



National  
Native Title  
Tribunal

National Native Title Tribunal

# Review of Native Title and Heritage Processes in Western Australia

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## **Disclaimer**

This Report was commissioned by agreement between the Honourable Roger Cook MLA, Premier of Western Australia, and Mr Kevin Smith, President of the National Native Title Tribunal. It has been prepared under mutual circumstances of confidentiality for the Government of Western Australia and is provided in those same confidential terms. All information gathered from, and imparted by, consultees in the preparation of this Report was done so under a mutual understanding of the terms of strictest confidence.

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# 1) Executive Summary

1. This Report presents the findings of a targeted review of Western Australia’s native title and Aboriginal heritage processes as they operate within the mining and exploration sector. The Review identifies options to improve the efficiency, effectiveness and equity of these processes for Traditional Owners and industry participants alike, recognising the high volume of future acts activity generated by mining tenure applications and the heightened sensitivity to heritage impacts in the post Juukan Gorge environment.
2. The Review was requested by the Premier of Western Australia in February 2025 and was undertaken by the National Native Title Tribunal (**Tribunal**) with support from the Department of Premier and Cabinet (**DPC**). Consultation occurred across July–October 2025 with a wide range of stakeholders including exploration and mining proponents (of varying scale), Traditional Owner organisations and Aboriginal heritage professionals, with additional engagement with relevant State Departments. Regional forums were held in Karratha, Kalgoorlie and Broome to support participation.
3. The statutory setting most relevant to this Review is defined by the interaction of three principal regimes: the *Mining Act 1978* (WA) (**Mining Act**), the *Aboriginal Heritage Act 1972* (WA) (**Aboriginal Heritage Act**) and the *Native Title Act 1992* (Cth) (**Native Title Act**). Together, these instruments establish the rights created by mineral tenure, the protection and offence framework for Aboriginal heritage and the future acts architecture through which the State may validly grant interests that affect native title. The practical difficulties examined in this report arise where these regimes intersect.
4. While native title is not a land tenure, it is a set of property rights. These property rights are managed through Prescribed Bodies Corporate (**PBCs**) acting as trustees or agents, and are compensable where impaired. The *Native Title Act* regulates the grant of tenure affecting native title through the future acts regime, including procedural rights and, for higher impact acts, the right to negotiate, which carries good faith obligations and is framed within a user pays model for negotiation costs.
5. For grants deemed to be of lower impact, most commonly exploration and prospecting licences, the State may apply the expedited procedure. Where applied, the right to negotiate is displaced unless a native title party objects and the Tribunal determines the expedited procedure does not apply. Unlike right to negotiate matters, there is no statutory good faith requirement or equivalent statutory cost recovery mechanism for expedited procedure agreement making, however the entitlement to compensation remains.
6. Parties may reach an agreement, generally in the form of Heritage Protection Agreements (**HPAs**), to resolve expedited procedure objections. In WA, the absence of default processes or minimum requirements where the expedited procedure is applied has the effect of concentrating a wide array of pressures and issues into HPA negotiation settings and outcomes, giving rise to high levels of disputation and system stress.
7. The *Aboriginal Heritage Act* applies broadly to places and objects meeting the s 5 definition, whether or not they are recorded on the register of sites. Section 17 creates very broad offence provisions for disturbance, which, in a risk averse environment, incentivises higher levels of activity including escalation into approvals pathways such as that required by s 18, even when these are ultimately not needed.

8. These heritage settings operate alongside the conferral of tenure rights and downstream approvals of the *Mining Act*, including permissions that may materially increase on ground impacts and potentially circumvent the requirements of the *Native Title Act*. Taken together, the statutory framework explains why cost, delay and mistrust tend to concentrate at the intersection of expedited procedure tenure processing, heritage management and the administration of mineral titles.
9. Consultations revealed a system under sustained pressure, characterised by deep mistrust between sectors, inconsistent policy guidance and uncertainty about standards and decision-making. Industry stakeholders emphasised project delays, high and unpredictable costs, and a lack of clear Government guidance, particularly in heritage matters and s 18 processes, resulting in risk-averse behaviours and repeated procedural steps. Native title parties emphasised systemic neglect of their property rights, financial stress and capacity constraints within PBCs, and the view that assertive positions are often necessary to secure meaningful protection of native title and heritage values in the absence of effective default safeguards or minimum requirements.

## Summary of Findings by Focus Area

### Focus Area 1: Administration of the Expedited Procedure

10. The expedited procedure is applied to a large proportion of exploration and prospecting tenure in WA and is objected to at a high rate by native title parties. The primary reason for this high rate of objections is that in WA, there are no other practical mechanisms through which native title parties are capable of engaging proponents and protecting their interests.
11. This is driven by an absence of default processes or minimum requirements regarding native title and heritage processes to apply to grant of tenure that would otherwise balance the interests of parties. In contrast, other jurisdictions (notably Queensland and the Northern Territory) operate more prescriptive minimum requirements, through conditions, duty of care frameworks and native title protection conditions, which correlate with lower objection rates and greater certainty of process. A number of proponents that operate across jurisdictions report that WA requirements fall well short of contemporary operational standards and internal risk controls, generating operational risk.
12. In WA, the State's settings are perceived as a "lowest common denominator" approach, containing limited endorsements and conditions, no meaningful notice or engagement expectations and heavy reliance on heritage agreements being negotiated to protect parties' interests. This encourages objections to the expedited procedure as the principal mechanism to bring parties to the table and enables strategic behaviours in both sectors that distort outcomes.

#### *Key directions and recommendations (summary):*

- Reform the State's expedited procedure settings to ensure interests are properly balanced, reduce objections and support efficient tenure grant.
- Develop and implement enforceable minimum requirements/default processes for low-impact tenure as set out in focus area 8.

## Focus Area 2: Heritage Protection Agreements

13. Focus Area 2 addresses Heritage Protection Agreements (HPAs) as the principal mechanism through which Aboriginal heritage risk is managed and working arrangements established, in the context of mining and exploration where tenure is processed under the expedited procedure. HPAs have become the primary practical pathway through which parties seek certainty of process, manage reputational and social license risks and avoid inadvertent contraventions of the *Aboriginal Heritage Act*.
14. Native title parties commonly use objections to the expedited procedure as the device to bring proponents to the table to negotiate a HPA. From the native title perspective, a HPA provides visibility of proposed activities on country, establishes procedures for heritage protection and surveys and supports early engagement and relationship building. From the proponent perspective, HPAs are sought to provide a clear, cost-effective and durable pathway for timely exploration activity, while reducing legal and reputational risk associated with heritage impacts and the operation of the *Aboriginal Heritage Act*.
15. Stakeholders reported that HPA negotiation has become increasingly complex, costly and adversarial, with disputes commonly arising over cost recovery, timelines, survey triggers, exclusion zones, and the incorporation of broader provisions, including environmental and social clauses. Unlike right to negotiate matters, expedited procedure agreement-making is not subject to statutory good faith obligations, and native title parties cannot rely on a statutory cost recovery mechanism.
16. In practice, PBC under-resourcing and high matter volumes mean negotiation costs are sought from proponents. Proponents, particularly smaller operators, frequently dispute these costs. Conversely, native title parties emphasise they would not be put to the expenditure but for the proponent activity, that proponents don't properly factor in these costs as a cost of doing business and expressed that it is inappropriate for PBCs to subsidise the commercial activity of a third party.
17. While both PBC and industry sectors routinely engage with each other, it is apparent there is little mutual understanding of the operational environment and pressures of the other. In addition, there is no systematized effort to engage in intersectoral dialogue in an effort to resolve key issues and pressures. Further, there is little to no relevant or quality information available from relevant Departments to assist to overcome fundamental gaps in knowledge which may assist to set a more constructive foundation for engagement between parties. Rather, HPA processes are often conducted by rote within a system under stress and low mutual understanding, which serves only to increase pressures and conflict.
18. The Review identifies the Regional Standard Heritage Agreement (RSHA) as a key structural irritant. It is widely rejected by native title parties as outdated and legally problematic and is reported by both proponents and PBCs to disrupt negotiations and undermine relationships. Perhaps worse than this, it is seen by many as a State sanctioned mechanism to circumvent native title requirements and in doing so, may have generated compensation liabilities for the State. Many inexperienced proponents report it to be misleading in relation to what constitutes contemporary standards, affecting their ability to properly budget and prepare, as well as fostering conflict.

19. The Review also notes emerging trends towards inclusion of compensation/annuities and broader “land access” concepts within HPAs. These are driven by uncertainty around compensation liabilities, heightened sensitivity to impacts on country, and low confidence in regulatory enforcement.

*Key directions and recommendations (summary):*

- Retire the RSHA as a policy instrument and replace it with contemporary minimum requirements.
- Improve publicly accessible information and guidance for proponents on native title, PBC decision-making requirements and process expectations.
- Establish structured intersectoral dialogue (State–industry–native title) to rebuild system trust and function and to address key policy issues and areas of contention.
- Develop guidance on approaches to compensation in exploration/prospecting settings and strengthen partnership models to address expanded provisions and exclusion zone disputes.

### Focus Area 3: Heritage Surveys, Costs and Associated Issues

20. Heritage survey costs were consistently identified as high and, in some cases, prohibitive, particularly for smaller proponents. Cost concerns are often focused on consultation rates of Traditional Owners, however evidence provided to the Review indicates that a significant proportion of total expenditure often flows to external consultants rather than to PBCs or Traditional Owners themselves. Capacity constraints within PBCs drive reliance on consultants for coordination and reporting, which can amplify costs and reduce transparency.
21. Stakeholders identified recurring issues in survey administration and conduct, including repeated surveys over previously cleared ground, uncertainty about the validity period of clearances, inconsistent methodologies, variable report quality and timeliness, and unresolved intellectual property and cultural information handling concerns. These issues fuel mistrust and can result in duplication, delay and unnecessary escalation into processes for applications under s 18 of the *Aboriginal Heritage Act*. The Review identifies an absence of widely accepted guidance on a number of topics and in the absence of such guidance, these issues are negotiated ad hoc, which can contribute to dispute, delay and inconsistent outcomes.
22. Concerns were expressed by industry regarding report quality and timeliness, including factual errors, cut and paste practices and insufficient detail to explain findings or support subsequent approvals. Native title parties similarly noted consultant shortages and variable practitioner capability. The Review concludes there is no consistent, sector wide standard for reporting content and quality (including the management of sensitive information), and that clearer guidance from the Regulator would assist to lift standards, reduce dispute and improve confidence.
23. The Review also notes the DPLH Aboriginal Heritage Survey Program as a constructive initiative but finds awareness and uptake to be low and identifies the need to address cultural sensitivity and information-handling concerns to improve acceptance.

#### *Key directions and recommendations (summary):*

- To service industry and PBC needs, the Regulator should publish technical guidance on key topics including but not limited to survey methodologies (including when they are appropriate), reporting standards and requirements, and standards calibrated to survey methodology and approvals needs, incorporating culturally appropriate information handling and clarification regarding ownership of intellectual property.
- Continue to support and expand the DPLH survey program, including targeted consultation with Aboriginal parties to address concerns and a coordinated awareness campaign to increase uptake.
- Address underlying system pressures through capacity building and standards (including consultant quality and PBC capability), and through minimum requirements/default processes where agreement cannot be reached.

#### **Focus Area 4: Heritage Policy and Process Issues**

24. Focus Area 4 considers policy and process issues arising under the *Aboriginal Heritage Act*, with particular attention to the practical operation of s 5 (what constitutes a protected place), site verification and significance, s 17, s 18 approvals processes and the new information provisions introduced in 2023. The Review identifies a cycle of uncertainty and precautionary escalation, limited public guidance, assessment backlogs and risk averse behaviour by proponents, which in turn increases the volume of approvals applications and further burdens decision making pathways.
25. Stakeholders consistently reported uncertainty regarding the threshold for a place to be treated as a site (or a place to which s 5 applies), and how that threshold is to be assessed in the field. Consultees noted debate about the extent to which broader landscape features (including waterways and ranges) are captured by s 5, and that the absence of clear, contemporary guidance from the Regulator contributes to inconsistent practice and heightened risk management. In a low risk environment, parties commonly assume s 5 applies until an evaluation is made, resulting in higher transaction costs and escalation into approval processes.
26. The Review finds that precautionary s 18 applications are likely to have increased, including where a permit is ultimately unnecessary if a place is assessed not to meet the s 5 threshold. This has contributed to administrative backlogs and cost/time impacts for proponents and Aboriginal parties. Stakeholders reported that the backlog of s 5 assessments has the practical effect of shifting evaluations into s 18 processes, intensifying workload and decision making pressure. In addition, consultees reported that s 18 applications can strain relationships with native title parties, particularly where applications are lodged for regulatory validation rather than because disturbance of a clearly defined site is intended.
27. Consultation expectations for s 18 applications, while largely policy driven rather than express statutory requirements, were also reported as producing “non decision loops” where consultation is costly, difficult, or unsuccessful. In these circumstances, proponents described being repeatedly directed back to consultation requirements without clear thresholds for what constitutes adequate effort, while Aboriginal parties reported consultation fatigue and concern about proponent intent. The Review concludes

that clearer internal decision frameworks and better articulated public guidance regarding consultation thresholds are required to support robust and timely decisions.

28. The Review also concludes that improved transparency, internal decision-making frameworks, and well-articulated consultation thresholds are essential to robust, timely decisions.

*Key directions and recommendations (summary):*

- Develop and publish technical guidance on ss 5 and 17 and the evaluation of significance, with indicia grounded in statute and jurisprudence.
- Review DPLH/ACHC resourcing and administrative arrangements to address backlog pressures.
- Strengthen internal decision-making frameworks for s 18 consultation and information requirements; provide officer training; update public consultation policy accordingly.

### Focus Area 5: State Government Consistency, Decision-Making and Coordination

29. Stakeholders reported that Aboriginal engagement and consultation requirements are frequently inconsistent between Departments and, at times, within Departments. This manifests as duplicated or misaligned processes across the life of a project (future acts, heritage, water and environmental requirements), increasing cost, complexity and consultation fatigue for proponents and PBCs. Native title parties also reported being overburdened by the volume and variety of Government “asks”, with pressure often misattributed to proponents rather than Regulators.
30. A further strong theme in consultation was risk averse decision making and a perceived reluctance of Departments to provide policy leadership. Industry consultees described “non decision loops” in which Departments respond to difficult issues by repeatedly requesting further steps or information, including in circumstances where a proponent has demonstrated sustained attempts to fulfil previous requirements, which are often not based on statute or regulation. This approach is said to increase uncertainty about requirements, extend timeframes and amplify cost across projects, while also overburdening Aboriginal parties.
31. The Review also identifies an absence of an overarching cross Government narrative and governance mechanism capable of coordinating native title, heritage, mining tenure, environment and water settings. Departments are perceived to operate within statutory silos, managing issues on an ad hoc basis rather than through a coordinated system. Stakeholders from all sectors emphasised the need for stronger central policy coordination with authority and resourcing to drive consistent policy development and oversee implementation of reforms.
32. Significant policy issues that impact Government were also identified. Native title parties raised concerns about “tenement parking”, where proponents lodge tenure applications to secure ground but then prolong agreement negotiations and Tribunal processes to delay grant. This behaviour is said to drain PBC resources, distort HPA negotiations and increase costs overall. Consultees noted that the Tribunal has limited tools to address delaying

conduct, with the capacity to discourage or sanction such behaviour resting principally with the State’s mining Regulator, the DMPE, through its tenure administration powers.

33. Native title parties also raised concerns regarding the operation of excess tonnage permissions for exploration and prospecting tenure, particularly where the expedited procedure has applied to the underlying grant. The policy position that consultation is only required once cumulative tonnage exceeds a set threshold of 10,000 tonnes was criticised as arbitrary, given the potential for material on ground disturbance below this level. The Review also notes risks for the State, including potential compensation exposure and the prospect of litigation about whether excess tonnage permissions constitute a notifiable future act.

*Key directions and recommendations (summary):*

- Conduct a coordinated review of Aboriginal consultation requirements and decision frameworks across Government to reduce duplication and improve consistency.
- Deliver cross Government native title and PBC training for relevant public servants, with periodic process reviews.
- Put in place empowered, resourced cross Government coordination arrangements to oversee policy development and reform implementation.
- Implement reforms that reduce incentives for tenement parking and strengthen Regulator response to delaying behaviour.
- Review excess tonnage policy and processes to ensure Native Title Act compliance and manage State risk.

