

The Statutory Framework for the Protection of Aboriginal Heritage Sites in WA

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Outline

- Legislation – concepts and operation

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 - Aboriginal Heritage Act 1972 (WA)
 - Aboriginal Heritage Regulations 1974 (WA)

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 - Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)
 - Native Title Act 1973 (Cth)

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 - Aboriginal Heritage Regulations 1974 (WA)
 - Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)
 - Native Title Act 1973 (Cth)
- Strengths
- Weaknesses, reform

Aboriginal Heritage Act 1972

Automatic protection of Aboriginal sites and objects

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Protection may be balanced with other matters of public interest

Aboriginal Heritage Act 1972

Dramatis personae:

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- Governor (in council) – protected areas; regulations

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- Minister – consents; covenants

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- Aboriginal Cultural Material Committee – evaluation & advice

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- Traditional custodians – delegated power of Minister

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- Trustees of the Museum – delegated powers re objects

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- Aboriginal Cultural Material Committee – evaluation & advice
- Traditional custodians – delegated power of Minister
- Trustees of the Museum – delegated powers re objects
- SAT – review of Minister's decisions re land use

Aboriginal Heritage Act 1972

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note: “importance and ... significance”

Aboriginal Heritage Act 1972

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 - (d) place for storage of traditional objects

Aboriginal Heritage Act 1972

- Sec.19 – 26 – protected areas:

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 - » Order – in – Council

Aboriginal Heritage Act 1972

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 - » Order in Council
 - » 6 months; extendable.

Aboriginal Heritage Act 1972

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 - s.26 regulations

Aboriginal Heritage Act 1972

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– authority to excavate site and remove any thing - on the advice of the Committee

Aboriginal Heritage Act 1972

Sec. 17: offence to excavate, destroy, damage, conceal or in any way alter any Aboriginal site

unless acting with the authorisation of the Registrar under section 16

or the consent of the Minister under section 18.

Aboriginal Heritage Act 1972

Penalties – s.57

- First offence
 - natural person - \$20,000 and/or 9 months imprisonment
 - body corporate - \$50,000

Aboriginal Heritage Act 1972

Penalties – s.57

- First offence
 - natural person - \$20,000 and/or 9 months imprisonment
 - body corporate - \$50,000
- Second or subsequent offence
 - natural person - \$40,000 and/or 2 years imprisonment
 - body corporate - \$100,000

Aboriginal Heritage Act 1972

Sec. 18 – consent to use land for specified purpose

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- Committee report and recommendation

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- Minister may decline/consent; conditions

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- Consent personal – not transferrable

Aboriginal Heritage Act 1972

- Sec.27 – covenants:

Aboriginal Heritage Act 1972

- Sec.27 – covenants:
 - holder of interest in land containing Aboriginal site
 - in lieu of declaration as protected area

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 - agreement with Minister - prohibiting or imposing conditions on development or use

Aboriginal Heritage Act 1972

- Sec.27 – covenants:
 - holder of interest in land containing Aboriginal site
 - in lieu of declaration as protected area
 - agreement with Minister - prohibiting or imposing conditions on development or use
 - permanent or specified period
 - binds owner and successors – registrable

Aboriginal Heritage Act 1972

- Sec. 38 register of places (and objects)

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 - maintained by Registrar
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 - so far as practicable

Aboriginal Heritage Regs 1974

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- apply in relation to any Aboriginal site, protected area or land held under covenant

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Aboriginal Heritage Regs 1974

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- restriction/prohibition of access to protected areas
- absolute offences: obstruction, disorderly conduct, animals
- qualified offences (consent by Minister or Registrar):
specimens, equipment, disturb surface, vegetation, vehicles, animals, commercial photography, etc, etc, etc.

ATSI HP Act 1984

Aboriginal and Torres Strait Islander
Heritage Protection Act 1984

ATSI HP Act 1984

- Commenced 25 June 1984

ATSI HP Act 1984

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- Protection of significant Aboriginal areas and objects by declaration

ATSI HP Act 1984

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An area of land or water “of particular significance to Aboriginals in accordance with Aboriginal tradition”.

