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Review of the *Aboriginal Heritage Act 1972* Phase Two proposals for new legislation

Submission to the Department of Planning, Lands and Heritage

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About CME

The Chamber of Minerals and Energy of Western Australia (CME) is the peak resources sector representative body in Western Australia. CME is funded by member companies responsible for over 90 per cent of the State's mineral and energy production and workforce employment.

In 2017-18, the value of Western Australia's mineral and petroleum industry was $115 billion. Iron ore is currently the State's most valuable commodity at $61 billion. Petroleum products (including crude oil, condensate, liquefied natural gas, liquefied petroleum gas and natural gas) followed at $26 billion, with gold third at $11 billion. Both commodities saw an increase in value of 39 and 5 per cent respectively from the previous financial year.

The resources sector is a major contributor to the State and Australian economy, contributing to a third of the State's total industry Gross Value Added.[1] The value of royalties received from the sector totalled $5.8 billion (iron ore and concentrates providing 77 per cent), accounting for 19 per cent of State Government revenue.[2] [3]

Summary of recommendations

Recommendations addressing key concerns

In development of the Draft Bill, CME recommends the Department prioritise the concerns highlighted in the recommendations below, reflecting the key issues of concern to industry.

Proposal 2

- The proposal to broaden the definition of Aboriginal heritage means the new Act will affect a greater proportion of land in WA, and capture a larger number of land use proposals. Decisions about land use, in light of the broader recognition of heritage values, must be made efficiently and in the best interests of the State as a whole.

Proposal 6

- Agreements are an important, efficient and effective way to plan for how land use may proceed in light of heritage values. To achieve this, parties to new agreements that have been endorsed by the Minister should be able to utilise the processes in their agreement in place of statutory heritage assessment and/or approval processes. Furthermore, an endorsed agreement should provide a complete defence to offence provisions. This provides an incentive to invest the time to develop agreements that meet set standards and, in turn, the ability to utilise a significantly streamlined process. In endorsing an agreement, the Minister should only consider whether the heritage assessment and management provisions meet the standards which have been endorsed by the Minister.
- CME has significant concerns about the proposal for existing agreements to be excluded from formal consideration in approval processes unless they are assessed and 'ratified' by the State. All existing agreements and relevant heritage information should be capable of forming part of the body of relevant information to be considered in deciding whether to approve a land use. In considering the weight of this information, the decision maker should be required to consider it against published standards, endorsed by the Minister. Crucially, this would not involve an 'assessment' or judgement of the agreement itself, rather a consideration of the body of information as a whole. This is important, as any retrospective assessment or 'ratification' of an agreement poses significant risk and potential for adverse outcomes for all parties.

[1] Duncan, A., Kiely, D. and Salazar, S., *Quarterly Economic Commentary: March 2019*, Bankwest Curtin Economics Centre, Curtin University, April 2019, p. 4.

[2] Excludes contributions via North West Shelf grants, State taxes and levies.

[3] Department of Mines, Industry Regulation and Safety, *Western Australian Mineral and Petroleum: Statistics Digest 2017-18*, October 2018, p. 17.

Proposal 5

The new Act should include streamlined mechanisms for land uses with no or a low impact on Aboriginal heritage values. The Act should identify land uses that may proceed without approval under the new Act, particularly for cultural landscapes and heritage values that affect vast areas of land. Examples may include activities undertaken by the Department of Biodiversity, Conservation and Attractions (DBCA) in managing land areas, core maintenance undertaken by a tenement holder, or preliminary walking surveys. In cases where a proponent is not confident to assign a risk profile to an activity, CME recommends that the AHC be empowered to make a decision that a land use does not affect heritage values and does not require assessment or approval under the Act. CME also recommends that the AHC develop - and the Minister endorse - risk-based standards for land uses that may have a low impact on heritage values (eg many exploration activities) so that they may proceed without approval provided those standards are met. Decisions of the AHC and the Minister should be made public (perhaps recorded against the relevant site on the register) to help develop a body of precedent regarding the operation of the standards, while building proponent confidence in assessment of activities that do not impact on heritage.

The new Act should only allow proposed land uses to be referred or called in for assessment and approval once.

Proposal 3(A)

CME supports the appointment of Local Aboriginal Heritage Services (LAHS) to provide local input on heritage values, and considers that the LAHS should provide that input on behalf of the relevant community of native title claimants/holders, traditional owners and knowledge holders within an identified area. The LAHS (or the Department in cases where there is no LAHS, or an LAHS is not able to meet prescribed governance standards) should be the only entity authorised to provide input in approval processes and to appeal or seek review of decisions. There should be clear opportunities for LAHS involvement, and set statutory timeframes to enable the approval process to continue in light of the information received. Critically, the LAHS must be resourced sufficiently to enable them to appropriately fulfil their responsibilities.

Proposal 3(B), 3(C)

- CME supports the creation of the Aboriginal Heritage Council (AHC) as a body to advise on heritage values, and the proposal for it to be involved in land use decisions in a manner that is a delegation from, and reduces the work load on, the Minister. However, the AHC's role should be limited to decisions to approve proposals with no or a low impact on Aboriginal heritage values, and decisions that implement agreements reached between LAHS and land use proponents. The AHC should be required to operate in accordance with a set of binding standards endorsed by the Minister. The proponent and the LAHS should each have a right to appeal AHC decisions to the Minister. All other land use decisions should be made by the Minister, on advice from the AHC.

Transitional Arrangements

- CME strongly recommends that careful consideration be given to the proposed transitional arrangements, and that these are published in full by the Department ahead of the Phase Three Draft Bill. Under those transitional arrangements, existing s18 consents should have the same status as an approval granted under the new Act (including that it should run with the land); pending s18 notices should continue to be assessed and approved under the current legislation; approved land uses (including where there is no s18 consent required and approvals under the *Mining Act 1978*, *Petroleum and Geothermal Energy Resources Act 1967*, *State Agreements* and the *Environmental Protection Act 1986 Act* are in place) should not require further approvals under the new Act; and heritage information gathered and agreements reached before the commencement of the new Act should be taken into account in decisions under the new Act.
- Acknowledging the timeframes outlined for passage of a new Act, CME recommends the Department establish a body of key stakeholders to undertake ongoing consultation, as per the Expert Technical Advisory Group (ETAG) model used by the Commonwealth Government for *Native Title Act 1993* reform. This has previously been utilised very successfully, bringing together Aboriginal people, industry and government to work through early drafts of legislation as they become available, and would contribute significantly to streamlining the passage and in turn early

adoption of a new Act. We note that this would not replace wider Phase Three public consultation, rather it would provide a mechanism for ongoing consultation with key stakeholders as critical elements of drafting are completed.

Environment and native title processes

- The new Act and its administration should manage the potential for inconsistent outcomes between it and State and Commonwealth environmental legislation. Ongoing consultation with the WA Department of Water and Environmental Regulation, the Environmental Protection Authority and Commonwealth Department of Environment and Energy should occur as part of this process.
- The new Act should operate consistently with, and not duplicate, the processes in the *Native Title Act 1993* (NT Act). It should facilitate and encourage agreements in native title processes that deal with both native title and heritage issues.