#### Focus Area 6: Consultants

34. Consultants (including heritage professionals, legal advisers and service providers) play an important role, but consultees raised significant concerns about “consultant capture”, predatory practices, conflicts of interest and inflated costs. These dynamics can impede relationship-building between proponents and PBCs and may divert resources away from capacity building within PBCs. The Review records broad acknowledgement that ethical and capable consultants can play an important facilitative role, but that a combination of capacity constraints and weak quality controls has allowed poor practice to have material system impacts.
35. A recurring concern raised in consultation is “consultant capture”, being circumstances where a consultant exerts disproportionate influence over a PBCs decision making or engagement settings, an issue affirmed by a number of PBCs. The Review notes that newer or under resourced PBCs are particularly vulnerable due to high matter volumes, limited internal capability and the complexity of the regulatory environment. In these settings, boards may rely heavily on external advisers, creating opportunities for predatory or conflicted conduct, and for consultants to become gatekeepers to the exclusion of direct communication between proponents and PBCs.
36. Cost impacts are reported to arise where PBC functions are outsourced and mirrored by consultants, or where consultants embed themselves in negotiation and survey delivery to create ongoing fee for service opportunities. Stakeholders reported examples of excessive fee demands impeding agreement making, survey costs escalating through coordination

overheads and consultant scarcity, and disputes about whether expenditure is directed to PBCs and Traditional Owners or predominantly to external advisers.

37. Proponents frequently described consultants acting as gatekeepers who can impede relationship building with PBC boards and Traditional Owners and creating uncertainty as to whether positions communicated are those of the PBC or the consultant. The Review also records concerns that some consultants may engage in practices that favour particular individuals within a PBC, causing internal division, instability and erosion of trust. These dynamics can have compounding effects: destabilised governance and reduced trust further increase reliance on consultants and delay decision making, feeding cost escalation and adversarial interactions.
38. In regard to heritage surveys and reporting, there was strong agreement across sectors that the standard of heritage work and reporting is variable and, in some instances, poor. Consultees cited a shortage of suitably experienced practitioners, the presence of low quality or unqualified operators, inconsistent outcomes across similar areas, heavy redactions, and reports containing factual errors or recycled content. The absence of consistent reporting standards and agreed expectations was identified as contributing to dispute, resurveying and reduced confidence in heritage outcomes.
39. The Review also notes that regulation is uneven across consultant types. Legal practitioners are subject to established regulation and disciplinary mechanisms, whereas other advisory roles and heritage practitioners are not. While peak bodies exist for archaeologists and anthropologists, there is no enforceable accreditation requirement for practice and limited capacity to impose sanctions for poor conduct. Consultees expressed broad support for accreditation and standards, while emphasising that any approach must preserve PBC choice and recognise the trust relationship necessary for handling culturally sensitive information.

*Key directions and recommendations (summary):*

- Develop, in partnership with peak bodies and with input from PBCs and proponents, an accreditation and standards framework for heritage practitioners.
- Establish a sector appropriate code of ethics and conduct and a voluntary certification mechanism for consultants providing services to PBCs, identify and support improved standards and ensure ethical providers can be identified.
- Strengthen Regulator thought leadership on survey methodology, reporting and information handling, including culturally sensitive information and intellectual property principles, to reduce scope for poor practice and dispute.
- Support PBC capacity and capability building to reduce vulnerability to consultant capture and enable more direct, relationship-based engagement between PBCs and proponents.
- Where consultant panel arrangements are considered, ensure design preserves PBC choice and is co designed with peak bodies and Aboriginal parties to avoid undermining trust or cultural safety.

**Focus Area 7: PBC Capacity and Capability**

40. PBCs are required to manage determined native title rights and interests within a complex statutory and regulatory environment and there is a sense in which they have not been

recognised as a sector by Government and industry. However, consultations indicate that many PBCs operate with chronic under resourcing and limited baseline support from Government, notwithstanding substantial compliance obligations and high transaction volumes generated by mining and exploration activity. This contributes to constrained administrative capacity, slower response times and increased reliance on cost recovery mechanisms within agreements.

41. Funding constraints commonly translate to limited staffing, reliance on external consultants, and the need to triage matters. In practice, this can slow internal approvals and decision making, create bottlenecks and exacerbate consultation fatigue for Traditional Owners.
42. The Review records persistent staffing and retention challenges for PBCs, particularly in regional locations. Limited budgets, high workloads and competition for skilled personnel can lead to high turnover, loss of corporate knowledge and reduced continuity in engagement with proponents and Government.
43. Board stability and capability were also identified as critical issues. PBC directors operate under corporate duties while also navigating cultural authority and customary decision making requirements. Many boards are volunteer or minimally remunerated, with limited access to tailored governance training and explanatory materials. High director rotation and skills gaps can impair timely decision making, increase reliance on consultants, and heighten vulnerability to consultant capture.
44. The Review highlights three recurring cost drivers that amplify PBC capacity constraints: high proponent demand, particularly in regions with dense exploration activity; constrained availability of Traditional Owners with the requisite knowledge and authority to participate in surveys and decision making; and seasonal limitations that restrict safe and practical survey windows. These factors can create lengthy scheduling delays for surveys and meetings, place upward pressure on costs, and can disadvantage smaller proponents who lack the capacity to fund priority access.
45. Capacity constraints within PBCs are not solely a PBC issue; they create system wide effects. Where PBCs are under resourced, agreement making and survey mobilisation can slow, heritage risk may be harder to manage, and the incentives for adversarial behaviour increase. The Review notes that stable, well supported PBCs are more likely to support constructive engagement and durable arrangements, whereas chronic under resourcing pushes interactions toward transactional cost recovery and reactive process. Addressing capacity constraints is essential to improving the efficiency and equity of native title and heritage processes, and to supporting more stable, partnership-oriented relationships between sectors.

#### *Recommendations and key directions (summary)*

- Provide increased, stable and targeted resourcing to support core PBC administration, compliance and engagement functions (including negotiation and agreement administration), reducing reliance on ad hoc cost recovery.
- Expand and coordinate capacity building programs to strengthen PBC governance, staffing and operational resilience, including governance training, executive development and practical explanatory materials for directors and staff.

- Design expedited procedure reforms and any minimum requirements with realistic accommodation of PBC capacity constraints and Traditional Owner availability, to avoid shifting system burdens onto PBCs without support.
- Address structural cost drivers by improving coordination of engagement demands across Government and by supporting planning mechanisms that reduce repeated or duplicative consultation requests across agencies.

## Focus Area 8: Expedited Procedure Minimum Requirements and Longer-Term Arrangements

46. Focus Area 8 addresses how WA may reform its expedited procedure settings by establishing enforceable minimum requirements for low impact tenure, while also identifying longer term arrangements that could provide greater certainty and reduce transaction costs.
47. Generally, the Review has found that the current WA approach does not balance the interests of the parties when the expedited procedure applies, so parties routinely rely on objections and negotiated agreements to achieve engagement, heritage risk management and practical protections for native title interests. The absence of clear minimum requirements gives rise to a significant number of the issues reported on. As such, and drawing on existing examples both interstate and within WA, the Review recommends the establishment of a set of minimum requirements to be applied to tenures to which the expedited procedure has been applied.
48. In broad terms, requirements would be expected to include:
- Clear notice and information requirements and reasonable timeframes for response and engagement.
  - Baseline expectations for consultation, heritage risk management steps and how surveys or heritage assessments are to be approached and conducted.
  - Administrative and cost provisions that recognise PBC capacity constraints and the user pays nature of the system, with transparent and indexable rates where appropriate.
  - A practical dispute resolution pathway to manage deadlocks.
  - Ability for parties to contract out by agreement, with the minimum requirements operating only as a safety net where agreement is not reached or a HPA lapses.
  - Governance for periodic review and indexation to maintain contemporary relevance.
49. Minimum requirements must be tailored to tenure types and the practical effects of the *Aboriginal Heritage Act*. Implementation must also account for high activity levels, traditional owner availability constraints, variable proponent capability (particularly smaller operators) and the need for appropriate cost coverage. In order to be effective, these minimum requirements must be applied as a condition of the tenure and be put in place either by regulation or in the form of conditions.
50. The Review recommends the formation of an independently chaired Task Force with representation from native title and industry sectors which is tasked with the development of minimum requirements and their means of implementation.

### *Longer term arrangements*

51. While minimum requirements are proposed, the Review indicates that longer term system improvement remains a strong preference and is likely to be achieved through broader Indigenous Land Use Agreement (**ILUA**) based arrangements. Such arrangements can provide consistent standards across regions and proponents, address compensation questions more directly, reduce repeated negotiation and survey transaction costs and create systems that overcome the broad suite of issues set out in this reporting.

### *Recommendations and key directions (summary)*

- Develop and implement enforceable minimum requirements for tenure granted under the expedited procedure, drawing from effective interstate models and existing WA based ILUA examples.
- Establish an independently chaired Task Force with membership from PBCs and industry to develop these minimum requirements and their implementation measures.
- Progress longer term ILUA based arrangements where feasible to provide consistent standards and reduce transaction costs, including clearer treatment of compensation and administrative funding.

### **Overarching Conclusion**

52. The Review concludes that the current operating environment is the product of systemic imbalance: an expedited procedure framework without effective default safeguards; a heritage regime that incentivises precautionary escalation and administrative bottlenecks; chronic under-resourcing of PBCs; and fragmented, risk-averse Government decision-making. Reform should be directed to re-centring the system on balanced minimum requirements, clear guidance and consistent decision frameworks, while investing in PBC capacity and building structured, ongoing partnerships between Government, Traditional Owners and industry. Without these measures, costs, delays and mistrust will continue to compound, diminishing outcomes for heritage protection, native title management and the efficient grant and use of mineral tenure.

## 2) Background and Approach

53. Over the course of the last several years, representatives from Western Australia's mining and exploration industry as well as traditional owner groups have made representations to the State of Western Australia regarding issues with the State's native title and Aboriginal heritage processes which are seen as disproportionately affecting their ability to operate and function effectively.
54. Arising from this, in February 2025 the Premier of Western Australia, the Honourable Roger Cook MLA, requested the assistance of the Tribunal to undertake consultation with industry and traditional owner groups in partnership with the DPC to identify options to improve the efficiency, effectiveness and equity of WA's native title and Aboriginal cultural heritage processes, within the context of mining and exploration. Due to the overwhelming effect of the State's native title and heritage processes on the Tribunal's future acts work, Tribunal President Kevin Smith agreed for assistance to be provided.
55. On 30 May 2025 the Government of Western Australia announced a targeted review into native title and heritage processes within the State's mining and exploration sector with a focus on improving outcomes for both Traditional Owners and industry. The Terms of Reference for the Review were released with that announcement and are appended to this Report at Appendix 1.
56. Throughout the months of July and August 2025, consultation meetings were held with industry stakeholders of various sizes and levels, guided by the Review's Terms of Reference, to discuss and identify systemic issues seen as impacting mining and exploration activity, as well as any proposals for potential solutions. Similar meetings were conducted through August and September 2025 with Traditional Owner and Aboriginal heritage professional groups, with particular focus on PBCs. Follow ups in all sectors were conducted during the course of October 2025 with report drafting commencing thereafter.
57. In order to facilitate regional stakeholder participation in the consultation process, forums were held in Karratha, Kalgoorlie and Broome with the assistance of DPC. These locations were selected due to their status as important regional hubs in regions with the highest level of mining and exploration activity within Western Australia. In turn, this gave the greatest access to participation in the consultation process to many of the most affected stakeholders.
58. Time was also taken to meet with representatives from relevant State Departments to understand issues faced within Government that bear on the subject matter of this Review. Valuable research and co-ordination assistance was provided by the Aboriginal Engagement Unit within the DPC.
59. As a result of this process, a series of themes covering a wide range of issues affecting both industry and traditional owner groups were identified. These themes cross a variety of policy areas, highlighting a complex of interrelated issues which act together to generate the set of issues raised by industry and native title parties in their representations to Government.
60. Following analysis of these issues, this reporting has been developed with two main purposes. Firstly, to properly articulate the wide suite of issues identified, in addition to

their statutory and administrative underpinnings, in order to provide a comprehensive account for policy and decision makers. Secondly, this reporting provides recommendations for actions that may be taken which may resolve or alleviate issues.

### 3) The Statutory Context

61. Generally speaking, the issues under scrutiny in this Review emerge from the intersection of the **Mining Act 1978** (WA), in particular the application for and grant of mining tenure, the **Aboriginal Heritage Act 1972** (WA) and the **Native Title Act (1992)** (Cth). There are further contexts which are referred to in this report, however this section will focus on these three main statutes due to their primary significance to the subject matter.
62. As an initial observation, the recognition of native title is a significant point of departure from the origins of WA's administration of mining through the *Mining Act* and the *Aboriginal Heritage Act*. While this was acknowledged in the consultations conducted over the course of this Review, there is a strong sense there is not a full appreciation of the implications of the advent of native title and its associated systems, and there has been limited success in harmonising them in WA.
63. This is certainly prevalent within Government, where Departments and agencies have to a large extent, been left to their own devices to manage their own statutory remit. While Departments are expected to manage their own remit, the Review has found that aside from key personnel, there is a low level of knowledge of native title, the nature of native title rights and interests and the *Native Title Act* amongst policy makers and administrators. In the view of the Review, this low level of knowledge or awareness does not enable the State to manage at an all of system level and generates inefficiencies and potential liabilities for the State.
64. Other sectors are not immune to this, with parties from both industry and the native title sector sometimes having limited views of the broader environment beyond their specific remit or interest. While this is perhaps unsurprising given workloads and the focus this requires, such an approach leads to frustration and potential conflict, focussing the resources of these parties away from their core activities.
65. This Review has sought to have and provide a view that is more comprehensive in an effort to understand the cause and effect of the manifold suite of issues that have been communicated throughout the consultation stage. This involves proper consideration of the native title, Aboriginal heritage and mining spheres together, given the interdependencies and interactions between them, in an effort to provide guidance to overcome the issues that have been identified. In doing this, there are key concepts that need to be understood as they illuminate the origins of identified issues and the recommended actions. To assist policy makers and administrators, the following background is provided.

#### 3.1) Native Title and the *Native Title Act*

66. At its most basic, native title is a body of rights and interests that are recognised to be held by native title holders. This is not a land tenure as such, rather it is described as a bundle of rights that can be exercised over the area of land in which they have been determined to exist. These rights and interests are said to be either exclusive or non-exclusive, where past acts such as the historic grant of a pastoral lease, have partially extinguished native title.

67. Exclusive native title rights are generally described as, subject to the traditional laws and customs of the native title holders and subject to the laws of the State and Commonwealth, the right to possession, occupation, use and enjoyment of these rights to the exclusion of all others.
68. Non-exclusive native title rights are specifically described within native title determinations. These non-exclusive rights often include such elements as, subject to the traditional laws and customs of the native title holders and subject to the laws of the State and Commonwealth, the right to access and/or live on the land, engage in cultural and spiritual activities, hunt, gather, use resources and the right to care for, maintain and protect the land including sites of spiritual or cultural significance. Putting this last point plainly, it is generally determined that native title holding groups possess a right to take care of their cultural and heritage sites, creating an intersection and sometimes conflict with, the *Aboriginal Heritage Act*, the *Mining Act* and various other Governmental processes.
69. Native title is communal by nature rather than being alienable rights *in personam*, which is more commonly understood. As a result of this, the *Native Title Act* requires that the native title of a group is managed by a Registered Native Title Body Corporate (**RNTBC**), otherwise and more commonly known as a PBC, as a trustee or agent.
70. At the time of writing, WA has 151 native title determinations covering approximately 2.2 million km<sup>2</sup>. This equates to native title being determined over 89% of the WA land mass with 145 PBCs operating to manage these determinations. In addition to this, there are 17 registered native title applications, or claims, covering approximately 140,000 km<sup>2</sup>. These registered claims possess procedural rights in regard to native title as though they were determined, meaning the same or similar procedures apply in these areas.

#### Native Title as a Property Right

71. Importantly for the context of this Review and for the consideration of decision makers, while not a land tenure, native title is a property right. It is important to emphasise this feature of native title as it seems to be often overlooked by policy makers and proponents, most likely due to its communal and inalienable nature and is instead often treated as a series of consultation requirements. This oversight looks to be the cause of some considerable policy misdirection.
72. Native title as a property right has important implications for policy making and statutory construction in that, if improperly treated, may create liabilities or otherwise invalidate grants of tenure from the State. Underscoring this is the fact that the future acts regime of the *Native Title Act* exists because of this feature of native title, including a reflection of s 51(xxxi) of the Constitution of Australia which relates to the acquisition of property on fair and just terms. In an unironic display of equivalence, the relevant compensation provision in the *Native Title Act* also sits at s 51 of that Act. So, while native title as a property right is inalienable, impact upon it is compensable.
73. Similarly, mining tenure, which will be the focus of much of this reporting, is a set of property rights that are set out in Part IV of the *Mining Act*. This covers a variety of tenures, however the tenures that have been most prominently discussed in the course of this Review are prospecting licences, exploration licences and to a lesser extent, mining leases.

