



1 June 2018

Graeme Gammie
Assistant Director General, Heritage Services
Department of Planning, Lands and Heritage
PO Box 7479
Cloisters Square PO WA 6000

By email: AHAreview@dplh.wa.gov.au

Dear Graeme

Review of the Aboriginal Heritage Act 1972 Consultation Paper

Thank you for the opportunity to provide comment on the *Review of the Aboriginal Heritage Act 1972 Consultation Paper – March 2018*.

The Association of Mining and Exploration Companies (AMEC) is the peak national industry body for mineral exploration and mining companies within Australia, the majority of which have project interests in Western Australia.

AMEC has a long standing objective for increased clarity, certainty, efficiency and effectiveness of native title and cultural heritage processes in order to:

- ensure fair, equitable and quality negotiated outcomes and benefits for Aboriginal people, governments and industry;
- reduce delays and costs for all stakeholders;
- provide increased trust, integrity and confidence in decision making; and
- ensure compliance.

These objectives are intended to enhance, and not diminish native title or cultural heritage values.

Various recommendations have been made in the **attached** solution based submission with a focus on numerous administrative initiatives which can be addressed in the short term, and others requiring legislative reform.

The key areas for attention include:

- The Register of Aboriginal Sites and Objects,
- The Aboriginal Cultural Material Committee,
- Consultation and notification processes,
- Appeal processes,
- Range and quantum of Fees and Charges,

Association of Mining and Exploration Companies

Offices located in Perth and Brisbane. Please address all correspondence to:
PO Box 948, West Perth WA 6872 | 6 Ord Street, West Perth WA 6005
P: 1300 738 184 | F: 1300 738 185 | info@amec.org.au | www.amec.org.au

- Guidance material, and
- Performance Reporting.

These may be implemented during the review process (not expected to be completed before 2020).

AMEC makes these suggested recommendations following detailed discussion and consultation with our members and our Aboriginal Affairs Committee, on which sit many industry practitioners intimately familiar with Native Title and Aboriginal Heritage as they interact with the resource sector. As such, this submission provides an industry perspective.

AMEC seeks to be a constructive contributor to this process and are not fixed in our views. We are genuinely willing to engage with all stakeholders and participants in the process, and to work toward better overall outcomes.

I would be pleased to meet with the Review Team to discuss the content of the submission, and look forward to the next stage of the consultation process.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Warren Pearce', with a stylized, flowing script.

Warren Pearce

Chief Executive Officer



Submission to the WA Department of Planning, Lands and Heritage
Review of the *Aboriginal Heritage Act 1972* Consultation
Paper – March 2018

ASSOCIATION OF MINING AND EXPLORATION COMPANIES

June 2018

CONTENTS

1. INTRODUCTION	3
2. EXECUTIVE SUMMARY	3
3. RECOMMENDATIONS	5
4. BACKGROUND	6
State of the industry	6
Difference between low impact and high impact activities	7
Outstanding findings from previous Reviews	8
Review of Approval Processes in Western Australia (the Jones Report) – April 2009	8
Review of the Aboriginal Heritage Act (the Avery Review) – April 2012	8
Productivity Commission Inquiry into mineral and energy resource exploration	9
5. SPECIFIC RESPONSES TO CONSULTATION PAPER QUESTIONS	11
6. ADDITIONAL COMMENTS AND RECOMMENDATIONS	23
Register of Aboriginal Places and Objects (Sites Register)	23
Accuracy and integrity of the Register	23
Site protection by disclosure	24
Site definition	25
Transferability of section 18 Consents	26
Reporting and transparency of heritage survey reports	26
Updates to the Register	27
Aboriginal Cultural Material Committee (ACMC)	27
Transparency	28
Structure	28
Decision making	29
Consultation and notification processes	29
Government consultation with Aboriginal people	29
Mining proponent consultation with Aboriginal people	30
Appeal processes	32
Range and quantum of fees and charges	33
Performance Reporting	35
Timeframes for Section 18 Notices	35

Prepared by: Association of Mining and Exploration Companies Inc (AMEC)

Head Office

6 Ord Street, West Perth WA 6005 (Offices located in Perth, Brisbane and Sydney)
Please address all correspondence to: PO Box 948 West Perth WA 6872

1. INTRODUCTION

Thank you for the opportunity to provide comment on the *Review of the Aboriginal Heritage Act 1972 Consultation Paper – March 2018*.

The Association of Mining and Exploration Companies (AMEC) is the peak national industry body for mineral exploration and mining companies within Australia, the majority of which have project interests in Western Australia.

AMEC has a long standing objective for increased clarity, certainty, efficiency and effectiveness of native title and cultural heritage processes in order to:

- ensure fair, equitable and quality negotiated outcomes and benefits for Aboriginal people, governments and industry;
- reduce delays and costs for all stakeholders;
- provide increased trust, integrity and confidence in decision making; and
- ensure compliance.

These objectives are intended to enhance, and not diminish native title or cultural heritage values.

2. EXECUTIVE SUMMARY

Industry has been faced with a number of high level challenges over several years, which have included significant delays and increasing compliance costs, including those associated with Aboriginal cultural heritage clearances.

AMEC has sought legislative and administrative reform with previous Governments, the then Department of Aboriginal Affairs (DAA) and now through the Department of Planning, Lands and Heritage (DPLH) in order to streamline processes and remove unnecessary duplication, regulatory burden and red tape.

Some administrative and system improvements were started a few years ago within the responsible agency, but more can be done through administrative reform, and without legislative amendments.

The current long cultural heritage approvals process and increasing costs to industry are unsustainable and have become a significant barrier to the development of resource sector projects.

The funding and business model used by many native title representative bodies to obtain payments from industry also needs to be closely reviewed.

In AMEC's view, these bodies should be facilitating meaningful engagement, developing long term business relationships, empowering Aboriginal people in the decision making process, and encouraging economic growth opportunities.

Over the last decade or more, AMEC has regularly been advised by industry members of their overall frustration with the current cultural heritage approvals process, to the point where some exploration companies have abandoned their tenements and turned away from

Western Australia¹ and invested in other jurisdictions. This is in the face of increasing global competition for mineral exploration investment.

Although this tenement holding reduction cannot be solely attributable to cultural heritage hurdles, it has been a factor in the overall decision making process. We therefore have a direct interest in any proposals to improve and reform the *Aboriginal Heritage Act (AHA)*, and the associated cultural heritage clearance processes.

There is a clear need to balance regulation and provide improved clarity and certainty for all stakeholders, whilst also appropriately recognising the 'owners of cultural heritage'.

Natural justice and procedural fairness should be key principles afforded to all stakeholders.

In addition to legislative reform, it is critically important that the Government provide priority and proactive attention to implementing appropriate administrative reforms specifically within the DPLH and the Aboriginal Cultural Material Committee (ACMC).

Significant opportunities still exist for a win:win for all stakeholders. Successful mineral exploration can lead to beneficial economic development incorporating financial and social dividends for Aboriginal people, regional and remote communities.

Various recommendations have been made in this solution based submission with a focus on numerous administrative initiatives which can be addressed in the short term, and others requiring legislative reform.

The key areas for attention include:

- The Register of Aboriginal Sites and Objects,
- The Aboriginal Cultural Material Committee,
- Consultation and notification processes,
- Appeal processes,
- Range and quantum of Fees and Charges,
- Guidance material, and
- Performance Reporting.

These may be implemented during the review process (not expected to be completed before 2020).

AMEC makes these suggested recommendations following detailed discussion and consultation with our members and our Aboriginal Affairs Committee, on which sit many industry practitioners intimately familiar with Native Title and Aboriginal Heritage as they interact with the resource sector. As such, this submission provides an industry perspective.

AMEC seeks to be a constructive contributor to this process and are not fixed in our views. We are genuinely willing to engage with all stakeholders and participants in the process, and to work toward better overall outcomes.