Recommendations for proposals for new legislation

Detailed responses to each of the proposals for the new Act are contained in Appendix I. In addition, CME recommends the Department adopt the following in the new Act:

- CME supports the broader definition of Aboriginal heritage, and suggests that the new Act must have clear, statutory criteria and standards so that places and their Aboriginal heritage value can be objectively identified based on evidence of the importance and special significance of the place to traditional owners and knowledge holders as a community.
- CME recommends the release of detailed governance standards by the Department on the operation of LAHS, and that compliance with these standards be overseen and enforced by the AHC and the Department. These standards should be publicly available and include set timeframes, minimum consultation standards, maximum fee amounts, reinforce the criteria for assessment of applications, and align with the proposed guidelines for heritage surveys. To ensure procedural fairness for all stakeholders, timelines should be published for all stages of the process, including application, agreement making, assessment and appeals.
- CME advocates for the creation of a register of recognised LAHS under the new Act, inclusive of the geographical areas of authority for each LAHS. The LAHS for an area within the external boundaries of a native title determination should by default be the Registered Native Title Body Corporate (RNTBC) for that area, providing they meet the required governance standards and are willing to undertake the role. The LAHS' should be required to meet standards set by the AHC for consultation with relevant traditional owners and knowledge holders within the area. CME supports the proposed mechanisms to oversee LAHS performance and for the Department to undertake the role if no appropriate LAHS exists.
- CME recommends that resources and funding be allocated to LAHS to facilitate good governance processes, cost effective operations and processes for consultation and heritage assessments.
- To streamline the assessment of proposals and the oversight of the LAHS, CME recommends that comprehensive terms of reference governing the operation of the AHC be developed, endorsed by the Minister, and published by the Department as a priority.
- CME recommends the Department consider the additional demands that the transition and operation of the new Act will place on current Departmental resourcing, in addition to the ongoing demands of the proposed LAHS and AHC.
- CME recommends that the Department prioritise the creation of clear standards of evidence for inclusion on the Register, and ensure adequate resource allocation to the proposed functions of the Register to facilitate its operation as proposed. All information on the Register must be compatible with current planning and data tools, including GIS based data and Programme of Works (PoW) spatial systems, to act as an effective instrument for land-use planning.
- CME recommends the Department publish criteria for the assessment of the significance of the impact on Aboriginal heritage values presented by a land use proposal, accompanied by the documentation requirements for consideration of applications within each 'tier'.

- CME recommends that the Department publish best-practice standards for proponents and LAHS to refer to in the development of new agreements in order for these to replace standard assessment and/or approval processes, once endorsed by the Minister.
- CME recommends that only the proponent and the relevant LAHS (on behalf of traditional owners and knowledge holders) should have rights to seek review of or to appeal a land use decision. This role would fall to the Department in areas without a LAHS.
- CME recommends that statutory timeframes for appeals are set, without the option to extend. Equal rights to appeal will be important to the equitable functioning of the new Act, however appeals should not be able to be used to cause undue delays to applications.
- CME recommends that enforcement options be revised to reduce the limitation period to 3 years, and to remove the proposal to prevent land being developed for 10 years. The proposal to allow compensation requires careful consideration alongside and to ensure there is no duplication with other entitlements.
- CME recommends that any proposal to award compensation should be required to take into account financial and non-financial benefits that may have already been provided or available under agreements and other legislation.
- The State should ensure adequate targeted Department resources are allocated to the AHC and LAHS to enable them to establish efficient underlying processes for meeting their responsibilities under the new Act.

Context

CME welcomes the opportunity to provide comment on the Review of the *Aboriginal Heritage Act 1972* Phase Two Discussion Paper[4] (the Discussion Paper) released by the Department of Planning, Lands and Heritage (the Department, DPLH) in March 2019.

The *Aboriginal Heritage Act 1972* (the AH Act) has been in operation since 1972 and CME supports replacement of the legislation to reflect the contemporary setting in which it operates. CME supports the development of legislation designed to provide Traditional Owners with a greater role in decision-making affecting their cultural heritage and to improve the operation and efficiency of the cultural heritage system for all stakeholders.

The Discussion Paper sets out proposals for new legislation with the aim of recognising, protecting, managing and celebrating the places and objects that are important to Aboriginal culture, while providing a clear and efficient land use framework. CME is broadly supportive of this aim.

Responses to the Phase Two Discussion Paper

CME has consulted extensively with its members to inform its submission in response to the Phase Two Discussion Paper.

In principle, CME supports the Department's stated objectives for the proposals for the new Act. Aboriginal people are the custodians of their heritage. CME and its members support a system that provides Aboriginal people a real and meaningful role in decisions affecting their heritage.

CME remains a strong advocate for streamlined legislation governing land use in Western Australia, and supports proposals that provide a clear framework within which transparent land use decisions can be made efficiently and effectively.

This submission firstly provides high-level comments on key issues followed by specific, detailed responses to each proposal in Appendix I.

Efficient and effective land use decisions

CME supports the proposal to adopt an updated definition of Aboriginal heritage that reflects contemporary standards. An expected outcome from the proposed, expanded definition of heritage is a greater proportion of Western Australia (WA) will likely have Aboriginal heritage value which will need to be taken into account in making land use decisions. This expanded coverage highlights the importance of an effective and efficient system that is able to strike a balance in ensuring that decisions are made in the best interests of the State as a whole.

CME makes a number of recommendations to ensure the new legislation achieves this balance. These include:

- Ensure clear statutory criteria and standards are set so that places and their Aboriginal heritage value can be objectively identified based on evidence of the importance and special significance of the place to Traditional Owners and knowledge holders as a community.
- Clarify the role of the AHC to reflect its skillset and membership. In relation to land use decisions, the AHC should be focused on assessment of proposals with no or a low impact on Aboriginal heritage values, as well as decisions that implement agreements reached between LAHS and land use proponents. The AHC should operate in accordance with standards endorsed by the Minister (including by applying standard conditions), and both the proponent and the LAHS should have a right to appeal AHC decisions to the Minister, with set timeframes for appeals. All other land use decisions should be made by the Minister, on advice from the AHC.

[4] Department of Planning, Lands and Heritage, *Review of the Aboriginal Heritage Act 1972 Discussion Paper Proposals for New Legislation*, 2019, Page 18, https://www.dplh.wa.gov.au/getmedia/ab8c0b4a-7941-4b31-aa89-658b74c976ad/AH-Review-AHA-discussion

- The AHC should develop, for Ministerial endorsement, risk-based standards for land uses that may have a low impact on heritage values (eg many early-stage exploration activities) so that they may proceed without requiring assessment or approval provided those standards are met. Availability of such standards should greatly improve the efficiency and efficacy of the overall system by ensuring the AHC's resources are focused on the right matters.
- Provide streamlined mechanisms for management of land uses with no or a low impact on Aboriginal heritage values. The AHC should be empowered to make a decision that a land use does not affect heritage values and does not require assessment or approvals under the Act (ie to make a "no assessment required" decision on referral). This would be similar to the option available under the *Environmental Protection Act 1986* (EP Act) where a proponent, if unsure whether or not their proposal should be assessed by the Environmental Protection Authority (EPA), can refer their proposal and receive a prompt decision that no assessment by the EPA is required.
- The new Act should only allow proposed land uses to be referred or called in for assessment once.
- The State should ensure targeted resources are allocated to the AHC and LAHS to enable them to establish efficient underlying processes to meet their responsibilities (including statutory timeframes) under the new Act. In the interests of efficiency and consistency in land use decisions, these must apply to all proposals. Proposals that exist in a region without an LAHS should not be disadvantaged.

To aid understanding and clarity of CME's proposals and key submission points, a high-level overview of a proposed framework is provided in Appendix II.

The role of agreements

CME supports the intent to achieve heritage outcomes through agreements. It promotes self-determination by allowing Aboriginal people to negotiate and make decisions about their heritage alongside other matters, and promotes a cooperative approach between Aboriginal people and other land users. They are also an important, efficient and effective way to resolve how land use may proceed, giving due consideration to heritage values.

As the Department asserts in the proposals for new legislation, agreement making under the Commonwealth's Native Title Act 1993 (Native Title) is an accepted means of reconciling the interests of Aboriginal people and land holders, and has the benefit of providing social, economic and best practice heritage outcomes for Aboriginal people. Agreement making fosters self-determination and economic empowerment of Aboriginal people, places Native Title as a core element to be considered before tenure is granted and enables native title claimants/holders to have significant influence on land use and the manner in which this land use occurs.

To further encourage this approach, CME considers that agreements that have been endorsed by the Minister as achieving appropriate standards should replace the need for statutory heritage assessment and approval processes. This provides a significant incentive for proponents to develop agreements that meet agreed standards. When deciding whether to endorse an agreement, the Minister should only be tasked with considering whether the heritage assessment and management provisions align with the standards endorsed by the Minister for use by the AHC.