## Future Acts

74. When a mining tenure is applied for and intended to be granted in an area where native title is determined or where there is a registered claim, it is considered a future act. A future act is defined in s 233 of the *Native Title Act* as an act that ‘validly effects native title in relation to the land or waters to any extent’. Put plainly, it is an act that may impair the future enjoyment of native title.
75. For the purpose of clarity, it is the grant of the tenure that is the future act, not the activity that occurs as a result of it. As such, the future act is conducted by the State at the moment it grants the tenure, as it is this act which gives rise to the rights and interests of the licence or tenure holder.
76. Due to the potential impairment of native title and consistent with the principle of fair and just terms for the acquisition of property, native title parties possess procedural rights when a future act is to be done. For the purposes of this Review, the most relevant future act provisions of the *Native Title Act* are contained in Division 3 Subdivision P, which sets out the right to negotiate and its associated provisions. The grant of a mining lease for example, is a class of future act that attracts the right to negotiate and is required to be processed in a manner consistent with this part of the *Native Title Act*.

## The Right to Negotiate

77. The right to negotiate itself is a process in which the parties are defined as the State, the grantee party (referred to as proponent in this reporting) and the native title party.<sup>1</sup> In this negotiation process, the State and the proponent are required to negotiate in good faith with a view to obtaining the agreement of the native title party to the doing of the future act.<sup>2</sup>
78. In addition to this good faith requirement, the *Native Title Act* creates a user pays system in that the native title party is provided with the statutory right to recover the costs of negotiating what is generally referred to as a s 31 or future act agreement.<sup>3</sup> This cost recovery could be from the proponent or the State or both. In these situations, the State has the clear position that cost recovery is to be from the proponent, as it is the application and activity of the proponent that has caused the cost to be incurred and the State does not wish to subsidise this activity. This seems a reasonable view.
79. After a 6 month time period from notification, any party may apply to the arbitral body,<sup>4</sup> the Tribunal, for a determination that the act may be done, that the act may be done with conditions or that the act may not be done.<sup>5</sup> In practice, an application of this type to the Tribunal rarely occurs after 6 months, with parties most commonly taking further time to settle agreements.
80. As mentioned, s 51 of the *Native Title Act* stipulates that there is an entitlement to just terms compensation for native title holders for any loss, diminution, impairment or other effect of a future act performed under Division 3. While it may be assumed that agreements entered into through the right to negotiate would fulfil compensation liabilities, this may not

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<sup>1</sup> s 30A, *Native Title Act*.

<sup>2</sup> s 31, *Native Title Act*.

<sup>3</sup> s 60AB, *Native Title Act*, where a s 31 agreement is the type of agreement set out in s 31(1)(b) of the *Native Title Act*.

<sup>4</sup> s 35, *Native Title Act*.

<sup>5</sup> s 38, *Native Title Act*.

always be the case. In any event, if a party applies to the Tribunal for a determination, and it is determined that the act may be done, even with conditions, the compensation aspects of the future act remain open. This may give rise to compensation claims by the native title party against the proponent, State or both in respect to the impact of the future act at a later date.

### The Expedited Procedure

81. When providing notice of a future act, the State may include a statement that the future act is one that attracts the expedited procedure<sup>6</sup> when it considers the act to be of low impact on native title rights and interests. This generally occurs for application of exploration and prospecting licences and increasingly, for petroleum exploration permits and special prospecting authorities. It is this procedure, the State's administration of it and the subsequent issues that arise that gives rise to a large proportion of the material considered in this Review. As a result of this, it is critical to examine the administration of the expedited procedure in WA.
82. If the State provides notice that the expedited procedure applies, the act may be done if the native title party does not object.<sup>7</sup> The practical effect of this is that when the State notifies that a future act attracts the expedited procedure, the right to negotiate does not apply and if no objection is forthcoming, the act may proceed with requirements towards native title holders being set out in the regulatory frameworks of each State or Territory. The State has complete discretion over whether to assert the application the expedited procedure to the doing of a proposed future act,<sup>8</sup> and it is this provision that is generally applied to the grant of exploration and prospecting tenure.
83. As indicated, a native title party has the ability to object against the application of the expedited procedure to the Tribunal, the effect of this being that the native title party is of the view that the right to negotiate should apply. Unless the objection or tenement application are withdrawn, or in more limited circumstances, where the expedited procedure statement itself is withdrawn, the Tribunal must make a determination on whether the expedited procedure applies. The criteria the Tribunal applies are at s 237 of the *Native Title Act*. This sets out that the act attracts the expedited procedure if the future act is not likely to:
  - (a) interfere directly with the carrying on of the community or social activities of the native title holders or its members.
  - (b) interfere with areas or sites of particular significance in accordance with the traditions of the native title holders.
  - (c) involve major disturbance to any land or waters concerned, or create rights whose exercise is likely to involve major disturbance.
84. There is a significant body of jurisprudence surrounding the type and manner of assessment to be undertaken by the Tribunal in addition to the criteria themselves and their meaning. While each of these criteria are relevant to the current Review, it is s 237(b), areas or sites of particular significance, that is extensively focussed upon by parties. For an area

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<sup>6</sup> s 29, *Native Title Act*.

<sup>7</sup> S 32, *Native Title Act*.

<sup>8</sup> See – *Yanunijarra Aboriginal Corporation RNTBC v State of Western Australia* [2025] FCA 490.

or site to be regarded as being of particular significance, it must be of special or more than ordinary significance to the native title holders, and depending on the nature of the site, simple entry on the site by an unauthorised person may constitute interference, given interference is measured against the traditions of the native title holders.

85. Should the Tribunal determine the act, a grant of exploration or prospecting licence for example, does not attract the expedited procedure, the right to negotiate instead applies.
86. When an objection to the expedited procedure is lodged, the Tribunal encourages the parties to reach an agreement that, when reached, would give cause for the objection to be withdrawn by the native title party and for the act to proceed. This practice encourages partnership between parties by putting in place a set of arrangements between them and overcomes the issues of capacity that the Tribunal would face if agreements were not reached, particularly due to the very large number of objections that arise in WA.
87. To date, these agreements generally cover heritage matters and create systems through which heritage matters will be administered, heritage surveys conducted and provide a negotiated system through which a proponent reduces or eliminates the risk of offending against the *Aboriginal Heritage Act*. This is one of the major intersections between native title and the *Aboriginal Heritage Act* and, in keeping with earlier comments, it is these agreements (HPAs), the process surrounding their negotiation and the procedures and actions that result that have given rise to the overwhelming bulk of the subject matter of this Review.
88. Unlike right to negotiate matters, and importantly for the context of this Review, there are no good faith requirements in regard to agreement negotiation for expedited procedure matters and neither is the native title party capable of recovering costs for negotiating agreements for matters subject to the expedited procedure. It is also important to note that while considered to be of lesser impact, these types of future acts remain subject to s 51 of the *Native Title Act* regarding compensation.
89. As previously mentioned, if no agreement is reached, the Tribunal must make a determination on whether the expedited procedure applies or whether the matter attracts the right to negotiate. Critically, if the expedited procedure applies in WA, activity may proceed with little further reference to the native title party, despite them holding property rights in the area affected. This is in sharp contrast with other jurisdictions that possess a range of default processes or minimum requirements which seek to balance the interests of the parties. No such balancing instruments exist in WA, which is a key contributor to the issues that are the subject of this Review.

### 3.2) *The Aboriginal Heritage Act*

90. One of the key implications of not reaching agreement with a native title party in these circumstances, and not conducting Aboriginal heritage surveys as a result, is there is an increased risk of offending against the *Aboriginal Heritage Act*. Since the events surrounding the destruction of Juukan Gorge and the national and international attention brought to Rio Tinto, including considerable shareholder pressure, it is evident that parties of all types, including exploration and mining companies, have considerably reduced their risk appetite in this area. This has in turn driven increased activity between parties and has emerged as a primary source of the issues discussed in this Review.

91. By way of background, consistent with everyday notions of heritage, Aboriginal heritage consists of both tangible aspects such as archaeological sites, rock art and burial places as well as intangible aspects. These can be resident in specific places or in the landscape more broadly, and derive from cultural norms, views, values and practices that are often unknown to those outside of the group.
92. The nature of Aboriginal heritage has presented challenges to policy makers and administrators. It can appear relatively amorphous from an outside view and due to its nature, crosses boundaries into other statutory areas such as environment and water and is more recently subject to determinations of native title and the property rights it entails. This can serve to generate cross jurisdictional duplication and tension as well as management challenges for on ground activity. It also generates significant questions as to how to properly manage Aboriginal heritage in a workable manner that balances protections and the need for works to occur.
93. There are a number of key components of the *Aboriginal Heritage Act* that have been the subject of discussion and are of relevance to this Review. The first is s 5 which defines what the *Aboriginal Heritage Act* applies to, which is:
- (a) any place of importance or significance where Aboriginal people have or appear to have left any object used, made or adapted for use for any purpose connected with the traditional cultural life of Aboriginal people past or present;
  - (b) any sacred, ritual or ceremonial site which is of importance and special significance to Aboriginal people;
  - (c) any place which in the opinion of the Aboriginal Cultural Heritage Committee (**ACHC**), is or was associated with Aboriginal people and which is of historical, anthropological, archaeological or ethnographical interest and should be preserved because of its importance and significance to the cultural heritage of the State;
  - (d) any place where objects to which the *Aboriginal Heritage Act* applies are traditionally stored, or to which, under the provisions the *Aboriginal Heritage Act*, such objects have been taken or removed.
94. It should be noted at this point that this definition is broad, and while qualified by the use of the terms ‘importance or significance’ and ‘importance and special significance’, the use of the word ‘any’ has broad implications for administrative practice and statutory interpretation. This is not to suggest an alternate should be used, however it is important to note this feature in the context of this Review due to the actions it gives rise to. The construction of s 5, or more specifically, s 5(b), was examined by Justice Chaney in *Robinson v Fielding*,<sup>9</sup> generating useful jurisprudence in this area.
95. Of particular significance in the context of this Review is s 17 of the *Aboriginal Heritage Act*. This section states that an offence occurs by any person who, unless acting with the authorisation of the Registrar under s 16 or given consent under s 18:
- (a) excavates, destroy, damages, conceals or in any way alters an Aboriginal site;

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<sup>9</sup> *Robinson v Fielding* [2015] WASC 108 [73] – [112].

(b) in any way alters, damages, removes, destroys, conceals or who deals with in a manner not sanctioned by relevant custom, or assumes the possession, custody or control of, any object on or under an Aboriginal site.

96. In addition to the specific terms, the use of the phrase ‘in any way’ casts the effect of this section very broadly. Effectively, this section does not recognise whether an activity is of low impact. Altering a site through activity such as soil sampling using hand tools for example, is altering a site in some way and would be an offence if authorisation is not first provided. This view is affirmed in regulation 10(b), amongst other disturbance types set out in r 10, of the **Aboriginal Heritage Regulations 1974** (WA).
97. An additional implication is that this section does not necessarily recognise whether there has been prior disturbance to a site. Even so, it must be noted that there are instances whereby decision makers have judged a place previously recognised as a site to be a place to which s 5 no longer applies due to disturbance having the effect that it was no longer of importance or significance, as was the case in *Abraham v Collier*.<sup>10</sup> This decision ultimately revolved around other issues so the effect of previous disturbance remained unclarified.
98. The practical upshot of s 17 is that the only real way of ensuring an offence does not occur is to know whether there are Aboriginal sites in the first instance, which means undertaking a heritage survey and then seeking authorisation to disturb the site if it is. This is ameliorated by s 62 of the *Aboriginal Heritage Act* which states that in proceedings for an offence, it is a defence if the offender can prove they did not know and could not have reasonably known that the place or object was a place to which the Act applies.
99. For activity such as mining and mining exploration which also operates within the context of the future act provisions of the *Native Title Act*, it may be difficult for a proponent to show they could not have reasonably known of such a place. In a risk averse setting therefore, a heritage survey would seem necessary irrespective of the impact of the activity and irrespective of previous disturbance. This is a critical point in the context of this Review. These features of the *Aboriginal Heritage Act*, coupled with the decreased risk appetite of proponents, are primary drivers of the subject matter under consideration.
100. Moving to other components, Part 5 of the *Aboriginal Heritage Act* contains provisions which create the ACHC<sup>11</sup> whose functions<sup>12</sup> include (amongst other things) evaluating the importance of places and objects, recommending to the Minister places and objects which should be preserved, acquired or managed and to generally advise the Minister.
101. Part 5 of the *Aboriginal Heritage Act* also creates the Registrar of Aboriginal Sites (**Registrar**) who is to administer the day to day functions of the ACHC as well as perform other prescribed duties.<sup>13</sup> Additionally, Part 5 creates the Register of places and objects (**sites register**).<sup>14</sup> This is a register of all protected areas, Aboriginal cultural materials and all other places to which the *Aboriginal Heritage Act* applies. Importantly, a place does not need to be on the register for the *Aboriginal Heritage Act* to apply given the terms of s 5 which provides that the *Aboriginal Heritage Act* applies to any place where the conditions

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<sup>10</sup> *Abraham v The Hon Peter Charles Collier MLC, Minister For Aboriginal Affairs* [2016] WASC 269, [24].

<sup>11</sup> s 28, *Aboriginal Heritage Act*.

<sup>12</sup> s 39, *Aboriginal Heritage Act*.

<sup>13</sup> s 37, *Aboriginal Heritage Act*.

<sup>14</sup> s 38, *Aboriginal Heritage Act*.

of s 5 are fulfilled. This also has important implications in the context of this Review as this reinforces the need for heritage surveys to be conducted to ensure a proponent does not offend against the *Aboriginal Heritage Act*.

102. While it is an offence to alter, damage or destroy a site in any way, a proponent may apply for a permit from the Minister pursuant to s 18 to undertake activity that would be likely to result in a breach of s 17. As part of the s 18 process, the ACHC must form an opinion on whether there is a site, evaluate the importance and significance of this site (if one exists) and submit a recommendation to the Minister on whether permission should be granted to disturb or destroy the site and any conditions this should be subject to. The Minister, as decision maker, must consider the recommendations of the ACHC, but is not bound by them, and must also have regard to the general interest of the community.
103. When evaluating the importance of places and objects in making a recommendation, the ACHC is to have regard to a number of criteria set out in s 39(2) and 39(3). These sections set out that the ACHC shall have regard to any existing use or significance under Aboriginal custom; any former or reputed use or significance attributed by tradition, historical association or Aboriginal sentiment; any potential anthropological, archaeological or ethnographical interest; and aesthetic values.<sup>15</sup> Additionally, associated sacred beliefs in addition to ritual or ceremonial usage, are to be regarded as primary considerations for the ACHC in its evaluations.<sup>16</sup>
104. As clarified in *Wintawari Guruma v Wyatt*, the overall evaluation undertaken by the ACHC is essentially a qualitative process using what is termed intangible and impressionistic criteria leading to a recommendation that is qualitative in nature.<sup>17</sup> Further, the criteria set out by s 39(2) and 39(3) are not mandatory criteria or rigid touchstones, but are set out by way of guidance and in the case of s 39(3), of relative priority for the ACHC.<sup>18</sup>
105. The *Aboriginal Heritage Regulations* set out that the ACHC may request further information of the applicant as well as the time frames associated with this.<sup>19</sup> These regulations also stipulate that a decision on an application must be made by the Minister within 28 days after the submission of the notice or as soon as practicable after that. In practice, this time frame is often impacted by requirements for further information.
106. There are no specific requirements for consultation with PBCs, Traditional Owners or affected Aboriginal people in the statute for s 18 approvals by the ACHC and neither is there reference to procedural fairness owed to Aboriginal parties in arriving at these recommendations and decision. This has been examined in various ways by the Supreme Court of WA<sup>20</sup> through which it is noted that while there is nothing expressed in the *Aboriginal Heritage Act* that displaces a common law requirement for procedural fairness,<sup>21</sup> that notwithstanding that Aboriginal people are the principal source of information as to

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<sup>15</sup> *ibid.*

<sup>16</sup> *ibid.*

<sup>17</sup> *Wintawari Guruma Aboriginal Corporation RNTBC v The Hon Benjamin Sana Wyatt* [2019] WASC 33, [331c]

<sup>18</sup> *Ibid*, [331f]

<sup>19</sup> r 14, *Aboriginal Heritage Regulations*.

<sup>20</sup> See *Bropho v. Western Australia* [1990] HCA 24; (1990) 171 CLR 1, *Wintawari Guruma v Wyatt op cit*, *Abraham v Collier op cit* and *Robinson v Fielding op cit*.