¹ Department of Mines, Industry Regulation and Safety statistics provided to AMEC indicate that the number of exploration tenements in force has reduced from 6,107 in 2013 to a current level of 5,370 (a 12% reduction over 4 years)

3. RECOMMENDATIONS

The following recommendations are made, based on the comments within the submission below:

Background

1. The difference between Low Impact and High Impact (ground disturbance) mining and exploration activities is recognised in the Victorian Aboriginal Heritage framework, and should also be recognised in the WA model.
2. The Director General of DPLH be delegated approval powers for any 'low impact' activities.
3. A complete operational Review should be undertaken within DPLH to improve the overall efficiency of the administration of the AHA.
4. The key Principles, Findings and Recommendations emanating from the Avery Review should be revisited, and improved upon, where necessary.
5. The Aboriginal heritage related recommendations by the Productivity Commission Inquiry into mineral and energy resource exploration should be implemented.

Register of Aboriginal Places and Objects

6. An audit of the Register of Aboriginal Places and Objects should be undertaken to ensure its accuracy and integrity for decision making.
7. Develop a strategy to clear the backlog of 15,000 lodged 'places'.
8. A key premise of the AHA should be 'mandatory disclosure' of sites, places and objects.
9. Ability to transfer s18 Consents between land holders (including between tenement holders).
10. Provision made for all historical and future heritage survey reports to be provided to the Registrar for recording on the Sites Register within a defined timeframe.
11. An 'Updates to the Register' Tab be included on the DPLH website.

Aboriginal Cultural Material Committee

12. The Department of Planning, Lands and Heritage should be appropriately resourced to service the workload demands of the Aboriginal Cultural Material Committee (and assessment of 'places').

13. Minutes or Meeting Notes, or Reasons for Decisions (excluding any confidential or commercial in confidence information) of the ACMC should be publicly available for scrutiny.
14. Maintain the discretion provided to the Minister for Aboriginal Affairs in appointing members to the ACMC.
15. The Minister for Aboriginal Affairs should remain responsible for the administration of the Act, and for decision making under the Act, based upon advice from the ACMC and DPLH.

Consultation and notification processes

16. Specific mandatory consultation and notification protocols should not be enshrined in legislation.
17. DPLH publish a flow chart of the consultation and notification stages that are used in the decision making processes to ensure natural justice and procedural fairness principles are provided to all stakeholders.
18. Default provisions be included in the Act to create a circuit breaker where negotiations / consultations have broken down, stalled or are clearly being frustrated.

Appeal processes

19. Consider the establishment of an Aboriginal Heritage Appeals Convenor role to hear appeals from those parties directly affected by decisions made under the Aboriginal Heritage Act.

Range and quantum of fees and charges

20. Regulate and release guidance material to cap the quantum and range of fees and charges for heritage clearances.

Guidance material

21. Technical guidance material be urgently released on the operations and administration of the current AHA, and revised post passage of an Amendment Bill.

Performance reporting

22. That agreed timelines and performance indicators (including trend lines over 5 years) should be made publicly available by the Department of Planning, Lands and Heritage on a quarterly basis for all approvals, such as section 18 Notices.

4. BACKGROUND

State of the industry

There are now strong signs that industry and investor confidence are starting to recover from record low performance indicators over the last few years. As current mines come to their natural end it is essential that successful mineral exploration occurs to replenish those mines

and their associated revenue streams to Governments and third parties (including native title parties).

Proposed reform of the AHA and the cultural heritage approvals / clearance process is therefore timely to allow reasonable and cost effective land access throughout the State in order that mineral exploration and mining activity can occur.

Difference between low impact and high impact activities

There does not appear to be a broad understanding of the difference between 'higher impact' mining and 'lower impact' mineral exploration activities, and their associated potential impact on cultural heritage values.

A 'one size fits all' approach appears to have been taken by NTRBs / PBCs and Aboriginal people when undertaking negotiations with mining and mineral exploration companies. This has resulted in the situation where many Heritage Agreements have become more complex and far reaching to the point where they have taken the appearance of Native Title Agreements.

The scale, duration and land uses of mining and mineral exploration activities are very different.

Activities that have a direct impact on (ie, ground disturbing) an Aboriginal site should require consent or authorisation. This should not include disturbance to 'buffer zones'.

This should not generally include access, use of existing tracks, maintenance of existing tracks, emergency works (firebreaks), geological mapping, rock sampling or soil sampling using handheld tools and non-ground disturbing geophysics, or indirect impacts (such as fly rock from blasting, adjacent dewatering or the aesthetics of place being 'impacted' by adjacent development).

When determining assessment and compliance processes more recognition should be given to the significant differences between Low Impact / Preliminary Exploration activity, as distinct to Advanced Exploration or Mining Activities.

Low Impact / Preliminary Exploration activity can be defined as exploration that is capable of being done without affecting an Aboriginal heritage site. Preliminary exploration programs will not noticeably disturb the land surface and may include mapping, sampling using hand held tools, geophysical investigation or other non-intrusive methods. Preliminary exploration will either be of a type not requiring rehabilitation, because of its negligible ground disturbance, or it will be rehabilitated upon the completion of the Program.

The difference between Low Impact and High Impact activities is recognised in the Victorian Aboriginal Heritage framework², and should also be recognised in the WA model. Consideration should also be given to the Minister delegating approval powers to the Director General of DPLH for any 'low impact' activities.

² <https://www.vic.gov.au/aboriginalvictoria/victorian-aboriginal-heritage-council.html>

Recommendation:

1. The difference between Low Impact and High Impact mining and exploration activities is recognised in the Victorian Aboriginal Heritage framework, and should also be recognised in the WA model.
2. The Director General of DPLH be delegated approval powers for any 'low impact' activities.

Outstanding findings from previous Reviews

In addition to an internal Departmental Review of the Register of Aboriginal Places and Objects (Sites Register) in 2010, there have been three other relevant and independent Reviews which have considered Aboriginal heritage approval processes.

Each made a number of findings which are still relevant today, and should not be ignored during the current review process.

**Review of Approval Processes in Western Australia (the Jones Report)
– April 2009**

The Jones Report made a number of findings and recommendations in relation to Aboriginal heritage processes, all of which were supported by AMEC. However, most remain outstanding.

The Report³ stated:

'a series of administrative reforms regarding Aboriginal heritage surveys, section 18, site register, record keeping, condition setting and staff training is required'.

It also stated that:

'the primary focus in increasing the efficiency of the AHA and removing unnecessary obstacles to development approvals under it should be an overhaul of the administration of the AHA rather than legislation, at least in the first instance.'

AMEC supports the implementation of administrative changes, which can be actioned without legislative reform.

Recommendation:

3. A complete operational Review should be undertaken within DPLH to improve the overall efficiency of the administration of the AHA.

Review of the Aboriginal Heritage Act (the Avery Review) – April 2012

The Avery Review was completed with the release of a Discussion Paper in April 2012. It contained 7 Proposals for improved clarity, compliance, effectiveness, efficiency and certainty, namely:

1. Prescribe the manner and form of the Register,

³ http://www.dmp.wa.gov.au/Documents/Investors/INV-ReviewofApprovalProcesses_April06.pdf
pages52-55

2. Additional criteria pertaining to the Aboriginal sites of State Importance,
3. Stronger compliance measures including civil penalties and remediation orders and adjustment to the onus of proof provisions,
4. Site impact avoidance certificates,
5. Enable the Department to levy fees and recover costs for surveys and other services,
6. Remove risk that section 18 consents may be technically invalid because of the definition of 'the owner of any land', and
7. Investigate options to amend the Aboriginal Heritage Act 1972 and the Environmental Protection Act 1986 to streamline decisions about Aboriginal heritage.

