# ABORIGINAL HERITAGE:
# THE RAINBOW SERPENT – WHEN GUIDELINES MISGUIDE

by Greg McIntyre SC

## INTRODUCTION

The Supreme Court in *Robinson v Fielding*[1] concluded that the guidelines adopted by the Aboriginal Cultural Materials Committee ('ACMC') for the determination of what is an Aboriginal site under the *Aboriginal Heritage Act 1972* (WA) ('*AHA*') are inconsistent with the definition of 'Aboriginal site' in the *AHA*.

This decision contradicts the approach the Registrar of Aboriginal Sites and ACMC have been taking to Aboriginal Sites, which has seen 22 sites removed from the Register. This approach, as determined by the Guidelines, threatens to leave any sacred site not associated with ritual or ceremonial activity unprotected by the *AHA*. It also removes from such sites the requirement under the *AHA* that the Minister for Aboriginal Affairs could conclude that it is in the community interest to excavate, destroy, damage, conceal or alter the site.[2]

## STATUTORY CONTEXT

Section 5(b) of the *AHA* says that the Act applies to 'any sacred, ritual or ceremonial site, which is of importance and special significance to persons of Aboriginal descent' and 'Aboriginal site' is defined to mean any place to which the Act applies.

The *AHA* establishes an ACMC with functions set out under section 39, including evaluating the importance of places alleged to be associated with Aboriginal persons and advising the Minister on questions referred to it. Section 39(3) prescribes that:

> Associated sacred beliefs, and ritual or ceremonial usage, in so far as such matters can be ascertained, shall be regarded as the primary considerations to be taken into account in the evaluation of any place or object for the purposes of this Act.

The Registrar of Aboriginal Sites has the statutory function of maintaining a register of places to which the *AHA* applies. Section 17 of the *AHA* makes it an offence to excavate, destroy, damage, conceal, or in any way alter, any Aboriginal site unless that person is acting with the authorisation of the Registrar under section 16 or with the consent of the Minister under section 18. Section 18 of the *AHA* provides for the owner of land to obtain consent from the Minister to use land for a purpose which would otherwise breach section 17.

## RECOGNITION OF MARAPIKURRINYA YINTHA SITE

The applicants in *Robinson v Fielding*, Diana and Kerry Robinson, are a sister and brother who are part of the Marapikurrinya family group (or clan estate) and part of the Kariyarra native title claim group. They are directors of Marapikurrinya Pty Ltd ('MPL'), a company which carries out heritage work in the Port Hedland area.

On 6 August 2008 the ACMC considered a section 18 notice issued on 17 April 2008 by BHP Billiton Iron Ore Pty Ltd ('BHPIO') on behalf of the Port Hedland Port Authority ('PHPA') and Mount Newman Iron Associates in relation to new berths to be located at Nelson point and further dredging of Port Hedland Harbour. The ACMC in considering that application formed an opinion that the Marapikurrinya Yintha, which is a body of water encompassing the waters of the Port Hedland harbour together with numerous creeks adjoining those waters, was an Aboriginal Site under that *AHA*; and the Marapikurrinya Yintha was entered onto the Register of Aboriginal sites.

A report by Anthropos Australia which was prepared for MPL and BHP, states that the Port Hedland Harbour in its entirety is a *Yintha* (meaning living water) imbued with the life of the *Warlu* (rainbow serpent). The ACMC received an oral presentation by Diana and Kerry Robinson in relation to the significance of the Marapikurrinya Yintha and they were given an opportunity to comment and respond to a report by an Anthropologist, Kim Barber, assessing the reports of Aboriginal ethnographic surveys and a cultural impact assessment of the works proposed.

The ACMC maintained its view that the Marapikurrinya Yintha was an Aboriginal Site in relation to section 18 notices on 16 October 2008; 2 December 2009; 3 August 2011 and at a meeting on 15 August 2011.

## GUIDELINES

In July 2013, the ACMC adopted new guidelines in relation to section 5 of the *AHA*, which included public release of a document titled *Section 5 of the Aboriginal Heritage Act 1972 (WA)* ('Section 5 Guidelines'). The Guidelines list criteria that will be taken into account when determining whether a place is a sacred, ritual or ceremonial site which are additional to the criteria specified in section 39 of the *AHA* as follows:

- The meaning of 'site' is narrower than 'place'.
- For a place to be a sacred site means that it is devoted to a religious use rather than a place subject to mythological story, song or belief.
- For a sacred site associated with Travelling Ancestors:
  - There are stories and songs that celebrate the activities of ancestral figure(s)
  - Either there are events which occurred to the ancestral figure at that place; or
  - The ancestral figure left some mark or thing that has form: eg a spring or rock formation.
- For sacred sites associated with figures or powers, the place is associated with a figure or a power which belongs to the country or was always there.