<sup>21</sup> *Robinson v Fielding*, [119].

the existence of sites in addition to the significance and importance of those sites<sup>22</sup> and that the ACHC is obliged to have sufficient information from affected Aboriginal people, this does not mean it is necessary to specifically invite Aboriginal people to make written or oral submissions. Instead, it may be sufficient to invite a proponent to provide appropriate reports which canvass the views of those affected, with anything further being considered in light of the individual circumstances of each case.<sup>23</sup> In the case of the Minister, it is held that the Minister may act unilaterally once the recommendation from the ACHC has been received and considered.<sup>24</sup>

107. Presumably in seeking to fulfil the ACHC's obligation to ensure it has sufficient information from affected Aboriginal people, the Department responsible, the Department of Planning, Lands and Heritage (**DPLH**), have published a 'Consultation Policy for Section 18 Applications'. This sets out broad guidelines regarding consultation with the relevant Aboriginal people in the lead up to, and in the process of, a s 18 application.
108. A new measure provided in the *Aboriginal Heritage Act* upon its re-enactment are provisions around new information following a decision by the Minister to provide a s 18 permit. This was a measure that sought to overcome the deficiency experienced in the Juukan Gorge example, where information that was gathered following the s 18 approval was not able to be taken into account leading to the lawful destruction of the site.
109. These provisions provide an ability for new information to be submitted to the decision maker which was unable to be taken into account in the original approval process. If the Minister becomes aware of new information they may confirm the consent, amend a previously granted consent, revoke the consent and provide a new one or simply revoke the consent.<sup>25</sup>
110. While s 18 approvals are generally applied to actions that will destroy or significantly alter as site, activities that create lesser or minimal disturbance can be approved through the *Aboriginal Heritage Regulations* with the approval of the Registrar. This generally occurs through r 10 of the *Aboriginal Heritage Regulations* in which approval can be provided by the Registrar through simple written consent.
111. The *Aboriginal Heritage Act* is of course applicable across the State beyond mining and the future act regime of the *Native Title Act*. As such, proponents generally seek to ensure they don't offend against the *Aboriginal Heritage Act*, which results in HPAs and survey activity in a wide range of areas and for a wide range of sectors. Given the very high level of interaction between native title parties and mining entities, arrangements created in mining and mining exploration have created a series of norms that proponents in other sectors such as local Government and primary production, are not necessarily able to meet. Representatives from these sectors also made a series of submissions to this Review during consultation.

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<sup>22</sup> Ibid [129]

<sup>23</sup> Ibid [140].

<sup>24</sup> *Wintawari Guruma v Wyatt* [53].

<sup>25</sup> s 18(6A), *Aboriginal Heritage Act*.

### 3.3) The *Mining Act*

112. Within this contextualisation, the provisions of the *Mining Act* are perhaps a simpler proposition given that in effect, it is focussed on those provisions which relate to the application, grant and operation of mining tenure. Like native title, the rights the holder possess under a mining tenure are a set of property rights as defined by the legislation. Unlike native title, these property rights are fungible and are routinely traded subject to the provisions of the *Mining Act*.
113. Although a larger suite of titles exist, the main focus of this Review has been processes that exist around exploration licences, prospecting licences and mining leases, each of which focus on a separate type of activity.
114. Exploration licences are described in Division 2 of Part IV of the *Mining Act*. This provides for the manner in which an exploration licence is to be applied for and granted, in addition to conditions which may be applied and security to be provided for compliance with conditions. Conditions include provision of a programme of work, expenditure, reporting and land rehabilitation requirements, and the Minister may also apply terms and conditions as they determine. Provisions are also made for the forfeiture of exploration licences in certain circumstances, such as the breach of conditions
115. An exploration licence is valid for five years, with the holder able to apply for a further 5 and then 2 year extension. Section 66 of the *Mining Act* sets out the rights of the licence holder, which include the ability to enter and re-enter the land for the purpose of exploration, carry out exploration works including digging pits, holes, trenches and sinking bores, to excavate, extract and remove prescribed materials and to take and divert water from surface or subsurface sources subject to the *Rights in Water and Irrigation Act 1914* (WA).
116. A tonnage limit for extraction of 1000 tonnes is prescribed in the *Mining Regulations 1981* (WA) for exploration licences. If an increased amount of extraction is required for exploration or infrastructure purposes, an application can be made for excess tonnage to the Minister in compliance with the *Mining Act* and the 'Excess Tonnage Guidelines' published by the DMPE. Excess tonnage may only be excavated in a manner consistent with an approved programme of works.
117. Similar provisions are made for prospecting licences in Division 1 of Part IV of the *Mining Act*. Prospecting licences have a term of four years, with a possible four year extension upon application, and provide the holder with in essence the same body of rights as an exploration licence with the exception they are for the purpose of prospecting, although the term 'prospecting' is not specifically defined in the *Mining Act* or the *Mining Regulations*. A prospecting licence may not exceed 200 hectares in size. Defined conditions are also applied however the ability for the Minister to apply conditions is more constrained.
118. Provisions are also provided for special prospecting licences which may be applied for where there is an existing primary tenement such as an exploration licence. These may only be held by a natural person and are limited to 10 hectares in size for the purpose of prospecting for gold. Special prospecting licences provide similar rights and terms to their holders as a prospecting licence however include a depth limit of 50 metres.
119. Both prospecting licences and special prospecting licences have a tonnage limit of 500 tonnes. Excess tonnage applications may be made to the Minister in the same manner as

those for exploration licences and the same provisions apply. In both cases, there is no limit to the amount of excess tonnage that may be applied for, and only when the cumulative total per tenement is in excess of 10 000 tonnes is there a requirement in the 'Excess Tonnage Guidelines' for an agreement from the affected native title party. During the course of this Review, a significant number of submissions were made in regard to excess tonnage applications and requirements to the extent that the Review has concluded there may be impacts for the State as a result of current approaches. These are discussed at section 9.4.2.

120. Perhaps the main distinction to make between exploration and prospecting licences is that while exploration licences are more focussed on exploration, with hopes to find minerals which can then be exploited for production through a mining lease, prospecting licences tend to be more focussed on production, particularly when gold is targeted. While this can occur simply through fossicking activity, it is very commonly through the use of heavy machinery and on site processing through dry blowers or water based plants.
121. A further general (although not exclusive) distinction between prospecting licences and mining leases, is that holders of prospecting licences generally process alluvial materials whereas holders of mining leases tend to process hard rock. Even so, with the use of excess tonnage provisions, it would appear that operations on prospecting licences can become substantial. Similar scale operations in other jurisdictions, such as Queensland, regard these as small mines, require the application for a mining lease and are subject to the right to negotiate with the equivalent of prospecting licences being reserved for fossickers.
122. Mining leases, as set out in Division 3 of Part IV of the *Mining Act*, provide the holder with extensive rights. These include the exclusive right to mine, take and remove any minerals from the land subject to the lease, to take water from surface and subsurface sources subject to the *Rights in Water and Irrigation Act* and to do all things necessary to effectually carry out mining operations in or under the land. Where there is a registered claim or where native title has been determined to exist, the grant of a mining lease is judged to be subject to the right to negotiate given the higher impact on the landscape.

## 4) Overview of Stakeholders Views

123. While a broader number of stakeholders were engaged throughout the Review process, the main body of stakeholders were those engaged in mining exploration, prospecting and mining in addition to PBCs, native title representative bodies and native title service providers.
124. What emerged from these consultations is a picture of an environment that is subject to significant pressure, deep seated feelings of mistrust on the part of all sectors, confusion over policy and standards and an environment characterised by cynicism and combativeness.
125. This is not to say there are not examples of strong relationships between individual players within the sectors. There are many instances where proponents and native title parties have built strong partnerships and relationships which have led to strong outcomes. These are characterised by early and ongoing engagement which is genuine in its nature and which enable native title parties to freely arrive at informed decisions.
126. There does remain however, significant work to do in order to create an environment characterised by partnerships between sectors based on mutual trust that provides for, and balances the needs of, each sector. Such an environment has to be founded upon strong, clear policies and standards with clear and consistent decision making. In such an environment, inefficiencies and duplications within processes across Departments would be minimised as part of an overarching whole of Government strategy, underpinned by guiding principles that balance the needs of all sectors.

### 4.1) Industry and Proponents

127. Throughout the consultation process, the main issues focussed on by industry related to timing and delay in projects, risks to projects caused by issues with heritage work, costs across multiple areas and issues with Government policies, practices and decision making. Rather than being distinct issues, it is apparent that all of these issues are closely interlinked.
128. Many industry consultees also expressed their view that the now repealed *Aboriginal Cultural Heritage Act 2021 (WA)* addressed the cost, timeline, process and agreement making issues they are currently experiencing, even while acknowledging that the accompanying *Aboriginal Cultural Heritage Regulations 2022 (WA)* had prevalent issues that needed amendment. This sentiment was echoed by a number of native title party consultees during the consultation process.
129. To this end, industry consultees repeatedly cited issues with the operation of the *Aboriginal Heritage Act*. A lack of guidance as to how ss 5 and 18 should be approached was a frequent topic of discussion, along with the backlog of s 5 applications for determination by DPLH that is leading to impacts upon industry projects and relationships with native title parties. Industry consultees advised the lack of guidance documentation provided by the State regarding how the DPLH and the ACHC will approach s 5 and s 18 applications is creating a situation where industry consultees, concerned with their risk profile and conscious of their public image, are left opting to engage in longer and more frequent

consultations with native title parties over what they consider to be small issues around heritage in order to try to avoid risk of inadvertent breach of the *Aboriginal Heritage Act*. Industry consultees say this has led to increased costs and delays for projects, increased burden on native title parties for consultation and surveys, and issues with the viability of some projects, including increasing the difficulty of raising capital.

130. Industry consultees also say the backlog of s 5 applications for determination by the DPLH has led to industry proponents lodging more applications for s 18 permits as this is a way to expedite the consideration of whether s 5 applies to a particular place. The downside of this, say industry consultees, is the increased costs and risks inherent in applications under s 18 due to the additional process requirements as well as the risk of impact to relationships with affected native title parties. Industry consultees were also quick to point out their belief that the backlog of applications for determination at the DPLH is due to significant under-resourcing within that Department, citing a severe lack of staff to cope with the volume of applications. Industry consultees often referred to staff of the DPLH being as helpful as they could be, given the tight resourcing and lack of process and legislative guidance they are working with.
131. Along with issues regarding lack of guidance regarding heritage issues, industry consultees also cited a lack of co-ordination and consistency of process and policy between Government Departments and often within Departments. Consultees advised that there did not seem to be any co-ordination between different Departments, leading to duplication of processes, inconsistent processes and increased costs and delays for proponents and their projects, as well as for native title parties. A strong wish for streamlining and co-ordination of Government processes and policies across the lifespan of a project was a consistent theme amongst industry consultees.
132. Allied with this, another strong theme emerged of an aversion by Government officers to make difficult decisions, particularly in spaces intersecting with heritage and native title. Industry consultees cited a strong preference amongst Government decision makers since the destruction of Juukan Gorge, to impose unreasonable standards and conflating consultation with consent. Industry consultees noted this, coupled with insufficient guidance regarding consultation policies and processes.
133. Industry consultees cited the destruction of Juukan Gorge as having ongoing impacts upon the relationship between industry and native title parties, as well as prominent impacts upon the public's view of their operations and their social licence to operate, often manifesting in issues around accessing capital for projects and shareholder activism. A number of proponents linked an increasing hostility and tougher negotiation tactics from native title parties as a consequence of the destruction of Juukan Gorge, particularly from smaller explorers who viewed themselves as having to live with the consequences of the actions of larger proponents.
134. This theme of separation, competition and conflict between different sized proponents was a common feature throughout the consultation process, with small, medium and large scale proponents each viewing the others with a degree of suspicion and blame for some issues within the sector. Often, larger proponents viewed the actions and behaviours of largely smaller proponents as tainting relationships with native title parties and creating issues of trust. Mid-sized and smaller tier proponents expressed frustration with larger

proponents setting cost, consultation and process standards they do not feel able to meet with their smaller pools of resources.

135. A common theme of discussion amongst mid and large tier consultees is the lack of financial and internal capacity within PBCs affecting the ability of PBCs to engage with proponents, causing delays in projects and increasing costs. Industry consultees noted that the vast majority of PBCs are engaged and work positively with proponents but are highly restricted due to a lack of financial and internal capacity. Large tier consultees noted that they frequently funded staffing positions within some PBCs in order to assist the PBC and ensure there is a dedicated person within the PBC to deal with their projects. Mid and smaller tier industry consultees noted that this was an advantage they could not afford, leaving them to have to compete with a number of other proponents for the limited time and capacity PBCs have available.
136. Industry consultees noted that the lack of internal capacity of PBCs has led to many relying on external consultants to assist them to deal with their workloads. External consultants include heritage professionals, such as anthropologists and archaeologists, as well as legal advisors and environmental consultants. Many industry consultees expressed significant concern about the behaviour of some consultants souring relationships with native title parties as well as increasing costs and delays to projects due to the demands of those consultants and their revenue-generating approaches. Some industry consultees expressed concern that the cost, delay and relationship impacts of certain consultants are making some projects no longer financially viable, impacting the future of exploration projects in Western Australia.

## 4.2) Native Title Parties and PBCs

137. On the part of native title parties, there are two key factors that have informed current outlooks. These are the destruction of Juukan Gorge in 2020, an event that was conducted lawfully under the statutory framework of the time, and the repeal of the *Aboriginal Cultural Heritage Act (WA)* in November of 2023. Other examples of site impact or destruction were cited during the course of the Review, however Juukan Gorge, being the highest profile of these instances, is seen as emblematic of legislative and policy failure in WA.
138. Underscoring these events is the unsuccessful Voice Referendum in October 2023 which, while a Commonwealth matter, has served to solidify the view that Aboriginal interests are a low priority for Governments and Australians in general. This also operates in the backdrop of historical factors which are not seen as resolved.
139. These factors have led native title parties to hold deep seated views relating to how native title interests are regarded and catered for by the State and other parties. Native title parties hold strong views that their interests are not considered part of or are subservient to the broader public interest. This has resulted in strong feelings of abandonment by the State in particular, and the generation of views that PBCs need to act assertively and at times aggressively to pursue their interests, as no other portion of the system in which PBCs operate caters for these interests in any real way. This is underscored by the manner in which the expedited procedure is administered in Western Australia in which PBCs feel they have no other option but to object in order for their interests to be catered for.

140. This is also coupled with deep financial stress and capacity constraints that are pervasive across the native title sector. Many PBCs feel they are subsidising industry and Government and, while they hear the concerns in regard to cost put to them by commercial interests, in the words of native title parties, find it difficult to countenance that commercial parties would seek their activities to be subsidised by native title holders.
141. It is difficult to overstate the depth of feeling that the Aboriginal native title sector has around these factors. This has resulted in a deep mistrust and cynicism towards external parties and generates perspectives and approaches that often aggressively prioritise the protection of native title rights and interests due to the perspective that the current system provides no such protections.
142. Despite this, the strongest theme emerging from consultations with native title parties during the course of this Review was the generation of partnership and relationships with proponents. Many native title parties stated that given the number of mines and the extent of exploration activity present on their country, they are demonstrably not anti mining or exploration. Rather, what is sought is early and ongoing engagement from proponents in order to generate mutually beneficial outcomes.
143. This outlook is based on both cultural and native title concerns. During the course of the Review, native title parties cited cultural responsibilities for country, places and sites which are taken seriously and from a law and custom perspective and reinforced by groups if transgressions occur, as well as protection of the bundle of rights as their greatest priorities. A recurring theme from native title parties is the importance of preserving country and protecting native title rights and interests for the benefit of future generations. This concept of intergenerational custodianship echoes through the actions of native title parties and lies at the heart of how they engage with the system before them.
144. Native title parties expressed a distinct lack of faith in the ability of the *Aboriginal Heritage Act* to protect Aboriginal heritage. This feeling is exacerbated by deeply held cynicism as to the ability and willingness of the DPLH and the DMPE to enforce the provisions of the *Aboriginal Heritage Act* and the *Mining Act* to protect native title rights and interests. Given native title parties view key Government Departments as either unable or unwilling to adequately enforce the existing regulatory regime to protect native title party interests, it is not surprising that native title parties seek to leverage other avenues of influence to protect their interests. The use of public perceptions about industry behaviours, social licence to operate issues and shareholder activism are effective tools for native title parties to use to address perceived inequalities in a system they say fails to cater for their rights and interests.