AMEC supported in principle most of the Proposals and the subsequent Amending Legislation (with the exception of that relating to the recovery of costs incurred by the Department in undertaking surveys and providing other services). It is understood that many stakeholders considered that there was not enough consultation in developing this legislation. Despite this, many of these proposals are worthy of ongoing consideration, and could be improved upon.

Recommendation:

4. The key Principles, Findings and Recommendations emanating from the Avery Review should be revisited, and improved upon, where necessary.

Productivity Commission Inquiry into mineral and energy resource exploration

In its submission to the 2013 Productivity Commission Inquiry, the Western Australian Government⁴ made a number of findings which are directly relevant to any reform of the *Aboriginal Heritage Act*, namely:

- *In 1994, the average time taken for the grant of an exploration licence in WA was 205 days. After 1994, the average time increased to 542 days. Timelines are now around 200 days but there is a growing cost to industry to achieve this.*
- *The Native Title Act requires that Prescribed Bodies Corporate or Native Title Representative Bodies are consulted or negotiated with prior to the grant of exploration titles. These consultations / negotiations have become increasingly costly for explorers.*
- *The Native Title Act (NTA) has become the key non-financial barrier to exploration in Western Australia.....this includes the management of cultural heritage as a product of the NTA's future act regime which governs the release of prospecting, exploration, mining and petroleum licences and leases.*
- *There are indications that withholding cultural heritage information after a heritage survey is completed is becoming increasingly prevalent as a means to extract further payments from resource companies.*
- *The captive native title and Aboriginal heritage market is a substantial barrier to mineral and energy exploration in WA.*

AMEC notes that these findings are still relevant today.

⁴ <http://www.pc.gov.au/inquiries/completed/resource-exploration> pages 2, 3, 7

The Productivity Commission Final Report⁵ was released by the Commonwealth Government in March 2014, and made a number of recommendations in relation to Aboriginal heritage issues, namely:

- *Recommendation 6.1 – The Australian Government should establish a system to accredit appropriate state and territory Indigenous heritage protection regimes.*
- *Recommendation 6.2 – Governments should ensure that their heritage authorities:*
 - o *Require that resource explorers or other parties lodge **all** heritage surveys with that authority (Emphasis added)*
 - o *Maintain registers which map and list **all** known Indigenous heritage sites (Emphasis added)*
 - o *Adopt measures to ensure that sensitive information collected by a survey is only provided to approved parties (and only as necessary for the purposes of their activities, on the basis of agreed protocols.*
- *Recommendation 6.3 – State and Territory Governments should manage Indigenous heritage on a risk assessment basis.*

AMEC supported these recommendations at the time, and still does. Despite some initial and limited consultation by the Commonwealth Government with State and Territory Governments the recommendations remain outstanding. The target implementation timeframes have expired, as their adoption is essentially the responsibility of State and Territory Governments.

In a media release dated 11 August 2015, the Director General of the then Department of Mines and Petroleum stated that over the previous 12 months, *‘it has taken an average of 364 days for exploration licences to be granted in Western Australia’*. Upon further inquiry, AMEC was advised that approximately nine months of this time is consumed by the native title and cultural heritage clearance processes. This timeframe is, in our view, excessive and can be a major dis-incentive and barrier to any form of mineral exploration investment and activity.

The current review by the WA Government provides an ideal opportunity for those Productivity Commission findings and recommendations to be considered and fully implemented.

Recommendation:

- 5.** The Aboriginal heritage related recommendations by the Productivity Commission Inquiry into mineral and energy resource exploration should be implemented.

⁵ <https://www.pc.gov.au/inquiries/completed/resource-exploration/report>

5. SPECIFIC RESPONSES TO CONSULTATION PAPER QUESTIONS

Question	AMEC Response
Purpose of the Act	
1. Is the long title an adequate description of what the amended Act should set out to do? If not, what changes should be made?	No comment.
Roles under the Act	
2. What do you think are the best ways to ensure the appropriate people are consulted about what Aboriginal heritage places should be protected, and how a proposal may impact those places?	• The landscape of individuals, groups and organisations constituting and representing Aboriginal people is complex and changeable. Many Aboriginal knowledge holders that speak for specific country are not involved in the formal business of Prescribed Bodies Corporate (PBC) or Native Title Representative Bodies (NTRB). - Therefore the Act should not restrict the ability of cultural heritage knowledge holders to speak for their country by mandating the involvement of any PBC or NTRB. Doing so would potentially lead to the silencing of many Aboriginal knowledge holders not aligned or engaged with a PBC or NTRB and lead to the disenfranchisement of small Aboriginal businesses established to participate in the resources industry through provision of heritage services. • DPLH should provide guidance on who is to be consulted on any particular issue. Meaningful consultation should mean exactly that, and 'not in agreement with'. • Guidance material should be made available on who should be consulted in cases where there may be over lapping claims, multiple stakeholders and non-determined areas.

	• There is a clear need to have a circuit breaker where negotiations / consultations have broken down, stalled or are clearly being delayed by one party although meaningful engagement and good faith negotiations may have occurred. • There should be default provisions to deal with these circumstances. • This should include obligations on the representative body / party to engage and / or release relevant cultural heritage survey reports. • Provision should also be made for issuance of immunity / exemption from the Act. In doing so guidance should be issued on what proponents need to do to avoid prosecution and meet their due diligence obligations, based on process.
3. To what extent has the provision to appoint honorary wardens been effective and how can it be improved?	No comment.
4. Are the roles and functions assigned under the Act sufficiently clear and comprehensive to fulfil the objectives of the legislation to preserve Aboriginal heritage places and objects? If not, what changes in roles and functions would you suggest?	The Minister for Aboriginal Affairs should continue to be responsible for the administration of the Act, and for decision making under the Act – based upon advice from the ACMC and DPLH. Consideration should be given to the Minister delegating approval powers to the Director General of DPLH for any ‘low impact’ activities. The roles and functions assigned under the Act relating to the ACMC are neither clear nor comprehensive. No Regulations/procedures have been made or at least made public in accordance with section 34 of the AHA governing the ACMC. There is a lack of transparency around criteria for how potential sites are assessed, lack of consistency in those assessments and routine delays and deferrals of assessments.

	This has led to uncertainty, legal challenges, legal costs, project delays and costs for the State, Proponents and Aboriginal people alike. Suggestions include: • The ACMC and DPLH should issue criteria/guidance documents, so assessments are more transparent and better understood; • The ACMC should perform its functions as soon as it is reasonably able. Deferral of assessments should be the exception and justification provided; • The ACMC and DPLH should not continue to allow their functions and processes to be subverted and frustrated by allowing delays to assessments or consideration of information submitted after procedural fairness timeframes have elapsed; • All parties should be afforded procedural fairness and the related timelines should be strictly adhered to, and not extended. Consideration should be given to 'default' provisions being applied when those timeframes are not met, and clearly being used to frustrate the clearance process; There should be a fair and appropriate level of input and transparency into that process; • Given routine delays and deferrals of assessments by the ACMC and the backlog of 'lodged' places pending assessment, the ACMC should be meeting more frequently so Notices are considered expeditiously. The ACMC role appears to be too broad which allows for DPLH staff to refer too easily to the ACMC. Individual ACMC members are expected to read and understand vast tracts of information referred to them by DPLH prior to each meeting. The sheer volume, complexity and sensitivity of data and information that needs to be comprehended by individual Committee members is understood to be onerous. These circumstances would make decision making very difficult and challenging. It is assumed that decisions are based on information and recommendations made by DPLH. The Department should therefore be appropriately resourced by government.
--	---