In the same way as new agreements made after the new Act commences, existing agreements should also have the option to be eligible to be considered by the Minister for endorsement.

Noting this, CME has significant concerns about the proposal for existing agreements to be "ratified" before they (or their outcomes) can be considered in the assessment and approval process under new legislation.

This is both a resource intensive and innately unpredictable approach to heritage decision making. It does not give due regard to the legal status of existing agreements, the circumstances in which existing agreements have been negotiated, the legal requirements they are designed to meet, the broader context of the agreement that was reached, or the significant investment of time and resources that was made by both proponents and Aboriginal people to reach such agreements.

Further, it risks undermining the trust and investment that has been made, and unpicking the value of those agreements for both parties. The value of these agreements extends well beyond Aboriginal heritage matters, with the potential result being that this proposal would have significant adverse ramifications for current projects, ongoing relationships, payments to claimants and new investment in the State.

The investment from industry and Traditional Owners to develop these agreements is considerable. It is important to note that given the expansive nature of such agreements, Aboriginal heritage comprises only one part of those agreements, and as such should not be critiqued in isolation. These agreements have been made by both parties voluntarily to cover a broad range of issues and within a Commonwealth regime that provides for representation for Aboriginal people and has a focus on authorisation by the group. It is not appropriate for the State to second-guess these agreements or the decisions of the parties who entered into it using the abstract context of this new Heritage Act.

The AHC, the Department and the Minister should instead recognise that these are agreements of a contractual nature that have legally binding effect enforceable at law, and leave the parties to resolve any question, dispute or request for amendment in the manner provided for in their agreement.

CME considers that the proposal to 'ratify' existing agreements in order for them or their outcomes to be considered by the new Act constitutes an overreach by the State and should be replaced.

The new Act should instead provide for the heritage components of existing agreements to be a relevant factor to be taken into account in the new heritage assessment and approval processes – while making it clear that the agreements themselves are not the subject of review or ratification by the State.

This would see the heritage components of existing agreements considered alongside other information as relevant information to support decisions made under the Act. In practice, the information they provide that is related to Aboriginal heritage would be capable of being reviewed along with supplementary information provided (such as survey reports, a cultural heritage management plan and subsequent consultation) against the relevant endorsed criteria for the decision.

CME considers that this approach is more likely to result in streamlined assessment and approval processes for everyone involved.

It will be necessary in this process to ensure appropriate protections or exclusions for confidential and/or commercially sensitive information, particularly in the publishing of decisions.

The role of the LAHS

CME supports the appointment of LAHS to provide local input on heritage values, and considers that the LAHS should provide that input on behalf of the relevant community of native title claimants/holders, traditional owners and knowledge holders within an identified area.

To enable the LAHS to provide the authority necessary for their area, the LAHS should be the only entity authorised to provide formal input in approval processes and to appeal or seek review of decisions. There should be clear opportunities for LAHS involvement, and clear timeframes to enable the assessment process to continue in light of the information received through consultation processes.

CME supports the proposal for the AHC to provide oversight to ensure the LAHS is performing this representative role effectively according to endorsed governance standards, and where there is a problem, to enable the AHC to require DPLH to perform the role of LAHS. This is critical, as parties should not be disadvantaged in cases where there are issues with an LAHS not meeting the governance standards for recognition and operation.

Need for clear transitional arrangements

It is critical for industry that transitional arrangements prevent disruption to existing projects and operations that have already received approval based on the legislation that existed at the time investment decisions were made. The proposed transitional arrangements should be published for consultation ahead of the first draft of the legislation.

CME recommends that the draft legislation include the following transitional arrangements:

- Existing s18 consents should have the same status as an approval granted under the new Act (including that it should run with the land).
- Pending notices issued under s18 of the current legislation should continue to be assessed and approved under the current legislation.
- Approved land uses should not require further assessment or approvals under the new legislation. This includes where there is no existing s18 consent, but approvals under the *Mining Act 1978*, *Petroleum and Geothermal Energy Resources Act 1967*, State Agreement and EP Act are in place and the proponent has gathered information to support the view that there were no Aboriginal heritage values affected under the *Aboriginal Heritage Act 1972*.

CME considers that the detail of the reform is where the key elements of consultation lie. CME and its members are keen to be actively involved in the consultation process for the third and final phase.

To facilitate this, while streamlining the consultation process, CME recommends the Department establish a body of key stakeholders to review and work through early drafts of legislation, as they become available. Modelled on the successful Expert Technical Advisory Group (ETAG), such a group would bring Aboriginal people, industry and government to the table to provide constructive feedback on legislation as it becomes available. Such a body would benefit all stakeholders, provide the Department with feedback during the drafting process, and ultimately improve the likelihood that the planned schedule will be met. CME would expect the Department of Mines, Industry Regulation and Safety would be a relevant government representative (along with other government representatives) within such a body.

Interaction with the *Native Title Act 1993*

The opportunity to align Aboriginal heritage legislation in Western Australia with Native Title legislation should not be underestimated. This reform package could deliver modernised legislation that reflects the contemporary operating landscape. With Native Title Determined Land making up the majority of our State, it is vital that the new legislation aim to unify the interaction and operation of the Aboriginal heritage and Native Title frameworks, for the benefit of all stakeholders.

To provide effective and efficient alignment with native title CME strongly recommends that:

- Registered Native Title Bodies Corporate (RNTBCs) should be the default LAHS within the external boundaries of their group's native title determination.
- Agreements dealing with heritage which have been entered into with representatives of Native Title holders in accordance with the *Native Title Act 1993* processes should be fully recognised and considered by decision makers in the new Act.
- Proposals must be careful not to duplicate the future act processes in Native Title legislation. New Aboriginal heritage legislation should not prevent agreements being reached in Native Title processes that deal with both native title and heritage issues.

Interaction with environmental assessments

State and Commonwealth environmental assessments take Aboriginal heritage values into account, and have resulted in duplication of assessment, and inconsistent approval results and management requirements to Aboriginal heritage legislation.

The creation of modernised Aboriginal heritage legislation in Western Australia should remove this duplication and potential for inconsistent outcomes by requiring the assessment and approval result achieved under the new heritage legislation to be deferred to or acknowledged in an efficient manner in environmental assessment processes. Ongoing consultation with the relevant Departments, both State and Commonwealth, should occur as part of this process. It is CME's understanding that the State is considering future amendments to the EP Act and hence there is currently a unique opportunity for potential reforms to both Acts to be aligned to remove the existing, problematic duplication and inefficiency.

Need for transparent regulatory framework for bodies created under new legislation

CME is supportive of the creation of both Local Aboriginal Heritage Services (LAHS) and the Aboriginal Heritage Council (AHC), subject to further clarity about their role.

For either of these bodies to operate successfully, and provide the transparency expected by stakeholders, the Department must develop a comprehensive framework to support their operation.

For the LAHS, detailed governance standards are required, including set timeframes for all stages of consultation and agreement development. This sets clear procedural expectations for all parties.

For the AHC, a publicly accessible Terms of Reference should be developed and made available, including criteria for decision-making, timelines for consideration and referral of applications, and a conflict of interest process for members.

To deliver on the proposed outcome of culturally appropriate and transparent consultation, agreement making, and assessment processes, CME recommends that a clear framework governing the LAHS and AHC be developed and published alongside draft legislation.

All such documentation should require endorsement by the Minister prior to being published.

Industry should be provided the opportunity to test such an important framework against existing applications and case studies (scenarios), to allow meaningful feedback and comments to be provided to the Department on the proposed reform.

Conclusion

Modernising Aboriginal heritage legislation presents a unique opportunity to ensure Aboriginal people are properly recognised as the custodians of their heritage and have a meaningful role in decisions that affect their heritage. It is important for Western Australia to get this reform right because it will significantly affect land use across our State and the opportunity for such ambitious reform may not emerge again. CME would like to see the reform unlock economic potential for all stakeholders, without creating additional hurdles or barriers to investment in Western Australia.

