E0025B2A9/$file/ef.ehw16.150623.tro.001.cw.pdf)

⁴ <http://www.robinchapple.com/sites/default/files/2015-05-05%20QWON%20part%202%2023%20sites.pdf>;
Vaughan, E 2015, *Excavating the Aboriginal Heritage Act: A cross-disciplinary study of Aboriginal heritage protection in Western Australia, 1972-2015*, Honours thesis, University of Western Australia. Page 70.

2) Abandonment of the proposed Aboriginal Heritage Act Amendment Bill 2014, which would make it easier to destroy or damage places of significance to Aboriginal people throughout Western Australia.

This request reiterates an earlier submission by AHAA in relation to Petition No 80 of 12 May 2015. The Committee responded to AHAA's submission in a letter stating that the Committee had resolved to conclude its inquiries on this matter on 17 June 2015, and included a letter from Minister Collier to the Committee in which he attempted (in our view, in a completely unsatisfactory manner) to address the concerns raised. Given the Committee's somewhat cursory dismissal of AHAA's earlier submission on this important matter, and the legal opinion on the AHA Amendment Bill provided to AHAA by Mr. Ian Viner QC,⁵ AHAA requests that the Committee now reconsider AHAA's previous submission and Mr. Viner's legal opinion.

AHAA would again highlight the fact that the Bill as proposed will be detrimental to Aboriginal heritage protection in WA by further increasing direct political influence over heritage processes⁶ and marginalising appropriate input into these processes by appropriate experts and Aboriginal people themselves. The current independent ACMC panel composed of experts and Aboriginal people would be stripped of its current functions of assessing sites and applications to 'disturb' such sites under s 18 of the AHA, and these powers would instead be vested in a government bureaucrat appointed by the Government of the day ('the CEO'); the position of ACMC Specialist Anthropologist would be abolished, thus making it arguably impossible for sites to be assessed under s 5b of the AHA, which relates exclusively to the anthropological significance of Aboriginal sites. The ACMC would thus become a kind of atrophied symbolic limb of DAA, devoid of substantial administrative functions, rather than an independent body whose function is to provide independent expert advice on Aboriginal heritage matters. Instead, complex anthropological matters such as the proper definition of a 'sacred site' would be outsourced to persons lacking the necessary expertise, qualifications or political independence to be able to perform such functions effectively, such as the current CEO of DAA, the current Chair of the ACMC, the previous and current DAA Chief Heritage Officers, or the State Solicitor's Office, thus opening the way for further litigation, as exemplified in the State Government's recent comprehensive legal, political and policy setback in the *Robinson v ACMC* case.

Both the current AHA and proposed amendments thereto appear to be inconsistent with both the *Native Title Act 1993* (Cth) and *Racial Discrimination Act 1975* (Cth),⁷ by providing a right to the 'owners' of land subject to s 18 applications (including the mere holders of exploration licenses over such land) to seek review by the State Administrative Tribunal of a s 18 decision of the Minister, while affording no such right to Aboriginal custodians or native title holders of the sites to be 'disturbed' under such ministerial approvals.⁸ Given the apparent inconsistency of both the current and amended Acts with these two important pieces of Commonwealth legislation, it is highly likely that aggrieved Aboriginal parties would try to mount constitutional challenges to the AHA under s 109 of the Australian Constitution, as previously foreshadowed by native title lawyer David Ritter.⁹

3) In consultation with Aboriginal people, establishment of an inquiry to review the Aboriginal Heritage Act 1972, its administration by WA's Department of Aboriginal Affairs and its Aboriginal Cultural Material Committee to ensure ongoing protection of places of spiritual and cultural significance to Aboriginal people.

⁵ <https://aboriginalheritagewa.files.wordpress.com/2015/05/2-viner-advice.pdf>

⁶ For a good example of inappropriate political influence over such processes, see: <http://www.smh.com.au/national/wa-minister-in-fight-over-friends-mine-20110613-1g0i7.html>

⁷ Cf WA Law Society submission to DAA (recently unaccountably deleted from DAA's website): http://www.daa.wa.gov.au/Documents/HeritageCulture/Aboriginal%20Heritage%20Legislative%20Changes/Submissions/Law%20Society_AHAB2014_20140731.pdf

⁸ Cf recently <http://ymac.org.au/wp-content/uploads/2015/09/150927-media-release-YuleRiver.pdf>

⁹ Ritter, D (2003) 'Trashing Heritage: Dilemmas of Rights and Power in the Operation of Western Australia's Heritage Legislation' in C. Choo and S. Hollbach (eds), *Studies in Western Australian History*, 23, p 204 fn 63.

Despite a clear political desire on the part of the State Government to achieve a 'quick fix' to perceived problems within WA's Aboriginal heritage protection regime, there is no real substitute for doing the job properly, by establishing a Parliamentary Select Committee to investigate these matters thoroughly, with appropriate input from qualified experts and Aboriginal people themselves.