	The structure of the APMC could also be improved with a mix of skills and expertise, including professional anthropologists. Normal conflict of interest meeting protocols would apply. Site assessment should be a function of the Department and not the APMC, and based on information provided by Aboriginal people and knowledge holders. The APMC should continue to make recommendations to the Minister on section 18 Notices.
What is protected	
5. Does section 5 adequately describe the sorts of places or sites that should be protected under the amended Act? If not, how can it be improved?	Guidelines would be useful to assist parties to understand the requirements needed to meet the criteria of section 5, as well as transparency around the assessment criteria used by DPLH and APMC. It is important that the understanding reached by Aboriginal groups and proponents that sites should carry a significance beyond simple artefact scatters is maintained. Any changes to the Act should not revert back to a model that recognises lower level archaeological places as significant.
6. Do section 6 and Part VI adequately describe the sorts of objects that should be protected under the amended Act? If not, how can they be improved?	We understand that section 6 is rarely used. Guidelines on the distinction between natural and artificial would be useful, as it is sometimes difficult to know where the line is drawn when considering objects made from natural material. Guidance on s6(2) would also be useful.
7. Is the declaration of a Protected Area under the Act the best way to deal with Aboriginal sites of outstanding importance?	We understand that this provision is rarely used and not managed properly. Places that fall into this category should be clearly detailed on an online register (like the State Heritage Register) and represented spatially and uniquely on the DPLH spatial database (AHIS). This is a more transparent and rigorous process.
8. Should the Act provide for the management of Aboriginal Ancestral (Skeletal) Remains? If so,	There should be an obligation to report skeletal remains to the Registrar. The usual process should continue to apply. The difference between skeletal remains and burials should be clearly explained in guidance material.

what needs to be considered?	Close attention needs to be given to inadvertent discovery of Aboriginal human remains. This is particularly the case when this occurs through development. DPLH needs to take a leading role in resolution of these matters in a reasonable manner. This should not be referred to the APMC in every instance and the Registrar should be empowered to provide advice to the Minister for pragmatic resolution. DPLH should take the lead on who needs to be consulted in individual cases, this should not be left to the proponent.
Protection and enforcement	
9. What sort of activities that may affect an Aboriginal site should require consent or authorisation?	Activities that have a direct impact on (ie, ground disturbing) an Aboriginal site should require consent or authorisation. This should not include disturbance to 'buffer zones'. This should not generally include access, use of existing tracks, maintenance of existing tracks, emergency works (firebreaks), geological mapping, rock sampling or soil sampling using handheld tools and non-ground disturbing geophysics, or indirect impacts (such as fly rock from blasting, adjacent dewatering or the aesthetics of place being 'impacted' by adjacent development). When determining assessment and compliance processes, recognition should be given to the significant differences between Low Impact / Preliminary Exploration activity, as distinct to Advanced Exploration or Mining Activities. Low Impact / Preliminary Exploration activity can be defined as exploration that is capable of being done without affecting an Aboriginal heritage site. Preliminary exploration programs will not noticeably disturb the land surface and may include mapping, sampling using handheld tools, geophysical investigation or other non-intrusive methods. Preliminary exploration will either be of a type not requiring rehabilitation, because of its negligible ground disturbance, or it will be rehabilitated upon the completion of the Program. The difference between Low Impact and High Impact activities is recognised in the Victorian Aboriginal Heritage framework, and should be included in the WA model. The Register needs to be accurate at all times and should be a trusted data source.

	Clarity is also required on what constitutes disturbance to ethnographic sites.
10. What should be the criteria against which to evaluate an activity that may affect a site (e.g. a proposal to use or develop land)?	The criteria used to evaluate the impact of an activity on a potential place or site should include: • Significance and cultural value of the place or site, • Nature and extent of impact, • How and to what extent that site will be affected, • Level of consultation undertaken and outcomes, • Quality of site recording and proposed mitigation, • Economic and social benefit of activity to State and Aboriginal people.
11. How can 'impact' arising from proposals for land use on sacred sites that do not have physical cultural heritage elements be assessed?	Potential impacts should be assessed against the specific values of that place (is the place focused on a landscape feature like a Hill or have an association with water for example) and against the significance and importance of the place, including any Ritual, Ceremonial and Sacred components. Ethnographic sites need to be openly and rigorously assessed / validated by professionals. Criterion against which the assessments are being made needs to be made clear.
12. Who should provide consent or authorisation for proposals that will affect Aboriginal sites?	The Minister for Aboriginal Affairs with advice from both the APMC and the DPLH (if considered necessary). This is similar to decisions made under the WA Environment Protection Act, where the Minister for Environment makes decisions based on advice from the Environment Protection Authority. The Minister may also seek advice from the Department of Water and Environmental Regulation (DWER), where considered necessary, and take into consideration other issues such as social and economic benefits to the State. Decisions involving significant projects are also referred to Cabinet for consideration. Part VII of the Environmental Protection Act⁶ provides appeal rights in respect of decisions under that Act. The Appeals Convenor investigates and provides advice to the Minister for Environment in respect to those

⁶ http://www.austlii.edu.au/cgi-bin/viewdb/au/legis/wa/consol_act/epa1986295/

	appeals. This includes a large range of environment related decisions. The intent is that the Office of the Appeals Convenor is to manage the appeals process independently, efficiently, effectively and fairly, without legal technicality or formality. AMEC understands that the Appeals Convenor model has been successful in ensuring that procedural fairness and natural justice principles are adhered to. AMEC suggests that consideration be given to the EPA Appeals Convenor model as it could be mirrored in the AHA reform. It could also deal with disputes and act as a 'circuit breaker' where consensus cannot be reached on proposed clauses, conditions or fees / charges to be included in a Cultural Heritage Agreement. All parties with a <u>direct interest</u> in a decision should have the ability to appeal a decision under the Act. There should be no 'public interest' appeal provision. The appeals process should be without legal technicality or formality, but still be capable of judicial review. Such process should be merit based. It is however critical that the appeals process is efficient and timely and does not create undue delays and additional uncertainty or costs for all parties. This is particularly the case where there is a vexatious or frivolous objection, or other special circumstances might apply (such as an emergency, an accident or severe weather conditions).
13. To what extent is the current section 18 application process effective and how can it be improved?	It is understood that too much information is provided to the ACMC members on each Notice. DPLH should provide robust and testable advice to the ACMC for decision making. This is similar to processes in other Government approvals related agencies. DPLH processing timelines should be shortened from the current target 40 business days, and have a fast track decision making process where special circumstances might apply. The current process has become unreliable through: • routine deferrals and delays;

	• lack of consistency in assessment outcomes (variations in assessments made for similar places leading to confusion, challenges and disputes); • inconsistent and unclear processes around 'procedural fairness'; • general lack of transparency (how are assessments and recommendations being made and against what criteria). Suggestions include: • There should be clear and detailed guidelines around section 18 submissions. The Notice form itself contains some guidelines but these lack detail, for example the notice map contains a link to the 'process map' but the link does not actually lead to a process map; • The data limits for on online submissions should be increased to allow for submission of large and multiple reports and documents; • Character limits on the Notice form should be increased for each free text field to allow for fuller detail (for example 'overall response of those consulted' and 'general interest of the community'); • The APMC and DPLH should issue criteria/guidance documents so assessments are more transparent and better understood; • The APMC should perform its functions as soon as it is reasonably able. Deferral of assessments should be the exception and justification provided; • The Minister must perform his/her decision making functions as soon as reasonably able (significantly within the current target timeframe of 30 business days); • The APMC and DPLH should not continue to allow their functions and processes to be subverted and frustrated by allowing delays to assessments or consideration of information submitted after procedural fairness timeframes have elapsed; • There should be clear and detailed guidelines around procedural fairness processes so that timelines and requirements are clear and all parties have a fair and appropriate level of input or right of response, with transparency into that process;
--	---