In principle, CME supports the Department's stated proposals, with important suggestions for change outlined in this submission.

Our recommendations aim to ensure the new Act provides a clear voice for Aboriginal people within a cost effective, fair and streamlined process for land use decisions to be made by the Minister in the best interests of the State, cementing Aboriginal heritage values and agreement making as an important factor in that decision making.

Often, agreements reached between land use proponents and Aboriginal groups (in this case, LAHS) provide the most efficient path and best-case outcomes for both parties, and must therefore be fully recognised in the new legislation. It is also critical for appropriate transitional arrangements to be put in place to enable projects to continue with investment certainty.

Several proposals require further consultation to deliver on the desired outcomes for new legislation. CME hopes that the suggestions and comments provided within this submission assist the Department in the development of draft legislation.

CME welcomes the opportunity to provide comments on the Phase Two Discussion Paper and proposals for new legislation, and looks forward to ongoing engagement with the Department in the development of the Draft Bill and the final phase of consultation.

If you have any further queries regarding the above matters, please contact Roannah Wade, Policy Adviser Land Access and Exploration, on 0436 472 667 or R.Wade@cmewa.com.

Appendices

Appendix I – Detailed Responses to Phase Two proposals for new legislation

Appendix II – Flow chart infographic outlining the proposed progression of a land use proposal

Appendix I

Detailed responses to Phase Two proposals for new legislation

Proposal	CME Response
1. Repeal the *Aboriginal Heritage Act 1972* and deliver new Aboriginal Heritage Legislation	CME supports a repeal and replace of the *Aboriginal Heritage Act 1972*. This would allow for modernisation and replacement of legislation that predates both the *Native Title Act 1993* and the *Racial Discrimination Act 1975.* In the replacement of this legislation, CME feels strongly that careful consideration should be given to how the new Act will interact with the *Native Title Act 1993* (Cth) in Western Australia, the *Mining Act 1978* (WA), the *Petroleum and Geothermal Resources Act 1967* (PGER Act), the *Environmental Protection Act 1986* (WA) (EP Act) and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). The proposed new legislation should not duplicate provisions within the above Acts, and should be integrated with existing assessment and approval processes, noting in particular that the EP Act prevails over other inconsistent legislation in WA (s5 EP Act). Transitional arrangements are also key to ensure a smooth implementation and to provide certainty for users of the existing Act. **CME recommends that the new legislation should:** • **enable efficiency of agreement making alongside agreements and determination processes that occur under the *Native Title Act 1993 (Cth)* – avoiding duplication; and** • **not create new approval processes that apply in addition to and are inconsistent with approval processes and conditions applied under the EP Act, the Mining Act, the PGER Act and the EPBC Act.** **Consultation with DMIRS, the EPA, the Department of Water and Environmental Regulation, the Department of Energy and Environment, the Commonwealth Government and the National Native Title Tribunal should occur as part of this process.** **CME also recommends that the transitional arrangements include:** • **Existing s18 consents should have the same status as an approval granted under the new Act (including that it should run with the land).** • **Pending notices issued under s18 should continue to be assessed and approved under the current legislation.** • **Approved land uses should not require further approvals under the new legislation. This includes where there is no s18 consent, but approvals under the Mining Act/PGER Act and EP Act are in place and the proponent has gathered information to support the view that there were no Aboriginal heritage values affected under the AH Act.** • **Enabling heritage information gathered and agreements reached before the new Act commences to be taken into account in making decisions under the new legislation.** CME considers that the detail of the reform, and associated transition arrangements, is where the key elements of each proposal lie. To facilitate the timeframes set by the Department for the introduction of a new Act, CME recommends the Department establish a body of key stakeholders to review and provide feedback on drafts of legislation as they become available. Modelled on the Expert Technical Advisory Group (ETAG) established by the Commonwealth Government, such a body would constitute representatives from the Department of Planning, Lands and Heritage, the Department of Mines, Industry Regulation and Safety, Department of Premier and Cabinet, Aboriginal people and peak industry body representatives. Able to meet regularly as drafts of sections of legislation become available, such a body would benefit all stakeholders while working towards meeting the planned schedule for delivery of a new Act.

2. Update definitions and scope of new Aboriginal Heritage legislation	CME accepts and supports the proposal to adopt an updated definition of Aboriginal heritage. The proposed definition reflects the shift in societal expectations that has occurred since the commencement of the AH Act, and aligns with current best practice in agreement making by industry. In the adoption of an expanded definition, which is likely to mean a greater proportion of Western Australia has Aboriginal heritage value, it becomes even more important to have clear, statutory criteria and standards so that places and their Aboriginal heritage value can be objectively identified based on evidence. Being a cultural value, the standard for recognition should include being of importance and special significance to knowledge holders as a community[5]. Of particular importance to proponents is how proposed 'intangible heritage' and 'cultural landscapes' are identified, assessed, and integrated into the proposed tiered assessment system. There is potential that including these broader elements in the definition will mean a wider range of land uses will need approvals, unless there are clear exceptions and thresholds in the new Act. CME endorses the statement on page 11 of the Phase Two Consultation paper that "the protection of a cultural landscape would not preclude other land uses, or necessarily require that they be authorised in some way… Rather, it would ensure that land use proposals and their evaluation, are sensitive to the broadest range of Aboriginal heritage values. Compatible land uses will be able to occur or continue within cultural landscapes without the need for any statutory approval." To achieve this, it is particularly important for the legislation to identify compatible land uses that do not need approval, and for policy and guidance material to set clear standards and identify how land can be used without affecting heritage value. If intangible heritage values are seen as existing in complete isolation to any physical elements, then CME considers that the potential for physical impact to these values must be conclusively ruled out. In the absence of clear guidance, there is a risk that the system will be quickly congested with applications that should not be captured for assessment, negating any streamlining or efficiency from the new Act, and with an associated adverse economic impact on the State. **CME recommends that:** • **the Department / AHC develop and publish criteria and standards of evidence for the assessment of all forms of Aboriginal heritage proposed in the new definition;** • **the legislation include exceptions to the requirement to obtain approvals - particularly for situations like those described on page 11 of the consultation paper;** • **the legislation include standard conditions/requirements that enable specific low impact activities to occur without further assessment/approval;** • **the Department develop guidance/policy material that guides decisions about how activities that are not low impact can occur with minimal impact on heritage values;**

[5] Chamber of Minerals and Energy Western Australia, *Review of the Aboriginal Heritage Act 1972 Submission,* 2018, page 7, https://www.dplh.wa.gov.au/getmedia/b94f82c9-8fdc-4e19-9c16-bb17e24d21fc/Submission-073-Chamber-of-Minerals-and-Energy