## 5) Focus Area 1: Administration of the Expedited Procedure

145. While the Review engaged in discussion with sectors beyond mining, it was mining exploration and the context of the application of the expedited procedure that formed the majority of discussion within consultations. This area of activity has broader impact into other sectors due to the high level of activity it generates and tends to set the norms of approach, expectation and action across the board. This occurs through the development of HPAs, an outcome commonly sought by industry and native title parties alike, which over the course of the preceding decades, have largely codified the manner in which heritage matters are dealt with in WA. Importantly, a HPA is an instrument which also enables compliance with the *Aboriginal Heritage Act*.
146. As such, the administration of the expedited procedure in WA, alongside the statutory features of the *Aboriginal Heritage Act*, is a key component of the development of the current environment and hence, a key element that has given rise to this Review. Because of this, the Review has formed the view that strong examination of the administration of the expedited procedure in WA is required, as are proposals for reform. To assist this examination, it is important to also contrast the manner in which other States and Territories approach the administration of the expedited procedure as these provide examples for reform that may be undertaken in WA in order to overcome identified issues.
147. While the expedited procedure is a feature of Commonwealth legislation, the manner in which it is implemented and administered is under the purview of the States. Each State takes a different approach depending on their own statutory and regulatory environment, in addition to the policy ends they are seeking to achieve.
148. By way of context, the following table shows the application of the expedited procedure in WA and the objections made by native title parties in WA.

Table 1: Notification and Objection to the Expedited Procedure in WA

Calendar Year	Notices with EP applied	Objections	Objection percentage
2022	2576	1497	58%
2023	1723	912	53%
2024	1850	1076	58%
2025	1834	1228	67%

149. Following is a break down over the same time period of objections made to the application of the expedited procedure by *Mining Act* tenure type. This table does not include *Petroleum and Geothermal Energy Resources Act 1967 (WA)* tenures that were notified over these time periods.

Table 2: Application of Expedited Procedure in WA by Tenure Type, Mining Tenure

Calendar Year	Exploration Licence	Prospecting Licence	Retention Licence
2022	1747	828	0
2023	1204	508	2
2024	1306	533	0
2025	1028	799	0

150. As can be noted, correlating with increased gold prices, prospecting licences have made a higher proportion of matters to which the expedited procedure is applied in recent years while exploration tenure has remained relatively steady following the marked increase experienced in the immediate years post COVID.

151. It is difficult to make direct comparisons between jurisdictions given the differences in tenure types, the overall numbers of tenure notification, regulatory environment and policy approach that occur between States. In general however, while a variety of factors such as different tenure types lead to the expedited procedure being applied considerably less in other jurisdictions, it is also objected to at a markedly lower rate.

Table 3: Notification and Objection to the expedited procedure by native title parties in the Northern Territory and Queensland

Calendar Year	Northern Territory			Queensland		
	Notices with EP applied	Objections	Objection Percentage	Notices with EP applied	Objections	Objection Percentage
2022	182	23	13%	277	67	24%
2023	127	35	28%	200	73	36%
2024	106	29	27%	236	78	33%
2025	97	20	21%	131	45	34%

152. When the expedited procedure applies in WA, the State through the DMPE applies a number of endorsements and conditions upon the tenure when granted, although these are not extensive. Endorsements, which are to draw the tenure holders attention to particular measures, include mention of the *Aboriginal Heritage Act*, the *Environmental Protection Act 1986 (WA)*, the *Land Administration Act 1997 (WA)* and a number of statutes around water resources and other measures. The conditions relate to rehabilitation of disturbance, disposal of wastes, permissions to use heavy machinery, access agreement with pastoral lease holders and a small assortment of other permissions, reflecting the requirements of the *Mining Act*.

153. The key difference between endorsements and conditions is that if there is a breach of an endorsement, enforcement action may occur under the terms of the legislation breached but this is not a cause for the forfeiture of the licence or tenure. Alternatively, if a condition is breached, this may be grounds for forfeiture.
154. Given the extent of pastoral leases across WA, it is useful to contrast requirements that minerals explorers have towards pastoral lease holders, pastoral leases being another form of property rights, and native title holders. A summary of the requirements of the *Mining Act* are published in a guide by DMPE entitled 'Prospecting, Exploration, Mining on Pastoral Leases'.<sup>26</sup> This is said to be read in conjunction with the 'Code of Conduct for Mineral Exploration on Pastoral Leases' however this document no longer seems available.
155. The guide sets out that all reasonable practicable steps should be taken to provide a pastoral lease holder with notice of entry in order to understand whether their presence will interfere with the pastoralists activities. Mining parties are further encouraged to adopt a good neighbour policy and mutual understandings in order to satisfy concerns a pastoralist may have in regard to impact on pastoral activities.
156. In regard to minerals exploration, an explorer must notify the pastoralist by telephone, in person or by registered post of any proposed ground disturbing activity prior to entry onto a pastoral lease. Further notice is also required when passing or re-passing within a certain distance of crops, infrastructure and certain facilities in the conduct of exploration activity, with written permission from the pastoralist required if exploration activities are sought to be undertaken within certain distances from the same. A pastoralist may also be compensated for damage to infrastructure, substantial loss of earnings, social disruption and expenses arising from reducing or controlling damage arising from exploration or mining activities.
157. While generally regulatory in nature, these are good sense provisions imposed by the State which seek to protect the holder of the pastoral rights while balancing the needs of the explorer, prospector or miner. The encouragement towards a good neighbour policy and the development of mutual understandings highlight the need for relationships between these parties to ensure their interests can be balanced.
158. No such instruments exist in regard to holders of native title over the same lands where the expedited procedure applies. In a sense, this encapsulates the entire issue at hand in this Review, with the lack of balance between the interests of the parties providing the incentive for native title parties to act assertively or aggressively to protect their own interests in the absence of regulatory support, often placing native title and proponents in opposition.
159. The approach to native title parties has instead focussed on Aboriginal heritage values alone rather than the broader suite of native title rights and interests. This is unsurprising as this is the manner in which native title parties themselves conceived of the matter in the late 1990s and early 2000s, a time in which native title was at application rather than post determination stage. This early approach has been embedded and looks to have led to a policy stasis which is more attuned to that time period rather than the current day in which native title has been extensively determined.

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<sup>26</sup> Department of Minerals, Petroleum and Energy (2016). [Prospecting, Exploration, Mining on Pastoral Leases](#). Accessed November 2025.

160. Reflecting this approach, when an exploration or prospecting licence is applied for and the expedited procedure applied, the condition DMPE places on tenure applications is that the proponent will provide to the native title party an executed copy of the Regional Standard Heritage Agreement (**RSHA**). This is with the exception of the Kimberley where this measure was never accepted.
161. The RSHA is a template HPA that was developed in or around 2002 by a panel of stakeholders chaired by a member of the Tribunal. The RSHA is, however, almost universally rejected by native title parties due to its terms being seen as out of date, not consistent with contemporary expectations and legally dubious.
162. While the RSHA is discussed in more detail in section 6.1, what it reflects is the idea that native title party interests focus on notions of heritage and heritage surveys rather than containing a broader understanding of the property rights that native title consists of. Again, this is perhaps unsurprising as it remains the general approach taken by industry and native title parties alike. There seems the growing realisation however, that this approach is seen as limited and is leading to stresses within the confines of heritage agreements. Still, it remains the case that the majority of native title parties remain focussed on the heritage component of their native title rights and interests within HPAs at least.
163. The framework for the expedited procedure and subsequent exploration or prospecting activity in regard to native title then, is a requirement for the proponent to execute an agreement that native title parties reject with endorsements towards the operation of existing statutory instruments including the *Aboriginal Heritage Act*. There are no notice requirements when conducting activity, there is no encouragement towards a good neighbour policy, there is no consideration or understanding of potential compensations and there is no useful guidance on approaches that might be taken by prospectors and minerals explorers.
164. Rather, it seems the case that the Departmental view is that the existing statutory framework is sufficient to cater for the interests of each party. Native title parties have strongly disagreed with this during the course of this Review, submitting there is little in this framework that caters for their interests in any substantial way. Many proponents have also echoed the feelings of native title parties and attribute this to systemic breakdown.
165. These factors give rise to strong perspectives from native title parties that the WA framework doesn't balance the interests of the parties and provides an incentive or perhaps even imperative, for native title parties to engage in a series of actions to protect their interests within the sphere of operation of the expedited procedure and the *Aboriginal Heritage Act*, actions which often place them in opposition with other parties. This is perhaps unsurprising; any system in which a party feels they are not properly protected or factored in will incentivise responsive action.
166. As a result of this view, within expedited procedure processes, native title parties have expressed that the only manner in which they feel they can protect their interests in WA is to lodge an objection with the Tribunal. Native title parties express that in the absence of State requirements, this is the only measure that exists in which it is felt the parties can be brought together in an effort to generate discussion and possible relationship or

partnership and to ensure their interests are catered for. This is an imperfect measure however, as it commences with an objection rather than through more constructive means.

167. Objections before the Tribunal can take some time to be adjudicated given the volume of matters to be managed and adjudicated across the country, although particularly from WA, by a small institution. As a result, the Tribunal encourages parties to reach an agreement which would cause the objection to be withdrawn.
168. Time is a key concern for many proponents. Along with the strong desire of proponents to reach agreement to minimise reputational and social licence risks in an environment where these are amplified post Juukan Gorge, time pressures can be leveraged by native title parties in order to gain more favourable or expanded agreement terms and financial support for negotiation processes. This, in turn, gives rise to a set of issues that are discussed extensively in this reporting.
169. It must be noted that during the course of the Review, it has become clear that a small body of proponents also take advantage of the time features of Tribunal processes in order to engage in a practice known as tenement parking or land banking. This is a process whereby the proponent will lodge a tenure application which, as a lodged application, preserves the ground in their favour at the cost of only the application fee. These proponents tend to stretch the time periods for HPA negotiation, quibble over small details they understand native title parties will not agree to and after an extended period of time, express that agreement is not possible and send the matter to inquiry. By encouraging objections to the expedited procedure, this type of activity is incentivised or perhaps even enabled by the State's administration of the expedited procedure. This issue is examined more closely in section 9.4.1.
170. In general, it is clear that the manner in which the interests of the parties are catered for is not balanced, in that the interests of native title parties are sought to be dealt with expeditiously through the measures set out by DMPE and in the absence of a broader statutory or policy framework that compels the State or proponents to cater for native title party interests in any substantial way. This places native title parties into a constantly defensive position in which there is little faith or confidence in the State or proponents to cater for their interests unless they themselves act forcefully to ensure this does occur. This includes having standing policies to object to expedited procedure notices in addition to taking leverage from whatever other measures are available, be they statutory, regulatory or other points of leverage such as the social licence to operate of the proponent.
171. These views and actions then compound into the agreement making arena and the manner in which heritage works such as surveys are conducted both within and external to the mining exploration sector. In short, the Review has arrived at the view that the manner in which the expedited procedure is administered and the framework which surrounds it in WA, along with the operation of the *Aboriginal Heritage Act*, is a primary cause of the issues that have given rise to this Review.
172. Proponents expressed similar concerns, with a number setting out that when the expedited procedure applies in Western Australia, what is required of them by the State falls far short of their own internal requirements, and even impacts negatively on their relationship with native title parties. Ultimately, given their broader operational environment and obligations, it is their own internal standards these proponents seek to meet. This is in

contrast to their operations in other States, where regulatory requirements establish a foundation on which proponents can confidently conduct their business.

173. This highlights the lowest common denominator nature of the administration of the expedited procedure in WA. Rather than centring this at a level that at least accords with normal industry standards, it is set at the lowest possible level and provides work arounds. There is a strong need for the resetting of these standards to what is termed here as a more centred approach which outlines reasonable principles and requirements. Where this presents difficulties for industry parties at the smaller end of industry such as small explorers and prospectors, it is reasonable for the State to provide assistance to these parties to reach these more adequate standards where it is necessary, rather than to tune the entire system to this lowest common denominator.
174. In line with industry remarks, it is important to recognise that it is not solely native title interests that are affected by the manner in which the expedited procedure is managed. The upshot of this style of administration and the actions it incentivises are negative for the State and proponents as it generates a system that, overall, is inefficient and ultimately more costly. The DMPE for example, would have it that its main task is to oversee the efficient and timely grant of minerals tenure. The measures the DMPE puts in place however, coupled with the overall statutory and regulatory framework, are the very measures that ensure timeliness and efficiency cannot be achieved or, indeed, can be leveraged for other purposes such as tenement parking.
175. If the efficient and timely grant of minerals tenure is the highest aim, then the administration of the expedited procedure should include measures which aim to reduce the number of objections made by native title parties. This can only occur if the interests of the parties are balanced, providing confidence to all parties and to the State, generating timely and cost effective outcomes and enhancing relationships between sectors.
176. As an indication of what directions may be taken, while also reflecting on existing provisions in regard to pastoral lease holders, it is useful to understand the measures put in place by other jurisdictions that may provide direction as to what measures may be useful in WA to achieve these ends.

## 5.1) Northern Territory

177. The Northern Territory includes a more comprehensive set of conditions to be applied to exploration tenure upon its grant. These include conditions surrounding requirements for consultation with Traditional Owners, site protection measures, requirements for works that may involve substantial disturbance, mitigation of environmental impact and a complaints mechanism for Traditional Owners to the Minister in the event that exploration is conducted in a manner that adversely affects native title rights and interests.
178. In terms of the conditions surrounding consultation, these are not comprehensive by any means, however there is a requirement for the proponent to convene a meeting with Traditional Owners prior to the commencement of exploration activities at their own cost and to have regard to the representations made to it by Traditional Owners at that meeting.
179. These conditions are coupled with a statutory regime that differs in approach to that of Western Australia, with the chief measure being the *Northern Territory Aboriginal Sacred*

*Sites Act 1989* (NT) (**Sacred Sites Act**) which makes it an offence to enter onto a registered sacred site unless an authority certificate has been issued which allows this. A sacred site is defined in the *Aboriginal Land Rights (Northern Territory) Act (1976)* (NT) as a place that is declared to be sacred to Aboriginal people or of significance according to Aboriginal traditions.

180. This is distinct from the WA regime in the need for a declaration, which is made by the NT Aboriginal Areas Planning Authority (**AAPA**) following an application and review process, the effect of which is that the Act applies to those places that have been placed on the register following assessment. The AAPA also keeps information on a category it labels recorded sacred sites which, while not a statutory measure, indicates the *Sacred Sites Act* may apply to these places once the application and review process is complete. This in turn highlights the need for a precautionary approach by proponents.
181. A proponent may apply to the AAPA for an authority certificate to conduct activity. If the AAPA is satisfied there is not substantive risk of damage to a sacred site or where there has been an agreement between the Traditional Owners and the proponent, the AAPA issues the certificate. In coming to a decision on whether to issue an Authority Certificate, it is a requirement of the statute that the AAPA must itself consult with the Traditional Owners.
182. This is coupled with a secondary measure, the *Heritage Act 2011* (NT), an act which covers heritage places of all types, including what it refers to as Aboriginal places, all of which are declared as heritage places in s 17. The *Heritage Act 2011* also defines heritage assessment criteria and requires work approvals if work is to be carried out on a heritage place.
183. While there remains contestation within the NT on matters that are the subject of this Review, these and other measures look to provide a higher level of confidence and look to result in a lower rate of objection to the application of the expedited procedure, thereby facilitating the grant of exploration and other titles the expedited procedure is applied to.

## 5.2) Queensland

184. The State of Queensland also has a suite of measures which appear to increase confidence and look to have the effect of lowering rates of objection to the application of the expedited procedure. The most relevant of these for the purposes of this Review are the *Aboriginal Cultural Heritage Act 2003* (Qld) (**ACHA**), the Aboriginal Cultural Heritage Duty of Care Guidelines (**duty of care guidelines**), the *Mineral Resources Act 1989* (Qld) (**Mineral Resources Act**) and the Native Title Protection Conditions (**NTPCs**).
185. The ACHA imposes a general duty of care towards cultural heritage which requires that a person conducting an activity must take all reasonable and practical measures to ensure the activity doesn't harm Aboriginal cultural heritage. Specific activities are not listed, rather the ACHA provides guidance as to how the duty of care may be met by setting criteria a court may consider when deciding if a person has complied with the duty of care. These include the nature of the activity and the likelihood of harm, the nature of the Aboriginal cultural heritage likely to be harmed, the extent and result of consultation about the activity, whether a survey was conducted and the nature and extent of past uses in the area, amongst other considerations.