	• There should be an appeals process for Applicants and those parties with a direct interest in the Notice (Refer to Appeal processes below); • Given routine delays and deferrals of assessments by the ACMC and the backlog of 'lodged' places pending assessment, the ACMC should be meeting more frequently so Notices are considered on time. • Section 18 Consents should be transferable. If a consent is gained to use the land for a purpose, and the conditions of consent adhered to, then an application to transfer the consent to another landowner should be permitted. The focus of the Consent should be on the relevant area and the nature of the activity that is authorised. Provided the same activity in the same area is proposed, a new 'holder' should be able to rely on the section 18 Consent. • Further clarification around who can apply for and rely on a section 18 Consent would be beneficial. The definition of 'owner' is broad in some respects but also limited – for example, it does not extend to entities with a contractual interest in the relevant area eg farm-in / joint venture arrangements. • Any person who needs to impact a site must be able to apply for a section 18 Notice.
14. What provisions could be included in an amended Act to ensure the long-term protection of Aboriginal sites where alternative statutory arrangements do not apply?	No comment.
Penalties	
15. Are the enforcement provisions under the Act adequate to protect sites? If	It is AMEC's understanding that proponents are fully aware of their obligations under the Act and seek to ensure compliance with the Act. Mining industry proponents value the possibility of long term working

not, how can they be improved?	relationships with Aboriginal people and remote communities, and seek to develop that relationship as early as possible in the mine cycle. Proponents also have a strong desire to ensure that their reputational credibility and corporate social responsibility obligations are not tarnished at any stage during the exploration to production cycle. AMEC is unaware of any recent flagrant breaches to the Act which have required enforcement or prosecution action. Increasing financial penalties appears unnecessary.
16. Are the current penalties under the Act adequate? If not, how can they be improved?	No comment.
Site Assessment and Registration	
17. Should a defence continue to be provided where the disclosure of information (section 15) is against customary laws/protocols?	Non-disclosure is problematic if the State is to meet its legislative obligations to protect and prevent destruction or damage to sites, objects or places.
18. Are the criteria for assessing the significance of sites under section 39 (2) and (3) adequate to evaluate whether a site should be added to the Register? If not, what should the criteria be to assess the significance of a site?	Current references to aesthetic values and sentiment, and how these might be assessed, are unclear. DPLH should update the existing Due Diligence guidelines and release new guidelines around interpretation for section 39. This is an administrative issue that requires attention with emphasis on science and consistency.

19. What should be the steps to report, nominate, assess, enter, amend or remove an entry from the Register?	• Assessment of a potential site by a professional (archaeologist or anthropologist), • Appropriate consultation with Aboriginal people who hold cultural responsibility for the site, • Correspondence to the Registrar with above information, • Register amended if above is in order. • For simple matters like changes to archaeological site boundaries or locations, correspondence from an archaeologist to the Registrar should suffice. • The current Heritage Information Submission Form (HISF) should be redesigned as it is currently poorly designed. There should be guidelines around what detail is important to include (other than merely referring to various sections of the Act). • There should be no time limits on drafting and then submitting a HISF form. Currently, a downloaded Form must be submitted within a year. • Assessments should be made with reference to the provisions of the Act, and then to any guidelines (currently none). Assessments and assessment criteria should be clear and publicly available; • Places should only be entered into the Register as 'lodged' if they are likely to be assessed as 'Sites' or lack sufficient supporting information to make an assessment. They should remain as 'lodged' until such time as a decision is made. • All places should be made live on the AHIS system and not remain solely on an offline dataset or record. • Places should be re-categorised to indicate that they have been assessed and found to not be a site, rather than removed from the Register if they are assessed as not meeting the provisions of the Act. The Register should be definitive, clear and accurate at all times to assist users to meet their obligations. • Lands and Places subject to s18 consents should be readily viewed on the AHIS.
Other parts of the Act	

20. What do you think is missing from the Act?	Refer to the Recommendations in this submission.
21. What sections, if any, do you think should be removed from the amended Act, and why?	No comment.
Additional comments and recommendations	Refer to the Recommendations and comments below.

6. ADDITIONAL COMMENTS AND RECOMMENDATIONS

Further to the above responses to the Questions posed in the Consultation Paper, the following additional comments and recommendations of an administrative and legislative nature are made for consideration:

Register of Aboriginal Places and Objects (Sites Register)

Accuracy and integrity of the Register

The accuracy and integrity of the Sites Register is vitally important in building trust and confidence in the current and future administration of the Act.

In its submission to the then Department of Indigenous Affairs Discussion Paper – Register of Places and Objects in June 2010, AMEC made the following statements:

- *The Register is considered to be unreliable, unhelpful and un-industry-friendly.*
- *Major problems exist with the Register involving accuracy, the size of some buffer zones and the inclusion of sites that have not been properly assessed.*
- *There is no transparency or consistency to the application of the assessment criteria of Section 5, especially for ethnographic sites. Section 5 sets out the criteria for recognition of sites. It is open to considerable interpretation and covers archaeological sites, sacred ceremonial and mythological sites as well as historical sites.*
- *The listing of entire river catchments and ranges needs to be re-assessed.*
- *Clear transparent criteria need to be applied to differentiate between background artefact status and significant artefact concentration.*

In addition, AMEC recommended:

- Resources should be directed towards putting in place a proper process to assess existing and future sites.
- That process should remove the seven statuses currently used - either a site should be assessed as permanent (and therefore listed) or not at all.
- Sites under assessment or that do not meet the permanent status should be placed into a separate schedule or data base of non-definitive sites and available for perusal (which industry can use to assess and make their own risk assessments in relation to areas).
- Current closed sites that are deemed unreliable and sites for which there are no reliable geographic data should be removed immediately.
- The assessment process should include a discretion/directive to enable the Registrar to refuse to close the site where there is no basis provided for it being closed.
- Buffer zones in general should be assessed and removed unless a satisfactory basis is provided for their existence.
- The numbering of sites on the current website page is confusing, and should be clarified and systemised immediately.

In 2013 and 2014, a phased collaborative project between the then Department of Mines and Petroleum (DMP), and the then Department of Aboriginal Affairs (DAA) undertook an Aboriginal Heritage Buffer Zone and Remapping Project to improve the accuracy and integrity of the Sites Register.

Over 1,000 historical Aboriginal heritage sites within 10 square kilometres, and 1 square kilometre buffer zones were reviewed in the Canning Basin and the Kimberley region.

A large proportion of site boundaries were improved or reduced in size. In one case, the boundary increased from 100 square kilometres to 5,415 square kilometres.

The project also highlighted the fact that many sites had been inaccurately recorded in the Sites Register, and in some cases found to be outside the actual buffer zone.

Unfortunately funding for this very successful project ceased due to budget constraints.

In AMEC's view the Register remains incomplete and cannot be confidently relied upon to provide accurate and robust cultural heritage information to stakeholders in its current form.

Recommendation:

- | |
|---|
| <p>6. An urgent audit of the Register of Aboriginal Places and Objects should be undertaken to ensure its accuracy and integrity for decision making.</p> |
|---|

It is understood that there are around 15,000 lodged 'places' which need to be determined using a risk based approach as 'sites' or otherwise. This has been a long standing issue of concern to AMEC, however priority attention has not been afforded to addressing the current uncertainty that applies over these outstanding lodged 'places'.

Some attention has been given to tackling the issue, whereby about 800 lodged 'places' have been determined over the past few years. Based on current progress it will take decades for the backlog to be cleared completely.

Recommendation:

- | |
|--|
| <p>7. Develop a strategy to clear the backlog of 15,000 lodged 'places'.</p> |
|--|

Site protection by disclosure

The Aboriginal Heritage Due Diligence Guidelines⁷ state that '*the Aboriginal Heritage Act 1972 (AHA) (WA) was enacted to ensure that Aboriginal heritage to which the AHA applies could be appropriately protected and preserved*'.

In order for this objective to be achieved, AMEC considers that the principle of 'Mandatory Disclosure' should be a fundamental premise of the Act, with appropriate confidentiality protocols applying.