	• decisions of the AHC / Minister be publicly available (perhaps recorded against the relevant site on the register) so that a body of precedent develops as to activities that may proceed without impacting heritage sites and without a need for formal approval; • the new Act only apply to new applications made after the Act commences; and • existing applications should be considered under the current Act and using the definition of heritage that was current at the time of the application.
3(A). Local Aboriginal Heritage Services	CME is supportive of the creation and proposed function of Local Aboriginal Heritage Services (LAHS), being the point of contact for the involvement of Traditional Owners and knowledge holders in assessment and consultation processes, agreement making and management of heritage in areas to which they have a connection. CME recommends that an established LAHS be the only entity that proponents be required to consult with, with the LAHS responsible for ensuring they represent the views of all traditional owners/knowledge holders in a defined area, in accordance with consultation requirements set out in binding governance standards. The LAHS should also be the only entity that may exercise rights/obligations under the new Act on behalf of the relevant Aboriginal group, including submissions, consultation and appeals. If a LAHS is not performing its role effectively to the standards set by the AHC, then the AHC, and by extension the Department, should have the power to remove their status as the LAHS and appoint another entity (or the Department if there is no other entity eligible). This promotes self-determination, and will enable the LAHS to provide the authorised view of the community about their heritage, and to resolve internal conflicts within the community. With reference to the desired outcomes of this proposal, while consultation is an important factor, it is equally important for all parties that there is transparency and certainty in the consultation process, timelines, fees and operation of LAHS as the body representing the views of all Traditional Owners and knowledge holders in a particular area. The legislation or governance standards for operation of LAHS should include standard and maximum fees that may be rendered by a LAHS for its services under the legislation, and cost effective standards for consultation. In the setting of maximum fees, consideration should be given to the impact of such fees on juniors and explorers, in addition to larger companies. CME considers that Registered Native Title Bodies Corporate (RNTBCs) are the appropriate entities to undertake the functions of a LAHS. In the first instance, RNTBCs should be deemed to be the LAHS for those areas within the external boundaries of their group's native title determination. The AHC (and by extension the Department) should be able to replace the RNTBC with another LAHS for an area, or sub-area, including where the RNTBC is unable to perform the duties of an LAHS or where the AHC otherwise considers that another LAHS is more appropriate for that area, or sub-area. For example, if the LAHS cannot meet set standards for representation of the Traditional Owners in the area, or is unable to meet timelines mandated in governance standards. In regions where there is no active LAHS the Department must perform the roles of the LAHS for that region, to the same standards as mandated for LAHS's – through representation of the Traditional Owners for the area and meeting the same timeframes set in the Act. Further, the AHC should have the power to require the Department step into the role of an LAHS for a region in circumstances where the AHC has formed the view the LAHS is unable or unwilling to perform its role in accordance with the Act, regulations and policy guidelines. To deliver on the proposed outcome of culturally appropriate and transparent consultation and agreement making processes, **CME recommends the release of detailed governance standards by the Department on the operation of LAHS, and that compliance with these**

	standards be overseen and enforced by the AHC and the Department. These standards should be publicly available and include set timeframes, minimum consultation standards, maximum fee amounts, reinforce the criteria for assessment of applications, and align with the proposed guidelines for heritage surveys. To ensure procedural fairness for all stakeholders, timelines should be published for all stages of the process, including application, agreement making, assessment and appeals. Through set timelines. proponents should be protected in the case of stalling or delays in the consultation and agreement making process, the LAHS have an opportunity and set timeline to raise appeals or issues, and the Department is provided with clear benchmarking for the purpose of resource allocation and performance tracking. Crucially, having published timelines sets clear procedural expectations for all parties, and ensures that an application moves through the process in a reasonable and equitable manner. **CME advocates for the creation of a register of recognised LAHS under the new Act, inclusive of the geographical areas of authority for each LAHS. The LAHS for an area within the external boundaries of a native title determination should by default be the Registered Native Title Body Corporate (RNTBC) for that area, providing they meet the required governance standards and are willing to undertake the role. The LAHS' should be required to meet standards set by the AHC for consultation with relevant traditional owners and knowledge holders within the area. CME supports the proposed mechanisms to oversee LAHS performance and for the Department to undertake the role if no appropriate LAHS exists.** This would provide clarity to proponents and contribute to simplification of the consultation and agreement making processes. Finally, CME sees that the resourcing and capacity building of the proposed LAHS is of key importance, and must be considered in the implementation of proposed legislation. Without sufficient resourcing, tailored to regional workloads, LAHS will be unable to meet proposed deadlines within regulations for the significant numbers of heritage applications in WA. This would directly negate any benefits derived by their establishment. **CME recommends that resources and funding be provided to LAHS to facilitate good governance processes, cost effective operations and processes for consultation and heritage assessments.** This will assist LAHS to provide effective services and keep costs down.
3(B). Aboriginal Heritage Council	CME is supportive of the abolition of the Aboriginal Cultural Material Committee (ACMC) and establishment of the proposed Aboriginal Heritage Council (**AHC**). As advocated in CME's Phase One submission, CME is strongly supportive of the Minister retaining the final decision making role on matters concerning land use, given the importance of such decisions to the State as a whole.[6] There is scope for the AHC to decrease the system reliance on the Minister as the decision maker on no impact or low-impact land use proposals, and proposals that are adopting outcomes agreed between LAHS and proponent. CME understands that the vast majority of no/low impact proposals are accompanied by sufficient documentation, and involve low levels of risk, compatible with heritage values and are therefore appropriate to be considered by the AHC. Proponents and the LAHS should have a right to appeal the AHC's decision to the Minister.

[6] Chamber of Minerals and Energy Western Australia, Review of the Aboriginal Heritage Act 1972 Consultation Paper submission, 2018, page 2, https://www.dplh.wa.gov.au/getmedia/b94f82c9-8fdc-4e19-9c16-bb17e24d21fc/Submission-073-Chamber-of-Minerals-and-Energy

However, CME fundamentally does not support the proposal that the AHC would be responsible for final decisions involving the ***rejection or conditioning*** of a land use proposal, on anything other than conditions agreed between the proponent and the LAHS. A body that is primarily constituted and established as a *heritage advisory* body should not hold final decision-making authority when it comes to land-use decisions, as the decision needs to balance the interests of the State as a whole. The impact on heritage values is an important aspect relevant to that decision, but is not the only factor. The AHC is not appropriately constituted to make a decision of that nature.

The proposal described in the Discussion Paper appears to gives the AHC too much latitude to make decisions that are not decisions about land uses which have no or low impact on Aboriginal heritage values and not projects of State Significance – eg including projects that have a low, moderate or unknown impact on heritage values and where there is controversy between the LAHS and the proponent as to whether that land use should happen and on what conditions. CME considers decisions of that nature should be made by the Minister, using advice from the AHC.

The AHC should be limited to assessing proposed land uses that have no or low impact on Aboriginal heritage values or are being done in accordance with an agreement. For all other applications, the AHC should be required to provide advice to the Minister on the potential impact of the proposal on Aboriginal heritage values, with the Minister making the final decision as to whether a land use may occur and on what conditions. The LAHS (on behalf of the relevant Traditional Owners and knowledge holders) and the proponent should both have rights of appeal at appropriate points in the process. (Please refer to proposed process flow shown in Appendix II)

CME recommends that the proposal be amended so that the AHC:

- May decide that a proposal does not need to be assessed, with the result that it cannot be referred for assessment again in the future by anyone else.
- May only make decisions about land uses that have no or low impact on heritage values by application of AHC standards for low impact activities or where the outcome has been agreed between the LAHS and the proponent (such decisions should be subject to appeal by the proponent and the LAHS).
- Must refer and provide advice to the Minister in all other cases, for the Minister to make a decision about land use in the best interests of the State (the Minister's decision should also be subject to appeal by the proponent and the LAHS).

Land use undertaken in accordance with these processes should receive full protection under the Act, with no risk of committing an offence for affecting heritage values.

CME also recommends that the AHC should have standards, policies and procedures which guide their decisions/advice and are endorsed by the Minister. These would include clear criteria and timeframes for the assessment of all applications.

To streamline the assessment of proposals, CME recommends that comprehensive terms of reference governing the operation of the AHC be developed and published by the Department, including for addressing conflicts of interest.

Other components that must be included within the terms of reference include; set frequency of AHC meetings, requirements for publishing of AHC minutes, and mandated levels of experience for members.

Each of these regulatory elements will collectively serve to enhance the transparency of the AHC's processes and role, while providing clarity for proponents in development of proposals.