186. The ACHA also provides that a person is taken to have complied with the duty of care if the person is acting under the authority of the ACHA, under an approved cultural heritage management plan (**CHMP**), under a native title agreement or another agreement, in compliance with duty of care guidelines, or in compliance with the NTPCs. As a note, a CHMP is only required when the extent of activity goes beyond a certain threshold, that is, CHMPs are not required for lower impact activities such as minerals exploration.
187. The duty of care guidelines are a regulation of the ACHA and are a mechanism to guide compliance with the cultural heritage duty of care. While non-compliance with the duty of care guidelines is not an offence in itself, following the duty of care guidelines affords compliance with the duty of care.
188. The duty of care guidelines provide what are termed ‘reasonable and practicable’ measures for ensuring activities are managed to avoid or minimise harm to Aboriginal cultural heritage. The guidelines are based on the principle that it is unlikely Aboriginal cultural heritage will be harmed where the current or proposed activity is on land with significant previous disturbance or where the activity is unlikely to cause additional harm to that which may have already occurred. Based on this, the duty of care guidelines set out 5 categories of activity which are calibrated to potential impact of the activity and the previous disturbance on the land. Categories 1 – 4 are described as follows:
- (a) Category 1: Activities involving no surface disturbance.
  - (b) Category 2: Activities causing no additional surface disturbance.
  - (c) Category 3: Developed areas.
  - (d) Category 4: Areas previously subject to significant ground disturbance.
189. In each case, the guidelines provide that it is reasonable and practicable for the activity to proceed without further cultural heritage assessment, however circumstances in which features of cultural heritage significance have been previously recognised may cause further actions to be taken.
190. The highest category, category 5, are activities that will or are likely to cause additional surface disturbance and there is generally a high risk it could harm Aboriginal cultural heritage. In this instance, the duty of care guidelines set out that:
- (a) the activity should not proceed without a cultural heritage assessment;
  - (b) it is necessary to contact the Aboriginal party seeking advice on Aboriginal cultural heritage features and how best to avoid or minimise harm;
  - (c) if it is necessary to remove, relocate or harm a cultural heritage find, cease activity, contact the Aboriginal party and seek advice and agreement on how this is best managed;
  - (d) if agreement is unable to be reached the ACHA duty of care remains and all reasonable and practical measures must be undertaken to ensure no harm including, where necessary, the development of a CHMP; and
  - (e) activity that disturbs or harms Aboriginal cultural heritage that is entered onto the heritage register or heritage database should not proceed without the agreement of the Aboriginal party or through a CHMP.

191. Effectively, a decision has been made in the formulation of the regulatory framework that when certain activities are proposed, it is appropriate to undertake a set of actions to minimise the potential impact upon Aboriginal heritage values, with these actions outlined in the duty of care guidelines. This very often includes the need for a cultural heritage assessment or heritage survey.
192. The *Mineral Resources Act* governs both the application for, grant of and rights provided by different types of mining tenure. It also contains provisions relating to native title and land access by providing that exploration permits may be subject to the NTPCs<sup>27</sup>.
193. The NTPCs are a regulation of the *Mineral Resources Act* and are stated to be for the purpose of satisfying the requirements of the expedited procedure of the *Native Title Act*. In keeping with this, the NTPCs set out that exploration activities are not to be carried out if they are likely to result in interference or disturbance as described in s 237 of the *Native Title Act* unless in accordance with the NTPCs.
194. The NTPCs outline a detailed series of processes to notify and meet with native title parties in addition to the conduct of heritage assessments, reporting, work program development, dispute resolution and monitoring. It should be noted that if the native title party is unable to meet the prescribed time frames, the explorer is able to undertake the activity with no further NTPC driven engagement. Should this occur, there may be further native title party engagement through the requirements of the ACHA and the duty of care guidelines, as these have additional or underlying requirements for finds and/or disturbance of Aboriginal heritage and consultation with Traditional Owners. To that extent, these create a set of procedures and requirements that are interlinked with other components of the regulatory framework, a key component of their operation.
195. The NTPCs contain a series of complex processes, for this reason, they are described in further detail in section 12.1 in consideration of possible reform in WA. In practice, the NTPCs provide what may be considered a set of minimum requirements for when the expedited procedure applies. Within this, it is important to note that that the NTPCs create strong obligations for both proponents and native title parties alike. Parties may contract out of the NTPCs by reaching their own arrangements should they wish to, which is commonplace, however if this does not occur, the NTPCs apply.

### 5.3) Concluding Remarks

196. As illustrated, there are strong differences between jurisdictions on minimum requirements when the expedited procedure applies to future acts. While it is difficult to make direct comparisons due to tenure differences which lead to the expedited procedure to be used less in other jurisdictions, that there is such a difference in the rate of objection is noteworthy. Given the administration of the expedited procedure is one of the main drivers of the issues considered in this report, the need for reform away from the lowest common denominator approach is clear.
197. It could be expressed that statutory compliance is an appropriate minimum standard as is the case in WA. WA's approach however, does not assist statutory compliance and in the case of the RSHA, could actually undermine it. Although the Queensland NTPCs are seen

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<sup>27</sup> S 141AA *Mineral Resources Act*.

as onerous on all sides, their usefulness as a set of minimum requirements is precisely because they provide a framework for statutory compliance. This provides proponents with certainty of process while seeking to balance the interests of Traditional Owners.

198. Clearly, the WA administration of the expedited procedure is in need of change. This should aim to balance the interests of the parties, provide certainty of process, costs and time frames and generate a level of confidence that leads to a reduction in objections to the application of the expedited procedure. This will in turn speed the grant of tenure, ensure native title rights and interests are more properly managed and mitigate the wide suite of issues raised before this Review. Minimum requirements are explored in section 12 and a set of other complementary actions are described throughout this reporting. As an initial recommendation however:

**Recommendation 1.**

The State, as a matter of urgency, adjust its approach to the administration of the expedited procedure in a manner that seeks to balance the interests of the parties, consistent with the measures and recommendations of this Review.

## 6) Focus Area 2: Heritage Protection Agreements

199. The primary driver of this Review has been issues surrounding, and costs arising from, HPAs and heritage surveys. While HPAs arise in other contexts and sectors, they are most commonly sought within the context of the grant of mining tenure through the expedited procedure. This reinforces the importance and impact of the administration of the expedited procedure in which the aim of native title party objections is to develop a HPA, enabling the withdrawal of the objection and the grant of the tenure. In general, these agreements focus on heritage processes and measures and include terms around the administration of the agreement, costs, survey methodologies, survey teams and other heritage specific measures. In a broad sense, they also seek to satisfy concerns relating to that portion of a groups native title rights and interests that pertain to heritage matters in addition to ensuring compliance with s 17 of the *Aboriginal Heritage Act*.
200. As an initial point, it is apparent that native title parties seek to use HPAs and their negotiation to bring proponents to the table and to generate a discussion and relationship with a proponent, with the objection to the application of the expedited procedure being the device to generate this in the absence of other safeguards. From the point of view of native title parties, a HPA is felt to be the best mechanism through which to understand what activity is being undertaken within the native title determination or claim area, to establish measures through which heritage values can be protected and to ensure ongoing engagement with proponents. Native title parties express a strong preference towards early engagement to allow the parties to better understand each other's interests and motivations.
201. As it stands, HPAs commonly focus on what would be considered core heritage matters. An emerging trend, however, is a broadening of the concern and focus of native title parties to that of impact to country and the broader suite of native title rights and interests rather than strictly 'heritage'. This has resulted in the emergence of calls for approaches such as the development of land access agreements in some areas, which encapsulate a wider suite of concepts.
202. This departure from the more standard approach has caused some discomfort amongst proponents as it tends to be viewed as overreach. It may be that this is the case in regard to the terms sought, however this does highlight the emerging broader approach to native title rather than solely to heritage itself. In turn, this gives rise to one of the central questions posed in this Review by all parties is, what is reasonable in the context of exploration and prospecting within the expedited procedure?
203. From a proponent perspective, what is sought from a HPA is a set of arrangements that are clear, cost effective, predictable, durable and efficient. Having such an instrument allows industry to have a clear pathway through which to plan activities, manage budgetary and expenditure requirements, notify and conduct heritage works to guide activity and ultimately, to conduct exploration activity in a timely and efficient way that avoids, or minimises, disturbance to heritage values and where possible, to the broader suite of native title rights and interests.
204. Arriving at an agreement is not a mandatory requirement of expedited procedure, however there are strong incentives towards this as it enables a co-existence between mining and

native title rights and mitigates the risk of offending against the *Aboriginal Heritage Act*, which in turn mitigates reputational and social licence to operate risks. As was noted by a high proportion of proponents during the course of consultations, there is a high level of risk, ethically, reputationally and legally, in proceeding with exploration activity without a HPA in place, even if the regulatory backdrop allows for this if the expedited procedure is found to apply. From a native title party point of view, arriving at an agreement manages cultural risks to both themselves and proponents, in addition to risks to country and heritage places.

205. In many cases, the manner in which HPAs have developed looks to have become seen as counter to these aims. A significant number of proponents expressed the sentiment that in general, these agreements are not centred on heritage protection but rather are more focussed on revenue generation for consultants, advisors, PBCs and Traditional Owners or are alternatively focussed on ensuring activity is either strongly limited or cannot occur. This, it is submitted, is evidenced by the high costs of negotiating agreements, high costs of conducting heritage surveys, what is described as repeated and unnecessary surveys in the same area after short durations and unilateral imposition of exclusion zones with no clear rationale.
206. As could be expected, native title parties have different views. Instead, native title party focus for HPA development was submitted to be on protection of heritage and country first, relationship or partnership with cost recovery through revenue generation a necessary consideration. Where relationship and potential partnership are more clearly a priority, agreement complexity and costs tend to be lower whereas when revenue generation is perhaps a higher priority, triggers for activity are low, costs are higher, agreements are more complex and relationships are more difficult.
207. This doesn't tell the entire story however, as many native title parties experience very significant financial hardship which provides them with little choice as to revenue generation while others have extreme demands placed upon them due to a very large number of proponents seeking to conduct activity in their country. In these instances, the market forces of scarcity serve to increase costs.
208. As mentioned, in the context of the expedited procedure the State itself promotes a HPA, the Regional Standard Heritage Agreement or RSHA. Unfortunately this is seen by many as an instrument which adds complexity and undermines relationships. As such, it is worth examining the RSHA prior to examining HPA and heritage survey issues more broadly.

## 6.1) Regional Standard Heritage Agreement

209. As in previous discussion, the RSHA is a standard agreement that was developed in or around 2002 by the State via a committee of stakeholders chaired by a Member of the Tribunal. This was coupled with a funding program to native title representative bodies and service providers for the employment of Heritage Officers to cover the administrative costs of the RSHA system.
210. At the time, the RSHA was seen as a useful measure however no review process was built into its provisions, resulting in it being seen as redundant within a few years of development. As a result, the RSHA is not accepted by native title parties as the cost structure is such that its operation places a cost burden onto PBCs, it contains clauses that

are viewed as legally weak or worse and because it is viewed as not being in line with contemporary standards. A significant number of proponents echoed these views in the course of the Review, which is not surprising given the changes in outlook and expectation that have occurred since 2002.

211. Despite this being apparent for a significant amount of time, DMPE continue to include as a condition of the application for minerals tenure within the expedited procedure, that a copy of the RSHA executed by the proponent be provided to the native title party for their execution. This condition has been very strongly criticised by a large number of proponents and native title parties alike during the course of this Review, due to this requirement having the effect of disrupting agreement negotiations the parties may be undertaking, causing rifts with native title parties and generally making HPA development processes more difficult.
212. This criticism has arisen as, in the context of a set of talks that proponents describe as progressing well, the requirement to provide an executed RSHA was often likened by industry consultees to 'throwing a hand grenade' into HPA negotiations. As parties report, this can often lead to relationship disruption and cause time and funds to be expended due to having to deal with this DMPE requirement. As such, a significant number of proponents shared strong views that the RSHA needs to be taken out of the policy mix.
213. Alternatively, many smaller proponents from exploration and prospecting were not as critical of the RSHA but instead expressed confusion as to why, if it is a State sanctioned model agreement, native title parties do not accept it. Such a view would seem wilfully oblivious to long standing and well articulated concerns.
214. Native title parties made strong submissions to the Review that rather than being a State sanctioned model agreement, the RSHA is in fact a State sanctioned mechanism to provide proponents with a work around of native title interests. That is, it is a widely held view amongst native title parties that the RSHA is a State sanctioned mechanism utilised to assist proponents to avoid needing to take native title party interests into account. When the RSHA is provided to native title parties with a level of seriousness, is taken as a signal from that proponent that they intend to proceed with as little interaction with the native title party as possible, given the widely known rejection of the RSHA.
215. This is often seen in the context of expedited procedure hearings before the Tribunal. In these situations, it is common for smaller scale proponents and prospectors to 'offer' the RSHA to the native title party as required by the DMPE. It is well known that this will not be accepted so when it is inevitably refused, the proponent elects to take the matter to an inquiry with the aim for the expedited procedure to be found to apply. This makes this party effectively capable of then ignoring the native title rights and interests due to the lack of interlocking requirements within the State's regulatory framework, an outcome which seems out of step with contemporary standards.
216. It should be noted that when an inquiry into the expedited procedure is conducted, the main body of expense and effort rests with the native title party given the evidence and submission requirements. In one sense this is reasonable given they are the party who made the objection. Alternatively, when it is considered that in a more balanced system, the objection wouldn't necessarily be made in the first instance, this doesn't necessarily hold. This is particularly so when the process is set in motion by the State choosing to apply

the expedited procedure to the proposed grant of mineral tenure. The native title party can only react to protect its rights and interests in a system that fails to adequately account for them.

217. Enabling native title party interests to effectively be ignored also seems out of step with State interests when considering there are impacts on a party's property rights which are subject to compensation provisions in the *Native Title Act*. This potentially creates compensation liabilities for the State, although the extent of this liability is not yet settled. Even so, given the submissions received during consultations, it is difficult not to see the application of the RSHA by the DMPE as anything other than an effort to assist proponents to circumvent native title interests. The rejection of the RSHA and therefore its usefulness as a policy tool has been widely known for more than a decade, as has its effect in any negotiation process. Continuing to apply this measure in full knowledge of this is hopefully not revealing of a deeper intent on the part of the DMPE, although it is safe to say this is a view that is widely held by a number of proponents and native title parties.
218. The application of the RSHA has further impact in that it contributes strongly to the overall environment of cynicism, mistrust and combativeness. Even if it is not used as a deliberate instrument to circumvent native title interests and is merely an artifact of policy inertia, it serves only to disrupt positive processes, entrench negative viewpoints and incentivise disruptive actions. In this sense, the application of the RSHA is not in the interest of any party due to its ineffectiveness and overall negative effect.
219. There would appear to be resistance to relinquishing the RSHA as a condition of application of tenure in the expedited procedure on the part of the DMPE. Within this Review however, strong submissions have been made by proponents and native title parties alike on the strong negative impact of the DMPE's persistence with this instrument. At best it is out of step with contemporary standards, at worst it cruels the environment and creates potential liabilities for the State. As such, the following recommendation is made:

**Recommendation 2.**

The Regional Standard Heritage Agreement is removed as a condition applied to the application for tenure to which the expedited procedure is applied and is retired as a policy instrument.

220. There is merit in creating minimum requirements or a default process through which the parties may engage which balances interests, supports statutory compliance and is in keeping with contemporary standards similar to the default processes set out in Queensland through the NTPCs or drawing from the processes set in the Tjiwarl Palyakuwa (Agreement) Indigenous Land Use Agreement (**Tjiwarl ILUA**). Importantly, such minimum requirements are capable of being contracted out of or replaced by arrangements between the parties and in their development, care must be taken not to replicate the shortcomings of the NTPCs or RSHA. This is more fully explored in section 12.

## 6.2) Agreement Negotiation Processes and Costs

221. Despite the insistence upon the RSHA, and the issues associated with it, there are many instances where HPAs are successfully negotiated. There are, however, many instances where stakeholders from each sector reported significant frustrations with processes surrounding the negotiation of HPAs and the costs of doing so.
222. While an agreement is not required in the expedited procedure, there are a suite of advantages for the parties in reaching one. In doing so however, it needs to be recalled that agreement making in the context of the expedited procedure is not subject to good faith provisions like right to negotiate matters, and neither is there a statutory provision for native title parties to cost recover. These combine with a series of other factors to create barriers to agreement making.
223. There are also negative implications for not being able to achieve an agreement in instances where the expedited procedure ultimately applies given the lack of instruments in the State regulatory system, presenting a set of risks that many proponents are not willing to accept. In the absence of a HPA, a proponent cannot ensure it will not offend against the *Aboriginal Heritage Act*, given the operation of s 17, and neither can it manage implications for native title rights and interests.
224. A proponent could of course, commission its own heritage survey work in the absence of affected Aboriginal parties, however this would be restricted to archaeological materials and if a s 18 permit is required, would then fall short of Departmental consultation requirements. Alternatively, if a proponent was found to have damaged or destroyed an Aboriginal site, it would be subject to significant public scrutiny and, in the case of a publicly listed company, shareholder pressure and the diminution of its social licence to operate and reputation, affecting its further activities, operation and, most likely, ability to raise capital. These risks are amplified in a post Juukan environment.
225. These pressures place significant emphasis on the development of HPAs, with increased imperatives for proponents and a solidification of native title parties' positions. While native title parties view this as a levelling of the playing field, proponents expressed views that agreement processes have become combative and take long periods of time through which delay is used tactically with no real remedy.
226. In many respects, this reflects the new reality of interactions on matters of heritage and native title in the post Juukan environment, the impact of which cannot be overemphasised. This is broadly acknowledged by proponents who are keenly aware of the ongoing impact of this event on their business and activities. Even so, there is a sense that many are having difficulty adjusting to this changed environment.
227. Many industry consultees expressed strong concerns in regard to increased time taken to negotiate agreements. This reflects that time is often a strong factor for industry parties, particularly in minerals exploration. This sector is one in which there is strong internal competition for access to ground and grant of tenure in addition to expenditure requirements in order to propel activity once the tenure is granted. As such, industry parties often seek fast negotiation processes and fast implementation turn arounds in a way that may not be able to be catered for, or is leveraged by, native title parties.