⁷ <https://www.daa.wa.gov.au/globalassets/pdf-files/ddg>

The Minister, Government and proponents cannot meet their respective obligations under the Act to protect a site if they are unaware of its existence and general locality.

This will allow the Minister to meet the legislative obligations under section 10 of the AHA to *'ensure that so far as is reasonably practicable all places in Western Australia that are of traditional or current sacred, ritual or ceremonial significance to persons of Aboriginal descent should be recorded on behalf of the community, and their relative importance evaluated so that the resources available from time to time for the preservation and protection of such places may be coordinated and made effective.'* (AMEC emphasis added).

In addition, Section 38 of the AHA requires that the Registrar shall, so far as practicable, maintain a Register of all protected areas, Aboriginal cultural material and other places and objects. (AMEC emphasis added).

Compliance with 'mandatory disclosure' will also assist proponents meet their due diligence obligations and avoid unintended destruction or damage of sites, objects and places.

It will ensure the recording and protection of cultural information for current and future generations. This acknowledges that there is a natural decline in accurate heritage and cultural knowledge with the passing of older people that hold much of the knowledge that is relied upon.

It is understood that there are fewer younger people following a traditional path, so when the older people pass the knowledge goes with them. The main area of concern is ethnographic surveys that deal with the cultural heritage to country.

Recommendation:

- | |
|--|
| 8. A key premise of the AHA should be 'mandatory disclosure' of sites, places and objects. |
|--|

Site definition

AMEC has constantly requested clarity and guidance around the definition of 'site' as contained within section 5 of the AHA. This includes how it will be interpreted, and an explanation of the associated assessment criteria and processes.

The Government did issue some guidance material on 'sites', however immediately following the *Robinson v Fielding* Supreme Court decision in 2015 by Justice Chaney (Chaney decision), it was removed and has not been replaced.

The Chaney decision provided interpretative guidance on the current definition of 'site', and should be closely considered during the current review process and any proposed amendment to the AHA.

In any event, the Government must issue Guidance material on the definition, how it will be interpreted, and what assessment criteria will be adopted. This should be undertaken now under the current definition, and pending any further legislative change. Refer to the

recommendation that follows in relation to Technical Guidance material / Information Statements.

Clear and concise guidance material (to be conformed with by industry professionals (eg. Archaeologists)) should potentially reduce the requirement for assessment of 'purported' 'places' that do not do meet the fundamental test for being considered a 'site'

Transferability of section 18 Consents

Section 18 Consents are costly, can create long delays for land access. If mining and mineral exploration companies were able to access section 18 Consents obtained by a previous tenement holder, there would be increased efficiency, reduced delays and removal of duplicative processes.

The focus of the Consent should be on the relevant area and the nature of the activity that is authorised. Provided that the same activity in the same area is proposed, a new 'holder' (land holder and tenement holder) should be able to rely on the section 18 Consent.

If a Consent is gained to use the land for a purpose, and the conditions of Consent adhered to, then an application to transfer the consent to another landowner should be permitted.

Further clarification around who can apply for and rely on a section 18 consent would be beneficial. The definition of 'owner' is broad in some respects but also limited – for example, it does not extend to entities with a contractual interest in the relevant area eg farm-in / joint venture arrangements.

Recommendation:

- | |
|--|
| 9. Ability to transfer s18 Consents between land holders (including between tenement holders). |
|--|

Reporting and transparency of heritage survey reports

Many cultural heritage survey reports are being held confidentially by the parties to an Agreement, and not provided to DPLH for recording on the Register.

This is contrary to the spirit of section 15 of the Act – 'Report of Findings'.

It is noted that section 15 currently does not stipulate a specific timeframe 'when' a Report of Findings should be made to the Registrar. This is a significant shortcoming and needs to be addressed to improve the accuracy and integrity of the Register.

In order to overcome this dilemma caused by Confidentiality Clauses being included in Agreements (generally at the insistence of the Native Title representative party) there should be a mandatory timeframe stipulated in the Act on 'when' such reports should be provided to the Register.

It is understood that there are thousands of heritage survey reports being held on a confidential basis by various parties, including industry, which should be made available to the

Registrar. The administrative and financial implications of making these historical reports immediately available would be significant.

It is therefore suggested that provision be made for a transition period for the mandatory release of cultural heritage survey reports to the Registrar on the basis of the 'public interest' and removal of the need for duplicative heritage surveys to be undertaken over the same area.

All heritage survey reports (subject to any commercial-in-confidence information) prepared after promulgation of the Amendment Bill should be provided to the Registrar within a defined period.

Recommendation:

10. Provision made for all historical and future heritage survey reports to be provided to the Registrar for recording on the Sites Register within a defined timeframe.

Updates to the Register

In order to increase transparency, and meet notification protocols it is recommended that when the Register is updated, a Tab should be included on the DPLH website – 'Updates to the Register' providing a general description of the nature of the update.

Recommendation:

11. An 'Updates to the Register' Tab be included on the DPLH website.

Aboriginal Cultural Material Committee (ACMC)

It is understood that the workload of the Aboriginal Cultural Material Committee (ACMC) has been considerable over the past few years, particularly following the decision of the Supreme Court in *Robinson v Fielding*, following which the Minister directed that the ACMC reassess 35 Aboriginal heritage places⁸.

This also placed extra pressure on DPLH resources which were required to assist the ACMC assessments of these places. The 'precautionary principle' was also applied, which created some significant delays in those assessments. Based on industry feedback, we understand that the precautionary principle has continued to be applied with rigour by DPLH and the ACMC in their assessment and consultation processes.

In addition, the ACMC has been required to slowly deal with the backlog of 15,800 lodged 'places', which has now reduced to around 15,000.

Given the ongoing and routine delays and deferrals of assessments by the ACMC and the backlog of 'lodged' places pending assessment, the ACMC should be meeting more frequently so Notices are considered on time. This can also be achieved by increased use of telecommunication / video-link technology.

⁸ <https://www.daa.wa.gov.au/globalassets/pdf-files/acmc/list-of-previous-acmc-reassessment-decisions..pdf>

Recommendation:

12. The Department of Planning, Lands and Heritage should be appropriately resourced to service the workload demands of the Aboriginal Cultural Material Committee.

Transparency

Contrary to standard practice with other Statutorily based Committees, the Minutes or Meeting Notes, or Reasons for Decisions of the ACMC are not recorded on the DPLH website⁹.

Industry considers that there is a need to increase transparency and accountability around the operations of the ACMC, AMEC considers that such information (excluding any confidential or commercial in confidence information) should be publicly available for scrutiny.

Recommendation:

13. Minutes or Meeting Notes, or Reasons for Decisions (excluding any confidential or commercial in confidence information) of the ACMC should be publicly available for scrutiny.

Structure

It is noted that Part V of the AHA provides for the establishment of the Aboriginal Cultural Material Committee (ACMC) and for the Minister to appoint members having special knowledge, experience or responsibility. The Minister has no restrictions on the number of persons that can be appointed to the Committee. This discretion should be maintained.

Expressions of Interest are being called for Member positions from people with knowledge and experience in matters of Aboriginal heritage¹⁰. As at 29 May 2018, it is understood that there were 6 Committee members, including the Chairperson.

It has previously been suggested that representation on the ACMC should be increased to include at least one male of Aboriginal descent, and one female of Aboriginal descent, from each region in the State.

Although such a suggestion has the potential to widen the consultation framework, it is likely to make the operations and decision making processes of the ACMC cumbersome, unwieldy, and create more delays.

The current structure could however be improved by ensuring a mix of skills and expertise, including professional anthropologists. Normal conflict of interest meeting protocols would apply.