3(C). The Minister's Role	CME supports the desired outcome of ensuring that the system is not clogged with low-impact matters, nor matters implementing an outcome on heritage management agreed by the proponent and the LAHS. (See our comments in relation to proposal 3(B), which proposes that the AHC may approve those land uses, with a right of appeal to the Minister.) The approach also encourages agreement making and agreed outcomes. As articulated in CME's submission to Phase One of the AH Act Review[2] and in response to Proposal 3(B), CME remains strongly supportive of the Minister retaining final decision-making authority under the Act for all land uses and hence the right of the LAHS and proponent to appeal to the Minister. While industry recognises that a balance is required to facilitate efficiency within the system, land use decisions are critically important to the success of industry, the surety of investment in Western Australia and by extension, the economic prosperity of the State. As such, they must also be considered through economic and social contexts, rather than focusing solely on heritage. This leads to the Minister being the only appropriate final decision maker on all land use decisions.
3(D). The role of the Department of Planning, Lands and Heritage	CME agrees that the Department should remain responsible for the day-to-day operation of the Act. A critical component within the scope of operations will be the oversight of the development and capacity building of LAHS. It is vital that consideration is given to the resourcing demand this will place on the Department, and adequate allocation of resourcing is committed to this function. To date, no indication has been provided as to how Departmental structure and resourcing will be adapted to respond to a new Act. Equally, the role of the Department in supporting the proposed AHC in developing the key policies and procedures to guide its operation must be factored into resourcing decisions, given the importance of this for the operation of a new Act. **CME recommends the Department consider the additional demands this will place on current resourcing, in addition to the ongoing demands of the proposed LAHS and AHC.** Without effective resourcing, bodies created under a new Act will not transition smoothly or function effectively.
3(E). Heritage Professionals – aiding selection of those with appropriate qualifications and experience	CME supports the desire to improve outcomes for Aboriginal Heritage through the creation of standards, and provision of a mechanism to identify appropriately qualified individuals. CME agrees broadly with the assertions by the Department that the contribution of some heritage professionals adds unnecessary costs and poor outcomes for all parties[7]. Practices of this kind are not in the best interest of stakeholders in the Aboriginal Heritage process. CME suggests that the proposed standards for heritage investigation be developed in consultation with the various organisations representing the industry, for example, the Australian Association of Consulting Archaeologists who require members to adhere to a Code of Ethics and Consulting with Aboriginal Communities policy[8]

[7] Department of Planning, Lands and Heritage, *Review of the Aboriginal Heritage Act 1972*, 2019, page 15, https://www.dplh.wa.gov.au/getmedia/d156a20c-f353-4f21-b067-c810ee7e80ee/AH-Review-AHA-consultation-paper

[8] Australian Association of Consulting Archaeologists Incorporated, *Submission on the Review of the Aboriginal Heritage Act 1972 Consultation Paper,* 2018, page 16, https://www.dplh.wa.gov.au/getmedia/c5fa041c-17ab-4481-aa2e-bf1a634f1332/Submission-069-Australian-Association-of-Consulting-Archaeologists

and improving standards	Further, CME would consider that membership of such organisations could be considered by the Department to be a requirement, or beneficial component, for inclusion on the proposed register.
4. Retain the current form and function of the register of Aboriginal places and objects but rename it the Aboriginal Heritage Register	CME agrees with the proposal and desired outcomes for a new Aboriginal Heritage Register (the Register). For this to be successful there is a clear need for the creation and use of statutory criteria and standards of evidence for inclusion, as called for above with regard to the definition of Heritage in Proposal 2. Having clear standards of evidence for inclusion on the new Register will streamline the registration process for all stakeholders. For LAHS and proponents, provision of evidence benchmarks gives clarity to the 'registration test' set by the AHC for entry onto the Register. This will become particularly relevant should the Department progress the stated aim for LAHS to be tasked with the refining and entry of legacy information from their respective areas. For some regions, this will be a significant undertaking. In addition to describing the heritage value of a place, CME also proposes that the register have scope to include information about land uses (including when done adhering to certain conditions) that will NOT affect heritage values. Proponents should be able to rely on this to provide certainty that those land uses cannot be referred for assessment and approval under the new Act. This is a way to ensure that the broader definition of heritage does not result in unnecessary applications that clog the system and create a significant road block for economic activity in the State. With regard to the stated aim that the Register be considered as a valuable planning tool, CME considers that a key determinant of this will be the resourcing invested in the Register, the AHC and the LAHS. Without sufficient resource allocation from the Department to create and publish standards, capacity-build to encourage their use, and update and publish information lodged, none of the potential benefits to stakeholders will transpire. **CME recommends that the Department prioritise:** • **the creation of clear statutory criteria and standards of evidence needed to support inclusion on the Register,** • **a register that provides guidance for how land use may proceed without approval under the new Act, particularly for cultural landscapes and heritage values that affect vast areas of land;** • **adequate resource allocation to the proposed functions of the Register to facilitate its operation as proposed; and** • **ensuring information on the Register must be compatible with current planning and data tools, including GIS based data and PoW spatial systems, to act as an effective instrument for land-use planning.**

5. Introduce a referral mechanism to facilitate tiered assessments of proposed land uses	*Activities with no or low potential impact on heritage values* Land users should not require authorisation to use land for a purpose that does not impact on heritage[9]. Designing and managing activities to apply standards of conduct likely to avoid heritage impacts (and therefore avoid inclusion in the assessment or approval system) should be actively encouraged by the new Act. This is particularly important for activities, like many forms of exploration, that do not disturb ground or have a low impact on the land and on heritage values. Many proponents of low-impact land uses are undertaking activities of a precursory, exploratory nature. It is important that the approval process for low-impact use is not overly burdensome, and does not discourage proponents from conducting exploration in our State. Given the priority placed on encouraging exploration in the National Resources Statement[10], it is not in the interest of the Department, the State or the nation to be placing additional and unnecessary regulatory burden on proponents looking to undertake exploration in Western Australia. Many exploration activities can now be undertaken remotely, without clearing or ground disturbance, or through use of existing tracks, and hence should not be required to undergo the same extensive assessment process warranted where heritage may be impacted. When applying for approval through the Department of Mines, Industry Regulation and Safety (DMIRS), proponents are required to confirm adherence to site avoidance principles to receive approval. This aligns with the risk-assessment approach proposed by the Department in this proposal, and effectively mitigates potential impact. **CME recommends that the new Act include mechanisms that apply site avoidance principles, and enable activities that have little impact on the ground to occur without onerous assessment or approval processes. This will have a significant impact on the number of applications the AHC is required to consider, while facilitating responsible exploration and other activities in Western Australia.** **In particular, CME recommends that:** • **Binding standards of conduct be created for activities that have little impact on the ground, to enable those activities to occur in compliance with those standards and without the need for heritage assessment or approval processes.** • **The AHC be empowered to make decisions that 'assessment is not required' and which prevent a proposed land use from being re-referred and provide a defence to any offence provisions under the Act.** *Activities likely to have a significant impact on heritage values* Where proponents are applying to use land for a purpose that is likely to have a significant impact on Aboriginal Heritage in the area, CME supports the adoption of a 'tiered' approach to land use consents. Tiers should be assigned based on the significance of the heritage value, the nature of the impact of the activities proposed to be undertaken on that heritage value (consequence) and the reasonable potential for impact (likelihood)[5]. In the adoption of 'tiers of significance', it is important for clear regulatory criteria to be made available for proponents to self-assess, and develop their applications accordingly. To submit comprehensive proposals addressing all factors relevant to their 'tier', proponents need clear criteria against which their proposal will be assessed. Without this, the burden for the

[9] Chamber of Minerals and Energy Western Australia, *Review of the Aboriginal Heritage Act 1972 Submission*, 2018, page 8, https://www.dplh.wa.gov.au/getmedia/b94f82c9-8fdc-4e19-9c16-bb17e24d21fc/Submission-073-Chamber-of-Minerals-and-Energy

[10] Department of Industry, Innovation and Science, *Commonwealth of Australia National Resources Statement*, 2019, https://www.industry.gov.au/sites/default/files/2019-02/national-resources-statement.pdf

Department will be significantly increased, as detailed advice will be required from all proponents, individually, for the submission of every proposal.

The assessment process should identify tiers of consultation standards that are commensurate to the risk presented to potential heritage value, and that provide fair opportunity for Aboriginal groups, through their LAHS, to engage with the proponent about how the activity might occur in a manner that avoids, minimises or mitigates impact on heritage value. Once that opportunity has been provided, the process should continue to enable the AHC to make a recommendation, and the Minister to make a decision on land use. The Act, and the relevant standards, policies and guidelines that are applied should not create an effective veto on land use, by enabling a group to hold up or prevent a decision by withholding their engagement, information about Aboriginal heritage values, or their views on avoidance, impact minimisation or mitigation. This is particularly important for managing the effectiveness, the costs and timeframes for the regime in circumstances where the Aboriginal group holds the information about heritage value. The comments on page 19 of the Consultation Paper, paragraph (iii) under the heading 'Improving Professional Standards'; and the last paragraph on page 23 should be re-considered in light of this risk.