**Sites removed from the Register included significant sites such as the Burrup Peninsula.**

## 'NO LONGER A SITE'

On 17 October 2013, the WA Department of Aboriginal Affairs ('DAA') received a notice pursuant to section 18 of the *AHA* from the PHPA to impact a registered Aboriginal heritage site, the Marapikurrinya Yintha. The notice included a report from an archaeologist confirming that the site would be impacted by proposed works. A departmental report discussed the Anthropos Australia report and the report of Kim Barber (which assessed the cultural impact of the port expansion project) but failed to include the Robinsons' response to the Barber report. The departmental report concluded that Marapikurrinya Yintha is no longer a site to which section 5 of the *AHA* applies.

On 3 December 2013, the Registrar wrote to the PHPA, requesting additional information in relation to the site, stating that her view was that the ethnographic information submitted with the 2013 section 18 Notice 'does not demonstrate evidence of the Aboriginal heritage sites on the land subject of the notice.' In particular, additional information was sought in relation to details of specific rituals and ceremonies associated with the Marapikurrinya Yintha. None were able to be provided within the time frame allowed.

On 18 December 2013 the ACMC resolved to confirm and endorse the site assessment of the departmental report; ie that Marapikurrinya Yintha is no longer a site to which section 5 of the *AHA* applies.

## STANDING

It was argued for the WA Attorney-General that the Robinsons did not have standing to bring the case because, as custodians, their concern was of a spiritual nature that relied on dicta of Anderson J in *State of Western Australia v Bropho*[3]. It was suggested that the Plaintiffs did not pass the test for standing set in *Australian Conservation Foundation Inc v Commonwealth*[4] of having a special interest beyond that of the general public and beyond a mere intellectual or emotional concern.

The applicants argued that they had the same special interest as was accepted by Martin CJ in *Woodley v Minister for Aboriginal Affairs*[5] when he said:

> Mr Woodley is a senior representative of the Yindjibarndi People and the Yindjibarndi Aboriginal Corporation is a corporate entity which is representative of the Yindjibarndi People. The Yindjibarndi People undoubtedly have a special interest over and above that of the community in general in the preservation of heritage value of this site. They also have every reason to suppose that their interests would be respected in the processes relating to the grant of consent.

The Attorney-General also argued that the case could be contrasted with that of the applicants in *Onus v Alcoa of Australia Ltd*,[6] which concerned possible destruction of sacred relics. In that case, in addition to the beliefs associated with the relics, there was evidence of physical interaction with the relics. The Attorney-General contended that the applicants in this case had not pointed to any evidence of their physical interaction with the land and water the subject of the notice.

Justice Chaney referred to the evidence of physical interaction with the site in the Anthropos report and held that:

> In view of the physical interactions between the Marapikurrinya people (including the applicants) with the site, the applicants' role as senior traditional spokespeople of the Marapikurrinya responsible for speaking for the Port Hedland Harbour, the applicants' role as directors of MPL, and because the applicants' interests would be distinctively and adversely affected by the decision of which they seek judicial review, the applicants should be regarded as having a special interest in the site which gives them standing to bring these proceedings.[7]

## GUIDELINES AND ACMC MISCONSTRUE ACT

Justice Chaney found that, contrary to what was suggested in the Guidelines, the expression 'Aboriginal site' as used in the *AHA* includes 'place' and 'site' does not have a narrower meaning than 'place'. Justice Chaney rejected the contention for the Attorney-General that 'site' denotes a location on which a particular thing is devoted to a particular use and 'sacred' is used in the sense 'appropriated or dedicated to a religious purpose.' He concluded:

> In the context of legislation dealing with Aboriginal culture, the word 'sacred' must necessarily contemplate spiritual and mythological purposes. The words 'ritual' and 'ceremonial' are clearly referrable to cultural purposes, although such purposes may substantially overlap with sacred purposes.[8]

He rejected[9] the assertion in the Guidelines that 'for a place to be a sacred site, it must be devoted to a religious use rather than be subject to mythological story, song or belief' and held that:

> to the extent that the ACMC brought to account the lack of evidence of specific rituals, ceremonial or cultural activities associated solely with the site, as invited to do by the Department report, it acted upon a misconstruction of s 5 of the AH Act.[10]

## PROCEDURAL FAIRNESS

Justice Chaney noted that it was agreed by all members of the Court in *The State Western Australia v Bropho*[11] that the *AHA* did not show a legislative intent to preclude the principles of natural justice so as to displace the common law requirement for procedural fairness. He considered the object of the *AHA*, being 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 or their descendants'. He noted that under section 18 there is an obligation on the Minister to inform the owner in writing of his decision, but no obligation to inform any Aboriginal persons who may have an interest in any affected site; and that the owner of land who is aggrieved by a decision of the Minister made under section 18(3) is given a right under section 18(5) to apply for a review of the Minister's decision by the State Administrative Tribunal, but no such right extends to Aboriginal persons with an interest in the site.[12] Ultimately he concluded:

> Notwithstanding [an] overall focus on the interests of the community generally, it is plain that the effective operation of the AH Act requires input of some kind from Aboriginal people. Aboriginal people are necessarily the principal source of information as to the existence of sites to which the AH Act applies, and as to the significance and importance of those sites.