228. Proponents also voiced concerns regarding the lack of commercial or industry knowledge possessed by native title parties, in addition to concerns around gatekeeping by consultants and circuitous decision making processes. Examples of unethical behaviour on the part of native title party representatives were also raised as a concern, particularly when this was coupled with what are perceived as threats against a company's reputation and social licence to operate in order to achieve particular outcomes in a negotiation setting.
229. Conversely, native title parties voiced strong concern about the lack of knowledge proponents routinely possess in relation to native title, native title processes and the regulatory requirements a PBC is subject to. Given the number of expedited procedure matters that are dealt with by native title parties, it was often expressed that it was exhausting to constantly be required to explain to proponents the basis of PBC requirements and the outcomes sought. It was often submitted to the Review that there is a role for the State to provide proponents with appropriate background information of native title, PBCs, PBC requirements and the environment in general, however no or very little information is provided.
230. An examination of the DMPE website has confirmed a lack of useful proponent focussed information on these topics, in sharp contrast to equivalent agencies in other jurisdictions. Furthermore, where information exists, it is not immediately apparent where it may be accessed. The DPLH website contains a greater amount information which is more readily accessible, however this does not appear to be the primary source for many proponents and as could be expected, is focussed solely on heritage matters with little on the interaction between the *Aboriginal Heritage Act*, the *Native Title Act*, native title rights and interests and the *Mining Act*.
231. Additionally, native title parties expressed they often feel rushed towards an outcome and no real regard is given by proponents to the regulatory and cultural requirements a PBC or native title group is required to comply with in coming to an agreement, particularly if changes sought go beyond standing instructions.
232. Native title parties also expressed concern about large numbers of agreements from a variety of proponents with different terms creating a difficult compliance environment. As explained to the Review, a significant number of PBCs have large numbers of proponents wishing to operate in their determination areas, each of these seeking different terms. Because of the difficulty of managing dozens, if not hundreds of HPAs with different terms, these PBCs were often resistant to changes proposed by individual proponents, often placing them at odds with them and causing tensions in agreement making processes.
233. Native title parties also presented information to the Review regarding the conduct of some proponents and their representatives during negotiation processes, with examples of harassment, bullying and racism provided. Such conduct is extremely concerning, serves to create a more difficult environment overall and has a generally negative impact on those proponents that do not exhibit these behaviours.
234. In general however, while there are examples of very good relationships and partnerships between native title and proponents, there remains a significant distance between these two sectors in regard to their understanding of each other.

235. While the issues described here are of importance, it is clear the primary concern for proponents in this topic is the cost of negotiations. There is a general understanding that PBCs are constrained in their funds, however proponents often expressed difficulty with the notion they would be required to cover the costs of the native title party and their representatives or alternatively, the high costs that are reported to occur within a negotiation setting. There is a sense in which this is a reasonable concern given in a normal commercial setting each party will cover its own costs. There are added complexities within native title settings however, which depart from this norm.
236. In the first instance, native title parties state they would not be put to the activity or the expense were it not for the proponent making an application for tenure, and given strong commercial outcomes are likely for the proponent, raise the questions as to why they would be expected to subsidise this activity. When pressed on the difficult budgetary environment of many exploration companies, many native title parties expressed offence and put to the Review that PBCs were often in a parlous financial position themselves and that Aboriginal people on the whole remain the most impoverished group in Australia. As such, it was strongly expressed that it is inappropriate for commercial interests to expect PBCs and Aboriginal people to subsidise their commercial activities and instead, it would be more appropriate if these commercial interests budgeted properly for this class of activity.
237. Conversely, it may be argued that it is the role of the PBC to manage the native title on behalf of the group and the activity of negotiating a heritage agreement arises due to the native title party placing an objection to the application of the expedited procedure. When pressed on this, native title parties most commonly expressed that in the absence of any other part of the overall system enabling them to cater for or protect their interests, there was felt to be little other choice than to lodge objections and engage in this process, often with few resources, and to seek to then recover costs. This is particularly the case for PBCs who hold a group's native title rights and interests on trust and have a fiduciary duty to protect those rights and interests.
238. While it is an imperfect analogy, a comparison can be made in regard to the general view the State takes in right to negotiate matters where native title parties have the ability to recover costs from the other negotiation parties, being the proponent and the State. In these instances, the view of the State is that it will not cover costs of agreement negotiation and that this is the responsibility of the proponent as it is this party that is conducting the activity. This is not an unreasonable view from the perspective of the State and its management of public funds, and underscores the user pays system.
239. While native title parties and more specifically PBCs are not Government institutions, they emerge from statute, are required to comply with regulations, act as fiduciaries, manage property rights, often manage funds arising from the native title group and in the case of the grant of tenure, are responding to external parties. As such, native title parties point out that this is not a normal commercial setting and, matching the view of the State, maintain that a user pays system is appropriate given the PBC is not deriving a commercial benefit from the proposed activities.
240. Should the proponent be unwilling to assist to cover costs, these costs are then often built into HPAs themselves to enable post agreement cost recovery. This gives rise to a secondary set of issues regarding costs in the management of heritage agreements.

241. While most PBCs in the State have little to no resourcing, there are those that have a strong budgetary position as a result of native title agreements between the group and other proponents, mostly through right to negotiate matters. In these instances, PBCs point out that the outcomes of these agreements are for the benefit of the group as they are compensation for the impact on or loss of native title and therefore don't necessarily translate to resources for the PBC. In other cases, it was questioned why it would be expected that one proponent would subsidise the activities of another via PBC funds. This sentiment was echoed by a number of proponents during the course of the Review.
242. What is clear is that in general, PBCs have few resources, feel compelled to make expedited procedure objections and are then placed into an environment which requires both monetary resources and expertise. Little, if any, support arises from the Commonwealth or the State to fulfill their functions creating what is effectively a user pays system.
243. While for the most part costs sought by native title parties are relatively contained, proponents provided information to the Review demonstrating that on occasion, cost demands for agreement negotiation processes can go beyond what could be considered reasonable requirements or on some occasions, be extreme. These instances create significant barriers to finalising HPAs, leaving proponents open to the risks previously described if an arrangement cannot be made.
244. Because of these risks, proponents commonly expressed that in these matters, it remained their preference to reach terms with the native title party for the reasons outlined previously. When HPAs are finalised, proponents often feel aggrieved about these costs, and when they are not entered into, remain exposed to the risks explained earlier. It is now the case that many proponents are expressing a view that costs involved with HPAs in their negotiation and the heritage surveys they result in, are not worth the risks they manage. Such a view indicates a failure point in current systems.
245. These issues have emerged in an unplanned and unregulated space that is not supported by a system that encourages trust or optimism or provides useful pathways for either party if agreement cannot be reached. It is also one that lacks true dialogue between the sectors. Rather, processes are worked through by rote at significant cost, there is relatively little mutual understanding and effectively, behaviours and actions by both parties can be poor with parties tending to view each other as adversaries.
246. In response to this, there are a number of measures which can be taken to improve the underlying environment and assist to establish a body of understandings that improve the quality and efficiency of these negotiation processes.
247. The first set of measures relate to information provided to proponents from DMPE sources. As noted, the current level and standard of information that is available to proponents via the DMPE website is very low, is accessible only as a subset of other information and in general, is in great need of review and improvement. Having adequate and accessible bodies of information to enable proponents to greater understand the native title context, PBC role, function and requirements and other related topics, in addition to a suite of tools that may assist proponents establish improved understandings at the outset and then assist through processes, would be a very valuable starting point.
248. There is also a case for information resources and support aimed towards native title parties and PBCs to assist understandings of the proponent context, the *Mining Act* and the

processes surrounding the grant of tenure and the rights they create. On this, it is noted that DMPE has created an Aboriginal Empowerment Unit with the stated aim of streamlining communications and enhancing connections between DMPE and the Aboriginal community. This is a useful development that should continue to be supported and expanded when necessary.

249. Based on this, the following recommendation is made:

**Recommendation 3.**

- a) For the purposes of generating accessible information resources and tools for proponents and to improve understandings of requirements, conduct a review of the information resources on the DMPE website concerning native title, the nature of native title rights and interests, requirements of the native title system, PBC role, PBC function, PBC regulatory environment, PBC decision-making requirements in addition to Aboriginal heritage matters and other related topics with an aim to publishing a suite of easily accessible new information which assists to establish an information and knowledge base for parties prior to engagement.
- b) To assist PBCs to navigate the mineral tenure and heritage processes of the State, conduct a review of the information resources on the DMPE website concerning mineral tenure approval and regulatory processes under the *Mining Act* as well as avenues for PBCs to liaise with the DMPE regarding breaches of those processes.
- c) The Aboriginal Empowerment Unit of the DMPE develop a continuing programme of education and engagement with PBCs to facilitate the building of relationships and trust between PBCs and the DMPE.

250. Given the overall environment of mistrust, divergent understandings, information and knowledge gaps between sectors and the cascade of issues that have been highlighted during the course of this Review, it is clear there is a need for dialogue between the sectors. This would be to enable representatives of each sector to engage in priority topics at a policy level, to enhance understandings and relationships, to generate partnerships and discuss system improvements across the board. This will not generate organically given the circumstances in which this dialogue would convene and given the diffuse nature of the native title sector which presents coordination challenges. As a result, there is a role for Government leadership in generating this dialogue with the assistance and coordination of Industry and where possible, PBC peak bodies.

251. Given its current absence, it would be envisaged that an intersectoral dialogue would be conducted in accordance with a designed strategy and would likely commence with key players in appropriate forums who can mutually establish agendas and topics before expanding in the necessary way. With momentum built over time, it is likely the sectors would be capable of taking responsibility with the State able to reduce its role while remaining an important participant.

252. In light of the current state of affairs, there is potential for such intersectoral dialogue to be fractious in its early stages, however this would not be a sign of failure. Rather, this would reflect the current lack of opportunity for the sectors to raise and discuss difficult issues with each other and is common for early stage dialogues such as that proposed. With proper design and persistence, difficult early stages can be moved beyond. Further, if mutual understandings are able to be built on key issues, this will assist Government to identify and implement reforms aimed at overall system improvements with sectoral support.

**Recommendation 4.**

That the State, through the Department of Premier and Cabinet, develop and implement a strategy to generate an intersectoral dialogue between the mining exploration and mining sectors and the native title sector with the aim of enhancing understandings and relationships, generating partnerships and to discuss and generate system improvements.

253. The need for this dialogue is signified by the experience of the conduct of this Review. Many consultees from all sectors stated that the Review was their first opportunity to express views on the issues under consideration. The fact that this resulted in the communication of what can only be described as a cascade of issues of a breadth and complexity not anticipated speaks to the manner in which a wide range of policy areas have been neglected across a number of Governments. Such a dialogue then, would seem a matter of urgency.
254. Perhaps as a symptom of a lack of understanding and possibly respect between sectors, both sectors made submissions to the Review surrounding the conduct of the other, the content of which was both disappointing and disturbing. Unfortunately, these behaviours were reported often enough by each sector to highlight they aren't on the margins, and this contributes to the fractious and sometime toxic environment that currently exists. It is not useful to highlight specific instances however it would be remiss not to make recommendations as to how this should be worked on given the impact of the reported behaviours.
255. In this section, recommendation is made in regard to proponents. Happily, this will not impact upon the majority of proponents or their representatives, however it is obvious that in order to improve the overall environment and to build trust and mutual respect, it is necessary. In the interest of balance, actions and recommendations more relevant to native title parties on this topic are dispersed throughout this document and are an underlying component of the minimum requirements discussed in section 12.
256. As it stands, DMPE publishes a document entitled 'Engagement Protocols' with the stated objective of ensuring proponents are 'set up for success, and to enable the grant of tenure

in a timely fashion<sup>28</sup>, however this document is so remarkably deficient that it is difficult to see it of being of any benefit. With this in mind, the following recommendation is made:

**Recommendation 5.**

The State develop a Proponent Code of Conduct for the negotiation of Heritage Protection Agreements in the expedited procedure in consultation with proponents and native title parties. It is further recommended that compliance with this Code of Conduct be placed as a condition of the application of tenure to which the expedited procedure is applied and failure to comply is grounds for refusal of grant of tenure.

257. To be clear, a Code of Conduct is not intended to establish the same legal tests as those that exist for agreements negotiated pursuant to s 31 of the *Native Title Act* and neither does it mean that agreement must be reached. Rather, it is intended to lift the standard of conduct for those proponents or their representatives who harass or abuse native title parties or their representatives and who have been shown to the Review to routinely use profane, sexist and racist language as a component of their approach.
258. What this does mean however, as a condition of application of tenure, is that if it is shown that the Code of Conduct is breached prior to grant, this is grounds for refusal of the tenure application. Again, the majority of proponents will be unaffected by this, however such a measure will go a long way to raising the tenor of HPA discussions and it should not be controversial that parties should conduct themselves with professionalism and decorum as in any other setting.
259. The issue of HPA negotiation costs is closely related to that of PBC capacity and the resourcing of PBCs. As a result of this, possible actions are more fully discussed in that section later in this document. As a precursor however, this Review has found there is a good case for the State to make a contribution to PBCs to cover fixed, administrative and other costs for the negotiation and administration of HPAs and to assist PBCs to better fulfill their role. The Review has also found there is the case for the development and implementation of minimum requirements in those instances where the expedited procedure has been applied. Such measures would be expected to reduce pressures in HPA negotiations and improve system function.

### 6.3) Heritage Protection Agreement Terms and Content

260. Significant discussion arose surrounding the content and style of HPAs. From an industry perspective, it was noted that agreements developed in the context of the expedited procedure are growing in complexity and moving away from dealing solely with heritage matters and procedures. While not universal, this is a noticeable trend that proponents have some trouble coming to terms with.

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<sup>28</sup> DMPE, Engagement Protocols, DMPE [website](#).

261. What is clear from consultations is the terms of agreements are strongly dependent on the strength of the relationship between the parties in addition to their outlook. Those that see agreement making as an opportunity for partnership are understandably more satisfied with process and results whereas those that don't express considerable dissatisfaction.
262. There is a noticeable difference between larger companies with a stronger and ongoing dialogue and those with perhaps less resources and presence. As a generalisation, the former operate with good neighbour policies and seek an exchange of value with native title parties in which expectations can be set for both parties which will be understood to be met due to long standing relationships and interconnected arrangements. The latter tend to focus on the transactional nature of arrangements and seek the most expeditious and least costly outcomes without significant attention paid to partnership aspects. In this, it is again useful to recognise that minerals exploration is an industry with a high level of internal competition which creates a series of imperatives for these companies which are also expressed in interactions with native title parties. Interactions of this type, however, can create misunderstandings. The Review would again emphasise the need for inter-sectoral dialogue to generate a series of mutual understandings to mitigate or overcome these issues and the establishment of measures based on good neighbour policy.
263. Native title parties also have widely varying processes. Some are focussed on reducing complexity and ensuring proponents find it easy to come to the table for dialogue, and in doing so pursue agreements that are very short and concise, sometimes less than five pages in length. Others, if not most, take a more standard contractual approach, and present agreements that have been built, added to and modified over the course of a decade or more. These often respond to loopholes or deficiencies that have been exposed over time, so have increased in complexity and can be very lengthy.
264. On these occasions, it can still be observed that irrespective of simplicity or complexity, the agreement making process following objection to the application of the expedited procedure is one that seeks to generate dialogue and partnership, albeit contractual, with the proponent as there are no other opportunities within WAs system of operation to do so. As reflected upon previously, a wide range of native title parties state they are demonstrably not anti-mining or mining exploration given the very significant amount of activity that is occurring in their determination areas.
265. It is the case however, that a higher level of sensitivity exists as a result of the destruction of Juukan Gorge and the repeal of the *Aboriginal Cultural Heritage Act*. This looks to be leading to more strongly defensive positions on the part of many native title parties and in some cases, agreement terms that look to quell activity in the determination area.
266. These factors combined with the low trust environment, in addition to ongoing realisations surrounding the nature of the future acts being conducted and the user pays system as referenced in previous sections, have created trends within agreements that were discussed frequently within consultations. In the main, this is increased complexity and a movement away from solely dealing with heritage matters and includes compensation for the future acts, much like a right to negotiate matter, exclusion zones and provisions that include expanded environmental provisions and social surroundings, a component of the *Environmental Protection Act*.