The tiers of consultation should not include a requirement to negotiate in good faith as this will duplicate the native title process, and is not an appropriate standard given the nature of the potential impact on heritage values arising from some land use proposals.

CME recommends the Department publish criteria for the assessment of a proposals significance, accompanied by the assessment requirements for consideration of applications within each 'tier'.

The assessment and decisions made under the new Act should provide certain outcomes for land users. They should also be open to facilitating 'project wide', as well as individual activities. This is because proponents and their investors/financiers require certainty that a project can be developed and operated for a long period of time.

CME recommends:

- **"no impact" decisions and identified types of low impact decisions should be dealt with via the application of binding standards or by an expedited decision making process. This could be achieved by obtaining a binding decision from the LAHS (including in accordance with an agreement), or the AHC that a decision that a referral or assessment is not required or that a land use will have no impact on Aboriginal heritage be legally binding. It should provide a defence to all offence provisions under the Act for that land use.**
- **the new Act provide that a land use may only be referred (including via a 'call in') for assessment/decision once**
- **Once a proposal has been referred, assessed and approved in accordance with this process, implementation of the proposal should receive a complete defence to the offences in the Act.**
- **The system accommodate project wide land use approvals.**

6. Encourage and recognise agreement making	*New Agreements* CME supports the achievement of heritage outcomes through agreements that are based on respectful and positive relationships. Entering into voluntary agreements allows Aboriginal people to negotiate and make decisions about their own heritage, promotes self determination and a cooperative approach between Aboriginal people and land users. The proposal to encourage and recognise new agreement making between LAHS and land use proponents is to be commended. CME understands the desire of the Department to set a benchmark standard in agreement making with the creation of a new Act. To facilitate this, **CME recommends that the Department publish best-practice standards for proponents and LAHS to refer to in the development of new agreements in order for these to be mandatory considerations in future assessment processes (should the Proponent elect to take this path).** These may include the undertaking of a heritage survey by a heritage professional listed in the Department's directory, development of a Cultural Heritage Management Plan (CHMP), inclusion of reporting requirements, and requirements to undertake an avoidance and impact mitigation process. Documenting benchmarks for new agreements developed post-transition is supported by CME, providing a level of certainty for proponents with regard to their responsibilities in agreement development with knowledge holders. CME would expect that due consideration would be given to how such standards would interact with documentation requirements in Native Title agreement making. **CME also recommends that the Act provide a sufficient incentive for the parties to reach an agreement of this nature. For example, once the AHC is satisfied that an agreement meets its standard, the Act should require decision makers to apply the agreement, not to merely 'have regard' to it. CME considers that agreements about assessment processes and (separately or together) agreements about impact to heritage values should be capable of endorsement in this way. Further, there should be flexibility for agreements to cover projects, and a range of activities occurring within a broad area (such as a Native Title claim or determination area). Agreements that are endorsed by the Minister should replace the assessment and approval processes under the Act and provide a complete defence to offence provisions, similar to the status available for heritage agreements in South Australia.** Further, as the LAHS for a particular geographical area may change **CME recommends that the new Act expressly provides that any agreement with an LAHS that has been endorsed by the Minister will bind all future LAHS for the area to which that agreement relates as if they were a party to that agreement.** *Existing Agreements* CME strongly disagrees with the second part of this proposal: the intention by the Department that existing agreements be required to undergo a 'ratification process' by the State merely for those agreements to be 'taken into account', potentially found to be wanting and therefore not considered at all in decisions made under the new Act. This proposal is a resource intensive approach to heritage decision making that does not have due regard to the legal status of existing agreements, the circumstances in which existing agreements have been negotiated, the legal requirements they are designed to meet, the broader context of the deal that was reached, nor the significant investment of time and resources that was made by both proponents and Aboriginal groups to reach agreement. It risks undermining the trust and investment that has been made, and unpicking the value of those agreements for both parties. This is a value that applies well beyond Aboriginal heritage issues, with the result that this proposal would have significant adverse ramifications for current projects and new investment in the State.

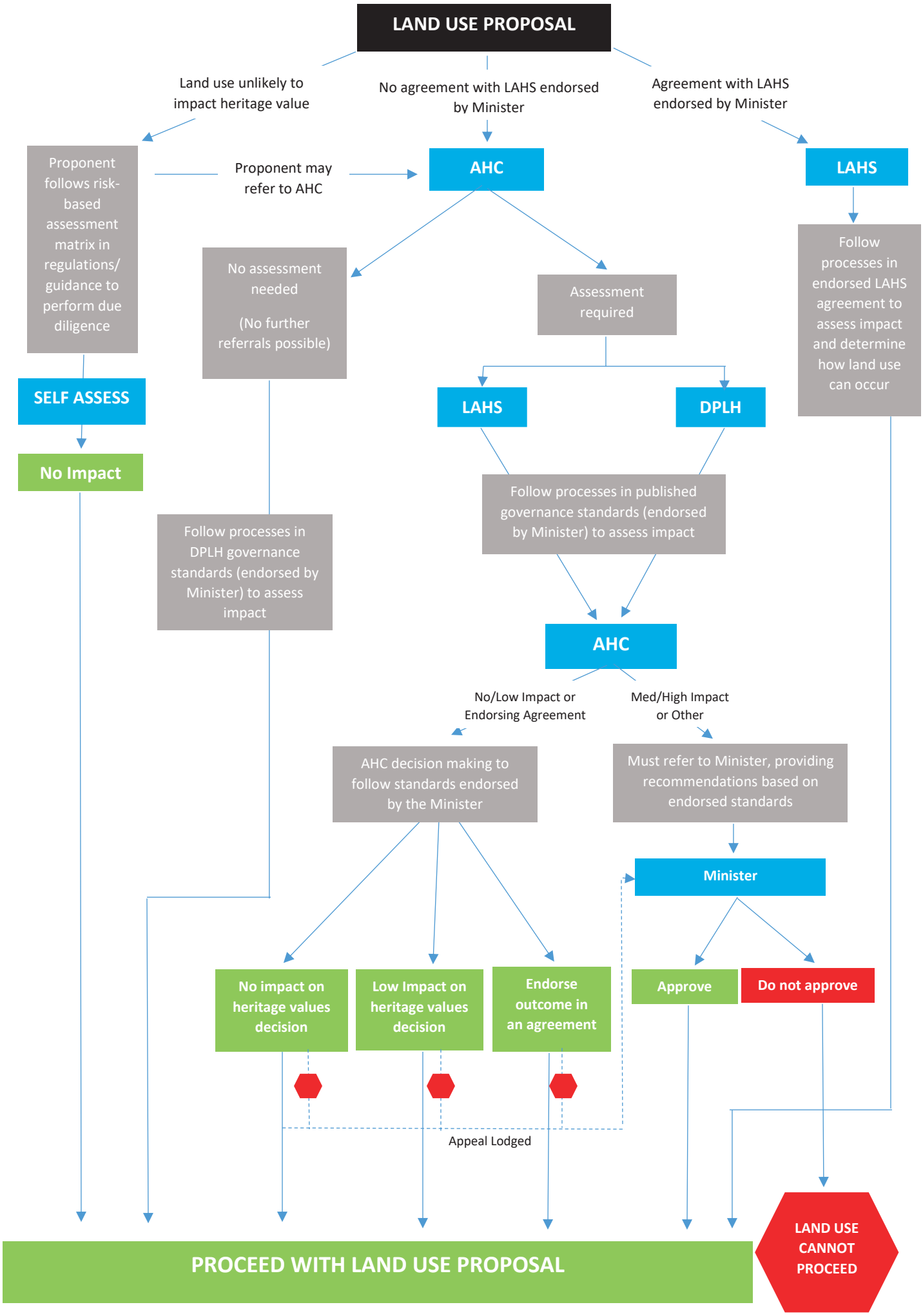
	As the Department asserts in the Proposals, agreement making under the *Native Title Act 1993 (*Native Title) is an accepted means of reconciling the interests of Aboriginal people and land holders, and has the benefit of providing social, economic and best practice heritage outcomes for Aboriginal people. It also fosters self-determination and economic empowerment of Aboriginal people, places Native Title as a core element to be considered before tenure is granted and enables native title claimants/holders to have a significant influence on land use. The investment from industry and Traditional Owners to develop Native Title agreements is considerable. It is also important to note that given the expansive nature of such agreements, Aboriginal Heritage comprises only one part of those agreements, and should not be critiqued in isolation. These agreements have been made by both parties voluntarily to cover a broad range of issues and within a regime that provides for representation for Aboriginal people and has a focus on authorisation by the group. It is inappropriate for the State to second guess them in the context of this new Heritage Act. In the current form, it is difficult to see how this proposal will result in any streamlining of the Aboriginal Heritage process drawn from existing agreements. **CME recommends that the new Act instead provide for existing agreements to be a relevant factor to be taken into account in the new heritage assessment and approval processes. In the same way as new agreements made after the new Act commences, they should also be eligible to be considered by the AHC/Minister for endorsement, and if that is achieved, having the effect of replacing the need for assessment and/or approval processes under the new Act.** This would see existing agreements submitted, without ratification or scrutiny by the State, and considered alongside other material as a relevant consideration to support decisions made under the Act. The evidence they provide that is related to Aboriginal heritage would be assessed along with other information (such as survey reports, subsequent consultation) against the relevant criteria for the decision. These agreements have legally binding effect enforceable at law. The AHC, the Department and the Minister should recognise that and leave any question or dispute as to their legally binding effect to the parties to resolve as a matter of contract law. Proponents with agreements that do not align with the minimum requirements for assessment and approval of a proposal under the new Act would then need to supplement the information through additional consultation, surveys, expert assessment etc. For example, a proponent with an agreement that does not contain a cultural heritage management plan may need to develop one and attach this to gain approval for a land use proposal. CME considers that its suggestion is more likely to result in streamlined assessment and approval processes for everyone involved.
7. Transparency and Appeals	CME supports the proposal to improve transparency in decision-making and equal rights of review and appeal for land use proponents and Aboriginal groups. CME recommends that for Aboriginal groups, the right to appeal should be limited to the LAHS or entities authorised to act on behalf of the group holding the cultural values in the relevant area. **CME recommends that statutory timeframes for appeals are set, without the option to extend. Appeals should not be able to be used as a stalling mechanism to extend set timeframes and cause undue delays to applications.** Certainty in assessment and appeal processes is vitally important to industry, both from an investment and decision making perspective. The setting of statutory timeframes provides all parties with fair rights of appeal and process certainty, without disadvantaging land users through open-ended extensions.