Recommendation:

14. Maintain the current flexibility provided to the Minister for Aboriginal Affairs in appointing members to the ACMC.

⁹ https://www.daa.wa.gov.au/about-the-department/boards_and_committees/aboriginal-cultural-material-committee1/

¹⁰ https://www.daa.wa.gov.au/about-the-department/boards_and_committees/aboriginal-cultural-material-committee1/

Decision making

The Minister for Aboriginal Affairs should continue to be responsible for the administration of the Act, and for decision making under the Act – based upon advice from the ACMC and DPLH.

The roles and functions assigned under the Act relating to the ACMC are neither clear nor comprehensive. No regulations/procedures have been made or at least made public in accordance with section 34 of the AHA governing the ACMC.

There is a lack of transparency around criteria for how potential sites are assessed, lack of consistency in those assessments and routine delays and deferrals of assessments.

This has led to uncertainty, legal challenges, legal costs, project delays and costs for the State, Proponents and Aboriginal people alike.

Recommendation:

15. The Minister for Aboriginal Affairs should be responsible for the administration of the Act, and for decision making under the Act, based upon advice from the ACMC and DPLH.

Consultation and notification processes

Future consultation and notification processes should meet standard natural justice and procedural fairness principles for all stakeholders, particularly in remote and regional communities. The processes involve separate consultation by Government with Aboriginal people; and consultation by Mining Proponents with Aboriginal people.

Government consultation with Aboriginal people

AMEC notes in various media articles and submissions to the Avery Review that there has been concern expressed that Aboriginal people's aspirations in respect of heritage have not been considered, and that they should have a greater voice in the decision making process through a mandatory legislative requirement to do so.

AMEC has no objections to the intent of ensuring that Aboriginal people are properly and fully consulted prior to any decisions being made which may affect their cultural heritage. It is however essential that there are no unintended consequences, such as increased financial leveraging opportunities, costs or delays.

The AHA and due diligence processes have operated for 46 years without the need for explicit consultation provisions being built into the legislation.

The Government's consultation processes with Aboriginal people are not readily known or publicly available. We understand, however through current arrangements there are

approximately 6 to 8 weeks between advertising an application for a section 18 Notice (in the West Australian) and it being considered by the ACMC. Industry considers this to be a generous timeframe.

The Government's long standing and existing '*Aboriginal Heritage Due Diligence Guidelines*' provide for early engagement and consultation, and clearly stipulate that consultation with the relevant Aboriginal people is a pre-condition to consent or approval under the *Aboriginal Heritage Act* (Emphasis added).

Section 29 of the NTA already provides that before undertaking a defined "future act", the State must give notice to native title parties and the public. The Department of Mines, Industry Regulation and Safety (DMIRS) manages this process in conjunction with the Department of Planning, Lands and Heritage (DPLH).

All Government agencies, including DPLH, apply conventional procedural fairness and natural justice principles, which includes ensuring that all relevant information and evidence is available to support a decision. In the case of DPLH, this includes consultation with relevant Aboriginal people.

This is done through public notification of its deliberations and direct advice to stakeholders. The Chaney decision confirmed that procedural fairness requires that there must be sufficient information available before decisions are made.

For these reasons, industry still does not consider that specific mandatory consultation protocols and timeframes should be enshrined in legislation. Instead it could be addressed by reference in the Regulations to meet established natural justice and procedural fairness principles.

Recommendation:

16. Specific mandatory consultation and notification protocols should not be enshrined in legislation.

In order to improve transparency around consultation and notification processes, DPLH should publish a flow chart describing the individual stages and timeframes.

Recommendation:

17. DPLH publish a flow chart of the consultation and notification stages that are used in the decision making processes to ensure natural justice and procedural fairness principles are provided to all stakeholders.

Mining proponent consultation with Aboriginal people

From a mining industry perspective, the Government has a long standing 'Expedited Procedure' policy in place whereby applicants for an Exploration Licence have to provide an executed Heritage Agreement (and consult with Aboriginal people) before the licence application can be progressed.

For most new mining (and exploration) activities, the “future acts” processes under the Native Title Act (NTA) currently provides a formal consultation avenue and adequately deals with objections to the cultural heritage approvals process (sections 29, 32 and 237 refer).

A tenement cannot be granted unless it has satisfied the formal “future act” requirements of the NTA.

This process usually sees Agreements concluded between Aboriginal people and proponents that provide for the protection of cultural heritage.

The Department of Mines, Industry Regulation and Safety website¹¹, states that:

‘Exploration licences attract the expedited procedure of the Native Title Act 1993 (S237). The State Government has a policy whereby applicants for exploration licences and prospecting licences will have to sign and offer a Regional Standard Heritage Agreement (RSHA) or prove they have an existing Alternative Heritage Agreement in place. This must happen before the applications will be submitted to the Native Title Act 1993 (NTA) Expedited Procedure. This policy does not apply to applications located within the Esperance Nyungar and South West Settlement ILUA areas and applications within the Kimberley region. Statutory Declaration to this effect must be lodged with the department.

A Native Title party affected by the proposed grant have the right to object to the expedited procedure statement within four months of the notification day. If no objections to the statement are received, the application may be granted. If one or more Native Title party objects against the inclusion of the expedited procedure statement, the NNTT must make a determination whether the act is in fact an act attracting the expedited procedure. If the determination is that the expedited procedure applies the government party may grant the tenement. If the objection is upheld the application proceeds into the right to negotiate process. Often parties reach agreement within the expedited inquiry process resulting in the objection being withdrawn and the grant proceeding.’ (Emphasis added)

The relevant RSHA¹² is offered in accordance with the Expedited Procedure Policy. However, in many instances an alternative Heritage Agreement is normally negotiated, which involves significant consultation with Aboriginal people.

In addition, DPLH already requires the land user to engage with relevant TOs before lodging any application, and that the proponent will need to (in the Application Form) identify the TOs, describe how they were engaged and what the outcomes of the engagement were.

Mining and exploration companies therefore already acknowledge cultural heritage values, and ensure that full consultation occurs with Aboriginal people in accordance with the Mining Act and the Native Title Act. These companies are keen to develop long term business

¹¹ <http://www.dmp.wa.gov.au/Minerals/Native-Title-Act-Process-3024.aspx>

¹² <http://www.dmp.wa.gov.au/Minerals/Native-Title-Act-Process-5548.aspx>

relationships for the benefit of all stakeholders, including significant native title royalty payments.

This is confirmed by the Supreme Court decision (*Robinson v Fielding [2015] WASC 108* (Chaney decision) where His Honour indicated that it is plain that the effective operation of the Act requires input of some kind from Aboriginal people as they are the principal source of information as to the existence of sites to which the Act applies (para 129).

There is a clear need to have a circuit breaker where negotiations / consultations have broken down, stalled or are clearly being delayed by one party although meaningful engagement and good faith negotiations may have occurred.

There should be default provisions to deal with these circumstances.

This should include obligations on the representative body / party to engage and / or release relevant cultural heritage survey reports.

Provision should also be made for issuance of immunity / exemption from the Act. In doing so guidance should be issued on what proponents need to do to avoid prosecution and meet their due diligence obligations, based on process.

Recommendation:

18. Default provisions be included in the Act to create a circuit breaker where negotiations / consultations have broken down, stalled or are clearly being frustrated.

Appeal processes

Part VII of the Environmental Protection Act¹³ provides appeal rights in respect of decisions under that Act. The Appeals Convenor investigates and provides advice to the Minister for Environment in respect to those appeals. This includes a large range of environment related decisions. The intent is that the Office of the Appeals Convenor is to manage the appeals process independently, efficiently, effectively and fairly, without legal technicality or formality.

The Convenor decides the most appropriate method of investigation having regard to the nature and complexity of the issue under appeal. There are no statutory timeframes, but the Convenor aims to have the appeal Report submitted to the Minister as soon as possible and within 60 days.

Once the appeal is determined by the Minister, there is no further right of appeal. Details of the appeal are published in accordance with the Regulations.

Appeals under the Environmental Protection Act are not heard by the State Administrative Tribunal.