## CONCLUSION

The disjunction between the *AHA* and the Guidelines which has been revealed in relation to the application of section 5(b) of the *AHA* can also be seen in relation to section 5(a) and section 5(c). The reasoning in the *Robinson* case ought to be extrapolated to the interpretation and application of those provisions.

Section 5(a) makes the *AHA* applicable to any place of importance and special significance where persons of Aboriginal descent have left an object connected with their traditional life, in other words, an archaeological site. The Guidelines go further than the statutory provision and suggest that an object will only be considered 'worthy of preservation' after taking into account seven criteria additional to those in section 39 of the *AHA*, including the condition of the place and object, temporal context, complexity, diversity, rarity, uniqueness and contribution to research.

Section 5(c) provides that the *AHA* applies to any place of 'historical, anthropological, archaeological or ethnographical interest'. The Guidelines again specify seven criteria additional to those set out in section 39 of the *AHA* in determining 'whether a place is a site'. They include criteria such as 'importance' and 'rarity' and make it a necessity that preservation will 'benefit current and future generations of Western Australians'.

The ACMC first adopted and commenced acting upon advice from the State Solicitor's Office,[13] which informed the Committee's decisions as to the places to which the *AHA* applied, on 1 November 2012. According to anecdotal reports from archaeologists, fewer archaeological sites submitted for registration have been registered since. This suggests that the Guidelines may have been playing a significant role in taking the ACMC beyond the *AHA* in assessing places and objects as not within section 5(a) and 5(c); having a similar impact to the flawed interpretation and application of section 5(b).

If the interpretation of the AHA argued for, on behalf of the Attorney-General, and the position adopted by the ACMC and set out in the Guidelines had prevailed, substantial numbers and perhaps the most culturally important category of Aboriginal site would have been denied protection by the AHA. Miners and developers would have been free to carry out developments which would have adversely affected such sites without risk of prosecution.

Since the *Robinson* decision has been handed down it has been confirmed that not only have 22 sites being removed from the Register,[14] but that a further 1262 of 1776 submitted to the ACMC for assessment have been deemed not to be a site.[15]

The WA Minister for Aboriginal Affairs has advised the Parliament that sites removed from the Register included significant sites

such as the Burrup Peninsula, the Ashburton, Collie, Murray, Sabina, Hotham and Robe Rivers, a site associated with the highly significant *Wati Kutjarra* (two men) dreaming and a burial site on Burswood Island. The Minister also said that 'literally hundreds' of letters have been sent to landowners advising that 'based on current knowledge the purpose sought by the applicant will not impact on any Aboriginal sites' and the department is 'working through it.'[16]

Sixteen new site applications, impacting on 26 local government areas, which had been assessed as not meeting section 5(b) of the *AHA*, will be now be reassessed by the ACMC.[17]

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1 [2015] WASC 108.

2 In *Bropho v Tickner* (1993) 40 FCR 165 Wilcox J concluded that the AHA did not provide effective protection to Aboriginal sites because the Minister had power to consent to their excavation, destruction, damage, concealment or alteration.

3 *The State of Western Australia v Bropho* (1991) 5 WAR 75. Franklyn J agreed with Anderson J. Malcolm CJ was of the opinion that Bropho had a special interest as a custodian because of the long standing cultural and spiritual attachment of his group to the site.

4 *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493, 530 - 531.

5 *Woodley v Minister for Indigenous Affairs* [2009] WASC 251, [38].

6 (1981) 149 CLR 27.

7 Ibid [61].

8 Ibid [87].

9 Ibid [98].

10 Ibid [99].

11 *The State of Western Australia v Bropho* (1991) 5 WAR 75.

12 *Traditional Owners - Nyiyaparli People and Minister for Health, Indigenous Affairs* [2009] WASAT 71.

13 Western Australia, *Parliamentary Questions,* Legislative Council, 5 May 2015, Answer of the Minister for Aboriginal Affairs to Question without Notice of Hon Robin Chapple.

14 Robin Chapple, *QWON C251 Mythological Sites* (18 March 2015) <http://www.robinchapple.com/sites/default/files/2015-03-18%20QWON%20C251%20Mythological%20Sites.pdf>.

15 Western Australia, *Parliamentary Questions,* Legislative Council, 21 April 2015, Answer of the Minister for Aboriginal Affairs to Question without Notice of Hon Robin Chapple.

16 Western Australia, *Parliamentary Questions,* Legislative Council, 14 May 2015, Answer of the Minister for Aboriginal Affairs to Question without Notice of Hon Robin Chapple.

17 Western Australia, *Parliamentary Questions,* Legislative Council, 19 May 2015, Answer of the Minister for Aboriginal Affairs to Question without Notice of Hon Robin Chapple.

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