	CME also recommends that appeal rights should only be exercisable by the proponent and the LAHS. The LAHS acts as the representative of the community of Traditional Owners holding cultural values in the relevant area and should be the only entity able to bring an appeal on behalf of the Traditional Owners. As the cultural value is a value held by a group of people, appellate rights should be available to that community and not individuals. The AHC should assist each LAHS to put in place and apply mechanisms for addressing internal disputes within the group.
8. A modernised enforcement regime	CME supports the proposal for a modernised enforcement regime, but has some concerns with the proposals listed. *Defence* The proposal to increase the threshold for the defence raises the risk that ALL land use proponents will need to apply this higher threshold irrespective of the risk an activity presents to heritage value. In applying a tiered assessment system for proposals, the defences available under the Act to proponents who may mistakenly disturb heritage must be also commensurate to the potential impact of the proposed land use on Aboriginal heritage values. If they are not, proponents of land use will need to apply a disproportionately high standard of heritage assessment, with consequential economic impacts for the State. This will contribute significantly to the workload of the AHC and the Minister, as many applications, including low impact proposals, will be captured for high-level assessments. CME recommends that the proposal include clear exceptions and exemptions from the need to obtain approval for some land uses. For example, this should include mechanisms that give proponents certainty that land uses with no or a low impact can proceed without approval (in some cases with standard conditions being met). *Limitation Period* It is CME's view that increasing the limitation period for offences under the new Act from 1 year to 5 years is too long. The Heritage Act 2018 (WA) limits this to 3 years. **CME recommends that the proposed 5-year limitation period is reduced to 3 years to align with this Act, along with the alignment of penalties.** *Penalties* The legislation should clarify corporate and individual penalties. *Compensation* Any proposal to award compensation should take into account financial and non-financial benefits that may already be provided or available under agreements and other legislation. *Prohibition on development and use of land* The proposal to include as an enforcement tool, an ability to prohibit development and use of land for 10 years should be re-considered. In the context of an updated and expanded definition of Aboriginal heritage, it has a significant potential to be a disproportionate penalty, and to have far reaching consequences for land use proponents and the State. We note that a similar penalty exists in the *Heritage Act 2018* (WA) for registered heritage places. However, CME is of the view that it is not appropriate in the context of Aboriginal heritage,

	particularly when sites are not registered, and because Aboriginal heritage often affects land in relation to which a number of parties have overlapping property / tenure interests and there are a wider range of potential land uses which are likely to apply to those lands. This penalty is especially problematic in the context of mining and related investment and other circumstances where the breach may have occurred on land that is not held exclusively (in freehold) by the offender. For example, it could mean a person with rights to access land under a miscellaneous licence can cause land to be unable to be used by others who also have (or in the future seek) an independent right to access the same land under their own miscellaneous licence. CME recommends that the proposed power to prohibit development and use of land for up to 10 years not be included in the new Act or, at the very least, its impacts should be narrowed by providing that the prohibition only apply to registered heritage places and to the particular person that was convicted of the offence triggering this penalty. This is akin to the way this is provision is intended and applied in the Heritage Act 2018 (WA), and aims to ensure that no innocent parties may be inadvertently disadvantaged by such a significant prohibition.
9. Protected Areas	CME supports the proposal that Protected Areas be retained under the new Act, along with the creation of regulation authorising specific management activities to be carried out by Aboriginal people. However, before areas are conferred this status, there should be a broad consultation process on the proposed management plan. The proposal should require the consent of those with an existing interest in the land or a right to use the land. With regard to these management activities, CME suggests that sites being considered for this level of protection be temporarily awarded this status for a set period of time, to allow for the development of an effective management plan. This acknowledges that a plan addressing the needs of a specific area, in consultation with the relevant custodians, may take time to develop. It also acknowledges the Native Title implications of conferring Protected Area status on an area. It is CME's preference that if these Areas are to be created, their management should be given due consideration as to prove effective and promote proper maintenance.

Appendix II

Flow chart infographic outlining the proposed progression of a land use proposal


LAND USE PROPOSAL
Land use unlikely to impact heritage value
No agreement with LAHS endorsed by Minister
Agreement with LAHS endorsed by Minister
Proponent follows risk-based assessment matrix in regulations/ guidance to perform due diligence
Proponent may refer to AHC
AHC
LAHS
Follow processes in endorsed LAHS agreement to assess impact and determine how land use can occur
No assessment needed
(No further referrals possible)
Assessment required
SELF ASSESS
LAHS
DPLH
No Impact
Follow processes in published governance standards (endorsed by Minister) to assess impact
Follow processes in DPLH governance standards (endorsed by Minister) to assess impact
AHC
No/Low Impact or Endorsing Agreement
Med/High Impact or Other
AHC decision making to follow standards endorsed by the Minister
Must refer to Minister, providing recommendations based on endorsed standards
Minister
No impact on heritage values decision
Low Impact on heritage values decision
Endorse outcome in an agreement
Approve
Do not approve
Appeal Lodged
PROCEED WITH LAND USE PROPOSAL
LAND USE CANNOT PROCEED