¹³ http://www.austlii.edu.au/cgi-bin/viewdb/au/legis/wa/consol_act/epa1986295/

AMEC understands that the Appeals Convenor model has been successful in ensuring that procedural fairness and natural justice principles are adhered to. AMEC suggests that consideration be given to the EPA Appeals Convenor model as it could be mirrored in the AHA reform. It could also deal with disputes where consensus cannot be reached on proposed clauses, conditions or fees / charges to be included in a Cultural Heritage Agreement.

All parties with a direct interest in a decision should have the ability to appeal a decision under the Act. There should be no 'public interest' appeal provision.

The appeals process should be without legal technicality or formality, but still be capable of judicial review. Such process should be merit based.

It is however critical that the appeals process is efficient and timely and does not create undue delays and additional uncertainty or costs for all parties. This is particularly the case where there is a vexatious or frivolous objection, or other special circumstances might apply (such as an emergency, an accident or severe weather conditions).

Recommendation:

19. Consider the establishment of an Aboriginal Heritage Appeals Convenor role to hear appeals from those parties directly affected by decisions made under the Aboriginal Heritage Act.

Range and quantum of fees and charges

Over the years, industry has been exposed to the Aboriginal heritage clearance process being used by some parties as a mechanism to lever additional financial payments. Many of these payments appear to be duplicative, unreasonable and unnecessary, however companies are compelled to pay them in order to obtain the clearance in a timely manner. This is clearly an unsatisfactory situation that should not be allowed to continue.

Research undertaken by AMEC, indicates that the average cost of a cultural heritage survey (excluding any meeting / agreement signing expenses) has increased from around \$11,000 per day in 2010 to the current approximate cost of \$30,000 to \$40,000 per day (subject to locality).

In 2010 these costs mainly comprised:

- Anthropological, archaeological and legal services,
- Native Title Representative Bodies / Prescribed Body Corporate administration fee,
- Traditional Owners / Consultants (normally 4-6 TOs engaged) who undertake the on-ground survey work.

The range of fees and charges included:

- Anthropologist – in house or external (survey preparation, airfares, car hire / fuel / mileage, meals, accommodation, site register search) - \$900 - \$1250 per day
- Anthropologist – in house or external – (report writing)
- Land Access / Heritage Manager – in house

- Aboriginal Liaison Officer (mobilisation and demobilisation, airfares, car hire / fuel / mileage, meals, accommodation) – in house
- Aboriginal consultants - \$400 / \$500 per day (travel time, meals and accommodation)
- Negotiation and legal fees – in house and external
- Administration fee 10% - 20%, in some cases capped at \$1,200
- Disbursements (taxis, phone, parking)

Further analysis of recent cultural heritage survey invoices indicates that the range of fees and charges has significantly expanded over the past decade.

Additional individual expense items can now include:

- Male and female anthropologist
- Principal anthropologist, a Senior anthropologist and a Field anthropologist
- Clearance preparation
- Clearance fieldwork
- Clearance report
- Desk top study
- GIS consultant
- Cartographer
- Compliance officer (in house)
- Insurance levy
- Environment monitors
- Rehabilitation inspections
- The greater of 5% of the annual on-ground expenditure, or 20% of the DMP / DMIRS annual tenement rental – verified by the Company's annual Form 5 Operations Report
- Aboriginal Consultant (daily expense of \$500-\$750 each)
- Meeting expenses associated with a Monitoring and Liaison Committee, and daily expenses around \$600-\$750 each
- Cross cultural awareness presenter / Cultural Awareness Training Package costs
- Pre-survey and post survey meeting expenses
- Review costs (every 2 years)

The growing range of additional fees and charges being incurred by mining proponents needs to be reviewed to ensure that they are fair, reasonable and justifiable on an actual cost recovery basis. AMEC considers that the Aboriginal Heritage Regulations should address this issue by limiting the quantum and range of fees and charges for heritage clearances. Guidance material should also be made available for stakeholders on the implementation of those Regulations.

As an example, the Department of Planning and Community Development in Victoria¹⁴ has published a 'Fees and Conduct Guidelines for Registered Aboriginal Parties' document to assist Registered Aboriginal Parties (RAPs) and project sponsors to:

- Work out suitable fees for the participation of RAPs in the cultural heritage assessment process, and
- Understand the standard of conduct expected of RAPs as professional organisations.

14

[http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/LTObject_Store/ltobjst10.nsf/DDE300B846EED9C7CA257616000A3571/B7389A02EE90A87CCA25823300171BA4/\\$FILE/07-41sra014%20authorised.pdf](http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/LTObject_Store/ltobjst10.nsf/DDE300B846EED9C7CA257616000A3571/B7389A02EE90A87CCA25823300171BA4/$FILE/07-41sra014%20authorised.pdf)

The Guideline has also been issued to ensure that RAPs are appropriately recompensed for participating in cultural heritage assessments, and to create certainty and transparency in relation to RAP fees. Sponsors and RAPS are encouraged to use these Guidelines.

Victoria's Aboriginal Heritage Regulations 2007¹⁵ set out the fees that RAPs can charge by adopting a 'fee unit' based scale of fees and charges within the meaning of the Monetary Units Act 2004.¹⁶

Recommendation:

20. Regulate and release guidance material to cap the quantum and range of fees and charges for heritage clearances.

Technical guidance material / Information Statements

Based on comments within the AMEC submission, and in order to improve certainty and transparency in the decision making and Aboriginal heritage clearance processes it is vitally important that guidance material is urgently released addressing the following crucial issues:

- o the definition of a 'sacred site', assessment criteria and how the definition is being interpreted;
- o procedural fairness;
- o natural justice;
- o consultation protocols and timeframes, particularly where there are overlapping claims, multiple stakeholders and non-determined areas;
- o the difference between Low Impact and High Impact activities;
- o how to trigger the NTA Expedited Procedure (other than by the existing method of execution of an RSHA), and how to negotiate through the process once it has been triggered;
- o process for the lodgement and assessment of section 18 Notices, including consultation and negotiation protocols; and
- o fair and reasonable fees and charges for heritage clearances.

This issue can be addressed in the short term, and not wait until passage of an Amendment Bill – which could be in 2019 or 2020. Once that Bill has been promulgated the guidance material will need to be reviewed and updated where necessary.

Recommendation:

21. Technical guidance material be urgently released on the operations and administration of the current AHA, and revised post passage of an Amendment Bill.

Performance Reporting

Timeframes for Section 18 Notices

Section 18 Notice Application timeframes are excessive, with data provided by the Department of Planning, Lands and Heritage (DPLH) showing the average processing times for the months between February 2017 to December 2017 to be:

¹⁵http://www.austlii.edu.au/cgi-bin/viewdb/au/legis/vic/consol_reg/ahr2007273/

¹⁶ http://www.austlii.edu.au/cgi-bin/viewdb/au/legis/vic/consol_act/mua2004202/

- February 2017 108
- March 96
- April 82
- May 112
- June 68
- July 88
- August 96
- September 71
- October 65
- November 73
- December 2017 87

The Government has a self-determined target timeline of 70 business days, which commences at the time of the ACMC meeting submission deadline, and concludes upon the Minister's decision.

Out of the last 11 months the target timeline has only been met once. AMEC considers this to be unsatisfactory as it does not recognise or accommodate critical business, operational and investment decisions that need to be made by mineral exploration and mining companies. The DPLH has allocated a target timeframe of 40 business days for itself, and 30 days for the Minister. These timeframes should be reviewed and significantly reduced.

Agreed timelines and performance information should be made publicly available on approvals processes. AMEC considers that such an approach will increase departmental transparency and accountability.

Recommendation:

22. That agreed timelines and performance indicators (including trend lines over 5 years) should be made publicly available by the Department of Planning, Lands and Heritage on a quarterly basis for all approvals, such as section 18 Notices.