ATSI HP Act 1984

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- Interim and long-term protection

ATSI HP Act 1984

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- Balance with other matters of public interest

ATSI HP Act 1984

Declarations – s.10

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- Application by Aboriginal or Aboriginal group

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- Representations to Minister's nominee

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- Report by Minister's nominee – prescribed considerations

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- Minister may vary or revoke at any time

ATSI HP Act 1984

Emergency declarations

ATSI HP Act 1984

Emergency declarations

- By Minister – s.9:
 - satisfied re status and serious threat
 - up to 30 days, if necessary up to 60 days
 - area, provisions for protection and preservation

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 - satisfied re status and serious threat
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 - area, provisions for protection and preservation
- By authorized officer – s.18
 - satisfied re status and serious and immediate threat
 - up to 48 hours
 - area, provisions for protection and preservation

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- Contravention of a provision of a declaration – s.22
 - natural person - \$10,000 and/or 5 years imprisonment
 - body corporate - \$50,000

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- Contravention of a provision of a declaration – s.22
 - natural person - \$10,000 and/or 5 years imprisonment
 - body corporate - \$50,000
- Summary proceedings by consent – s.23
 - natural person - \$2,000 and/or 12 months imprisonment
 - body corporate - \$10,000

ATSI HP Regs 1984

Aboriginal and Torres Strait Islander Heritage Protection Regulations 1984

(No relevance to the protection of Aboriginal heritage sites in
Western Australia as at September 2012)

Native Title Act 1993

Native Title Act 1993

Overview

- Addresses the validity of acts (effectiveness at law) which affect native title rights and interests

Native Title Act 1993

Overview

- Addresses the validity of acts (effectiveness at law) which affect native title rights and interests
- Does not address legality of acts which affect heritage sites

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- An act which is valid or validated is not for that reason lawful

Native Title Act 1993

Overview

- Addresses the validity of acts (effectiveness at law) which affect native title rights and interests
- Does not address legality of acts
- An act which is valid or validated is not for that reason lawful
- An act which is unlawful under Aboriginal heritage legislation is not protected by any process under the NTA (e.g. - NTA ss. 39(3), 44D).

Native Title Act 1993

Future act provisions

Native Title Act 1993

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- Aboriginal site impact must be considered in determining that an act is an approved mining (etc.) act excluded from right to negotiate (NTA s.26A, 26B, 26C)

Native Title Act 1993

Future act provisions

- right to negotiate excluded in some cases if Aboriginal site legislation applies to the area (NTA s.24JAA, 24KA, 24MB)
- Aboriginal site impact must be considered in determining that an act is an approved mining (etc.) act excluded from right to negotiate (NTA s.26A, 26B, 26C)
- expedited procedure not available unless Aboriginal site not likely to be interfered with (NTA ss.32, 237)

Native Title Act 1993

Future act provisions

- Aboriginal site impact must be considered in determining that a future act may be done (NTA s.39)

Native Title Act 1993

Future act provisions

- Aboriginal site impact must be considered in determining that a future act may be done (NTA s.39)
- State alternative native title law can not operate unless Minister determines (among others) that a Commonwealth or State law provides for Aboriginal heritage protection (NTA s. 43A)

Strengths

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- Automatic protection of all sites (WA legislation)
- Ad hoc protection of threatened sites (Cth legislation)
- Injunctions to prevent future contravention
- Prosecutions to punish and deter past contravention
- Processes to permit land use:
 - consultation
 - specialist advice
 - Minister's (political) decision
 - review by SAT/judicial review by Courts

Weaknesses and reform

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- Concurrent Commonwealth and State regulation:
 - scope for delay
 - conflicting decisions

Weaknesses and reform

- Concurrent Commonwealth and State regulation:
 - scope for delay
 - conflicting decisions
- Reform:
 - repeal State legislation?
 - amend Commonwealth legislation?
 - not to apply where State has effective laws?
 - limited to places of national significance?
 - remove from Native Title Act future act provisions?

Weaknesses and reform

- Aboriginal sites:
 - definition all encompassing – peanut and sledge hammer

Weaknesses and reform

- Aboriginal sites:
 - definition all encompassing – peanut and sledge hammer
- Reform:
 - different categories with different consequences
 - protected areas
 - other registered sites
 - current ethnographic significance
 - historical/archaeological significance
 - unregistered sites

Weaknesses and reform

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 - not all sites are registered – various reasons

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- Reform:
 - greater rigour in registration requirements and process?
 - prima facie evidentiary role?

Weaknesses and reform

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 - not all sites are registered – various reasons
 - not all registered places are sites – rigour? buffers? other?
 - zero evidentiary value
- Reform:
 - greater rigour in registration requirements and process?
 - prima facie evidentiary role?
 - registration of areas (not sites) and custodians/groups?

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 - inconsistent, unreasonable

Weaknesses and reform

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 - apply equally to protected areas and other sites
 - inconsistent, unreasonable
- Reform
 - General regulations for all sites? Necessary? Is s.17 sufficient?
 - Specific regulations for registered sites? Sub-categories?
 - Specific regulations for protected areas?

Weaknesses and reform

- Sec. 18 consent:
 - not transferrable
 - capacity for preemption under NTA s.39
 - delay, complexity, capacity for abuse
 - no procedure for “low impact” activities – all or nothing approach

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