The level of dysfunction in the ACMC and the DAA Executive's recent administration of Aboriginal heritage matters in WA has been clearly laid bare in the wake of the recent Chaney decision, and has led to the recent demotion of no less than four members of the DAA Executive. Under the current Government, DAA Executives with no professional qualifications or experience in Aboriginal heritage management have been recruited directly from industry backgrounds to administer WA's Aboriginal heritage.¹⁰ In a remarkable coup, the main industry lobby group which has driven the industry-friendly AHA Amendments process (the Association of Mining and Exploration Companies: AMEC) was even successful in placing its own former Manager of Policy and Public Affairs into a position as DAA Director of Policy and Reform. The current Chair of the ACMC (a political appointee with no qualifications or experience in Aboriginal heritage management),¹¹ has truncated this body's important deliberative functions to the point of farce,¹² has at the same time excluded qualified DAA Senior Heritage Officers from taking part in its meetings,¹³ as well as preventing Aboriginal custodians whose sites face destruction under s 18 provisions from making representations to the ACMC.¹⁴ The membership of the body has been run down to the point where it is often in danger of being inquorate, and it has also been deprofessionalised to the point where there is currently no anthropologist or archaeologist on the committee, despite its highly technical deliberative functions, and the fact that s 28 (3) of the AHA requires the presence of a Specialist Anthropologist on the ACMC. Both (of only two) current Aboriginal members of the ACMC appear to have serious conflicts of interest, while the current Chair has regularly taken part in deliberations affecting leases owned by a company in which he has a shareholding.¹⁵ DAA and the Minister do not appear to have established a register of interests to monitor such actual or perceived conflicts of interest, as recommended by the Public Service Commission.¹⁶ The current Chair of the ACMC also overruled the former ACMC Specialist Anthropologist's advice to reject the flawed SSO advice to the ACMC on the definition of 'sacred site' under s 5b of the AHA,¹⁷ leading to the catastrophic consequences for Aboriginal sites in WA and the reputation of DAA and the State Government witnessed in the Chaney decision. Since taking over as Chair of the ACMC in 2011, the current incumbent has also presided over a previously unprecedented level of site deregistrations.¹⁸

For these, and many other reasons which space does not allow us to enumerate, but which have been amply canvassed in AHAA's previous submission, as well as numerous submissions by experts and interested parties on these matters to DAA (now unaccountably expunged from its website),¹⁹ it is argued that the Legislative Council must establish a Parliamentary Select Committee to properly investigate the matters raised in this submission.

¹⁰<https://www.themonthly.com.au/blog/stephen-bennetts/2015/17/2015/1424128413/wa-s-new-look-aboriginal-heritage-policy-and>.

¹¹ <http://robinchapple.com/sites/default/files/2012-05-02%20QON%20DIA%20Site%20Deregistering.pdf>.

¹² <http://www.robinchapple.com/sites/default/files/2012-06-12%20QON%20ACMC%20meetings.pdf>

¹³ <https://aboriginalheritagewa.files.wordpress.com/2015/01/2012-05-02-qon-dia-site-deregistering.pdf>

¹⁴ As attested by Noongar custodians Bella Bropho and Albert Corunna

¹⁵ [http://www.robinchapple.com/sites/default/files/2015-08-](http://www.robinchapple.com/sites/default/files/2015-08-19%20QON%20ACMC%20interest%20and%20quorum.pdf)

[19%20QON%20ACMC%20interest%20and%20quorum.pdf](http://www.robinchapple.com/sites/default/files/2015-08-19%20QON%20ACMC%20interest%20and%20quorum.pdf)
¹⁶ <https://publicsector.wa.gov.au/public-administration/public-sector-governance/good-governance-wa-boards-and-committees/resources/conflicts-interest>

¹⁷ <https://www.themonthly.com.au/blog/stephen-bennetts/2015/17/2015/1424128413/wa-s-new-look-aboriginal-heritage-policy-andXXXX>

¹⁸ <http://aboriginalheritagewa.com/2015/07/04/uwa-sitewatch-study-highlights-mass-deregistration-of-aboriginal-sites-under-barnett-government-since-2008/>

¹⁹ <http://www.daa.wa.gov.au/en/Heritage-and-Culture/Aboriginal-heritage/Aboriginal-Heritage-Legislative-Changes/Submissions-recvied/>

Dr Noel Nannup, Noongar elder.

Mr Clayton Lewis, AHAA official spokesperson and Aboriginal custodian of the Monger's Lake Waterway sacred site DAA ID 24380, unlawfully deregistered by the ACMC.

On behalf of Aboriginal Heritage Action Alliance
Perth, 9 October 2015