### 6.3.1) Compensation and Annuities

267. Proponents, particularly exploration companies, expressed difficulty with the notion they would be asked to include compensation matters into an agreement associated with the expedited procedure given what is regarded as the low level of activity that is undertaken. Indeed in some cases, it appears that very little on ground activity occurs if drilling targets are unable to be identified in the initial investigation stages of an exploration program. In any event, compensation in HPAs is generally expressed through terms which seek yearly payment either as a percentage of annual exploration expenditure, a set annuity or a single payment on execution.
268. Native title parties made two main responses to difficulties expressed by proponents. While acknowledging that early stage exploration activity is of lesser intensity, native title parties point out that later stage exploration aimed at confirming or defining resources is intense and can have a significant impact on the enjoyment of native title rights and interests and the landscape, in addition to which there is a low level of confidence in rehabilitation measures or the level to which the DMPE enforces these measures.
269. Building from this, native title parties expressed views that even though these are generally expedited procedure matters they are still subject to the compensation provisions of the *Native Title Act* and it is therefore not unreasonable to have compensation liabilities fulfilled. Further to this is the view that while exploration and prospecting activities may be short lived, so may exploration companies themselves by design. This would mean the opportunity to seek compensation for impacts upon native title rights and interest may not be able to be taken in the future, except against the State.
270. In reality, compensation liabilities for impact on native title for exploration and prospecting activities remain uncertain. It could be that these liabilities are not substantial, however legal clarity through the courts has not been provided on this question. Additionally, it is clear that the desktop components of exploration have no impact on native title while the fossicking components could be expected to have only small impact, pointing towards a percentage of expenditure approach if one was to be taken. In essence though, the lack of clarity around liabilities creates uncertainty for all parties.
271. Part of the conundrum for industry parties is the view that this moves conversations towards those that would be held in right to negotiate matters rather than the expedited procedure. This is probably correct, but more likely highlights deficiencies in the expedited procedure itself given it was conceived of well prior to contemporary considerations and issues, in addition to its current administration.
272. Taking a precautionary approach, many industry parties agree to some type of annuity which might be pegged to exploration expenditure within HPAs. Generally, parties arrive at a figure proponents can agree to although disquiet is expressed. Alternatively, examples were provided to the Review in which native title parties sought more extreme annuities which were clearly well outside of a reasonable position and as could be expected, could not be agreed to.
273. To a large extent, this issue is driven by uncertainties in compensation liabilities, which will not be overcome until the Federal and High Courts have made decisions regarding compensation liabilities for future acts. This uncertainty is leveraged in different ways and generates difficulties for policy makers, however the State has a key role in both considering

and guiding this policy area, not the least due to the need to protect its own position against possible future liabilities.

274. There is no doubt issues around native title compensation have been deeply considered by the State, and an existing example of how this has been addressed is the Tjiwarl ILUA. This approach has general support from industry consultees except it is thought the rates applied are excessive. While replication of these arrangements are a clear longer term solution as explored in section 12, it seems appropriate that shorter term solutions be considered in the form of more detailed guidance, even though uncertainties remain in regard to potential compensation liabilities from exploration and prospecting activity.
275. From this perspective, it is thought appropriate that the State, likely coordinated by DPC, draft and publish a policy paper or guidelines for approach to native title compensation in this setting. Again, this is made difficult due to the lack of jurisprudence in this field, however this would provide guidance as to approaches thought necessary in addition to focussing discussion for debate and development. To this end, the following is recommended:

**Recommendation 6.**

Following consultation with native title parties and proponents, the State draft and publish guidelines regarding potential approaches to the negotiation and calculation of compensation in the context of mineral exploration and prospecting activities.

276. To be clear, such a publication would not be for the purpose of imposing a set of mandatory requirements. Rather it would be thought leadership and guidance, to enable and shape debate and of course would evolve with improved legal clarity. Such a publication would also make a considerable contribution to the actions considered in section 12 and may, with broader application of its principles, guide approach across Government on these same questions.
277. A publication or publications such as this would also provide great benefit for the State itself, particularly for those elements of Government such as utilities and public trading entities that are routinely required to conduct future acts on small and large scales. Establishing guiding principles would be expected to clarify approaches to be taken and settle areas of uncertainty, which remain considerable for those entities charged with delivering key services and infrastructure across the state.

### 6.3.2) Expanded Provisions

278. Significant concern was raised by proponents around broader provisions in HPAs that include environmental components and social surroundings aspects being built into exploration focussed agreements. Additionally, requests or requirements for terms that would be more suited to higher impact activity requiring environmental impact assessment were reported, including biological survey and hydrological reporting in addition to cultural heritage management plans. To be clear, discussions on this topic during the course of the Review were not a repudiation of these measures, rather, discussion was focussed on

views that such requirements are excessive for exploration, particularly low impact early stage activity, and go beyond or duplicate other State requirements and add to compliance burdens.

279. In a practical sense, proponents reported the blending of heritage and environmental topics often lead to unclear requirements or confusion around on ground works. It is also reported to lead to duplication of field work, requires multiple sets of field work or surveys, which in turn increases burdens on parties, increases costs and adds to the burdens placed on Traditional Owners. Adding to this final point, doubt was often expressed as to whether these provisions were sought by Traditional Owners themselves, or by consultants or representatives in order to generate fee paying activity for themselves. An additional concern is whether native title parties would withdraw their cooperation in the event agreement could not be reached with these terms.
280. Part of the rationale for expanded subject matter by those native title parties that seek it is that heritage is only one of the suite of native title rights and interests that are affected by activity. Additionally, native title parties argue that from their point of view, the perspective of heritage that confines it to archaeological or ethnographic places overly simplifies traditional owner viewpoints as cultural values apply to the landscape, giving rise to a focus on landscape values. As such it is argued that environmental and other factors need to be taken into account.
281. It was also clear during the course of the Review that there is a high level of sensitivity around water and waterways. While this is not confined to the Pilbara, there is a strong emphasis on these issues in that region due to a long history of groundwater abstraction leading to impacts on places of cultural significance. This issue was acknowledged by several industry parties who operate in the Pilbara.
282. Additionally, native title parties cite long histories of disturbance on the landscape from activities associated with exploration and prospecting licences, which leave a strong and long-lasting trace on the landscape. This, coupled with a low trust of Government and its enforcement, leads to the inclusion of enforcement clauses around rehabilitation to ensure there is an enforceable instrument should the explorer or prospector not fulfil their rehabilitation requirements. Such clauses need not be enforced if proponents meet statutory requirements.
283. Ultimately, parties can agree to the terms they wish to. The issue here is whether agreement may not be able to be reached due to terms that are thought to be excessive due to the measures sought being the subject of or unreasonably beyond statutory and regulatory requirements. If unable to reach agreement, proponents express the concern they are then unable to manage the risks outlined in this reporting, or that the relationship with the native title party may be impacted to the extent that cooperation is withdrawn from current and future tenure applications. Because of this, many proponents simply agree.
284. This is a difficult suite of issues to balance. Clearly, regulation cannot be imposed to prevent a party from introducing lawful terms it is seeking into a contract, thinking should instead go to why such measures are incentivised in the first instance and what may be put into place to satisfy the concerns this is responding to.
285. It is clear that, this and the other issues articulated in this section are symptomatic of the broader environment of mistrust. Native title parties continuously expressed the view that

Government does not adequately monitor and enforce the regulatory regime surrounding heritage, the environment and water. Whether this is based on perception or reality is in many respects irrelevant, native title parties are motivated to leverage their position and express these expanded terms to cover areas of concern and to build for themselves contractually enforceable instruments for situations where there may be an absence of enforcement on the part of the responsible agency.

286. While the issues described manifest in HPAs and generate impact upon proponents, their origin lies in a lack of confidence in Government systems. In considering this, and while it swings away from the immediate subject matter, it has again become apparent there is a lack of a systematised or formalised dialogue and relationship between PBCs and the State on key issues. Instead, individualised discussions, ad hoc interactions and occasional representations on individual issues occur which, while a particular issue may be satisfied, does not move the sectors towards broader understandings, organised policy development, increased confidence or issues resolution. This is in contrast with other sectors who are capable of strong and ongoing dialogue and cooperation on policy and legislative development.
287. It is now just a matter of fact that the native title sector and PBCs are now embedded in the legal and approvals frameworks of WA. Even so, it would appear that across Government, the realisation has not been made that native title parties and PBCs are themselves a sector. Properly understanding PBCs as a sector rearranges thinking and approach and necessitates a more comprehensive view of their operations, status, motivations, impact and influence. In the set of issues the subject of this section, this is expressed through a lack of faith in Government enforcement and the refocussing of these concerns towards the activities of proponent and HPAs. If the motivations of PBCs were addressed, these pressures would be expected to ease, however the absence of any systematised approach does not allow this.
288. Given this, and given the legal underpinnings of the status of PBCs, it would seem an imperative for the State to generate a formal and systematised dialogue with the PBC and native title sector in a similar manner to that discussed in Recommendation 4. The purpose of this would be similar to that of the previous intersectoral dialogue recommended to occur which is to build relationships and understandings, to highlight and focus on key issues to resolve, to develop solutions around key issues and to build confidence in governmental systems and enforcement. To that end, the following is recommended:

**Recommendation 7.**

Either separate to, or as an adjunct to, the actions proposed in Recommendation 4, the State, through the Department of Premier and Cabinet, develop and implement a strategy to generate an intersectoral dialogue with the PBC sector with the aim of enhancing understandings and relationships, generating partnerships and to discuss and generate system improvements.

289. Such a dialogue would be expected to address issues such as those highlighted in this section, coming to light as they do, in HPAs. It would also be expected to assist in the resolution of other issues set out in this report. Thus, while contained in this particular section with an aim to assisting the resolution of the issues highlighted, this stands as an overarching recommendation to support the resolution of a wider suite of issues.
290. While the specific issues highlighted in this section are of concern to proponents, as a counter, examples were provided during the course of the Review of the ways in which some PBCs are utilising their on ground presence in addition to the strength of their knowledge, by generating commercial partnerships to address capacity limitations within agencies around on ground monitoring activity, particularly around environment and water. These examples illustrate the innovative nature of these PBCs to identify such problems as opportunities and to create partnerships with agencies to address mutual concerns.
291. Not only do these examples demonstrate the benefits of Government working in partnership with PBCs, they also show how productive partnerships can work to alleviate capacity issues for both Government and PBCs. Further, engaging in such partnership and activity has had the effect of alleviating the types of specific concern outlined in this section and look to have reduced efforts towards the types of expanded provisions in HPAs as outlined. This in turn, has a positive impact for industry.
292. While these are more opportunistic measures, a broader and more systematised approach can be taken in an effort to expand such arrangements as a component of a more cohesive set of approaches to PBCs and native title corporations. To this end, it is recommended:

**Recommendation 8.**

Building on current examples and in a coordinated manner, the State continue to explore and expand opportunities to create partnerships with PBCs to undertake environmental and post work program monitoring and, where necessary, amelioration work across its compliance frameworks.

293. Although implementation of these recommendations would be expected to ameliorate issues, there will remain instances where parties are unable to reach agreement and end in deadlock over ways to move forward. To cater for these instances, the Review would underscore the need for the State to establish and implement an appropriate set of minimum requirements as discussed in section 12.

### 6.3.3) Exclusion zones

294. A significant body of conversation during the course of the Review was that of exclusion zones applied by native title parties in the course of HPA negotiations and within reporting following heritage surveys. While the need for buffer zones around heritage places is understood as it is practiced as a routine measure in environmental management, a significant number of proponents made remarks on what may be a reasonable buffer or exclusion zone to provide the required protections.

295. In general, proponents often regard the exclusion zones as being applied arbitrarily with little or no information provided around the reasoning for them. Perhaps the exception to this are those around waterways, where they are understood to be a result of concern regarding potential environmental degradation and therefore erosion of cultural values, however these zones are often thought to be larger than necessary.
296. When inquiring into this issue with native title parties, it became apparent that a strong driver of exclusion zones in heritage protection agreements was a lack of trust in the *Aboriginal Heritage Act* or State heritage protection practices. It was also noted that experiences of previous harm to heritage places and country incentivises native title groups to apply exclusion zones, that is, groups feel like they need to take those measures into their own hands and ensure protections are built into agreements rather than relying on the regulatory regime.
297. A further driver cited for the imposition of exclusion zones in heritage agreements is extensive ground water abstraction, particularly in the Pilbara. This, native title parties say, is now resulting in ground water draw down to the extent that environmental degradation is noticeable in culturally significant environments that are groundwater fed. This is also now extending to waterways, which in the view of many native title groups, are both culturally significant and have not been properly protected.
298. It also appears that some native title groups are reaching what might be termed the limits of acceptable change in regard to impact on country. This is a notion that is deployed in land management to express a limit of impact which, if exceeded, would result in unacceptable impact on land and environments. In these instances, native title parties cite the very extensive amount of mining and exploration activity that is being undertaken in their determination areas, and express strong views about now limiting or excluding activity on the areas of their country that remains relatively unaffected by this. As a result, not only have exclusion zones in agreements been utilised to achieve these ends, but in other instances cooperation has been withdrawn from proponents, with opposition instead emerging in regard to areas of country that a native title party feels should remain undisturbed.
299. It is generally the case that these exclusion zones have no statutory underpinning. Rather, they appear to be a function of native title parties' increasing desires to have portions of their country protected, with a lack of faith in the regulatory regime providing the incentive to take unilateral action. This is unlike buffer zones or protected areas in environmental management, which are imposed by the State through statute, regulation or conditions.
300. In the instance of exploration licences, while many proponents accept that particular areas or parts of the landscape will attract greater attention from native title parties such as waterways, examples were provided to the Review where these stated exclusion zones are in the order of tens of kilometres or cover a significant portion if not the majority of the area of the licence, often with little or no explanation. This leaves the proponent in the position where, if the wishes of the native title party are agreed, only small portions of the tenure would be available for exploration. This, proponents say, is aimed at sterilising land and quelling exploration activity and future prosperity of the State and provides an incentive to take expedited procedure matters before the Tribunal to inquiry in order to avoid what they view as the oppressive conditions sought by a native title party.

301. It could be that such exclusion zones are appropriate from the point of view of a native title party due to genuine cultural concerns. The opacity of such declarations however, does not assist the parties to arrive at a mutual understanding. Again, issues arise as to the extent of information that should be provided given cultural restrictions that may exist. The end point however, are that parties are at loggerheads with proponents seeking support from Government agencies and native title parties taking an increasingly defensive position.
302. This issue is again symptomatic of the environment of mistrust that is fed by the series of deficiencies that have been revealed during the course of this Review. Native title parties cite previous impacts and a lack of faith and trust in the regulatory regime while proponents cite an increased level of frustration and demands for Government action.
303. In some instances where very large exclusion zones are sought over broad areas of country due to culturally significant landscapes, a political decision will need to be made by Government on whether protection should be formally afforded or otherwise. Such decisions are beyond the scope of this Review. In other instances however, proactive steps might be taken to provide parties with clarity as to how these issues may be approached.
304. In the first instance, there is a lack of guidance from Government, the DPLH and the ACHC on how such exclusion zones are regarded. Formulating such guidance may not be overly difficult as it seems clear s 5 of the *Aboriginal Heritage Act* applies only to the spatial extent of the site itself. This would include those places on the sites register which show a larger or dithered boundary for the purpose of protection from inadvertent or deliberate damage, s 5 looks to only apply to the site itself, not the buffer provided by mapping within the register.
305. This does not necessarily resolve the issue of proposed exclusion zones in the context of the expedited procedure and HPA negotiations. It is not unreasonable for a native title party to propose areas to be avoided just as it is not unreasonable for a proponent to question the basis and spatial extent of such a proposal. The issue is whether the parties can come to agreement on that point.
306. Although this is likely to be assisted by the clarifications and guidance referred to above, given these zones are a function of negotiation rather than statute, seeking to overcome this sticking point is likely a function of the quality of the environment and increasing trust in systems on which many of the recommendations of this report are based including those proposing intersectoral dialogue and increased clarity from the State. A further measure may be applied within an appropriate set of minimum requirements when the expedited procedure is applied. An example used in the consideration of this in section 12, the Queensland NTPCs, contain provisions for exclusion zones and dispute resolution on this issue.
307. As discussed in the previous section, the building of partnerships between PBCs, Government and industry in environment and water regulatory space has the capacity to significantly restore trust. The development of partnerships with a focus towards the preservation and protection of country and places of significance have the potential to lower the temperature of the discourse in this area as well as properly valuing environmental and cultural inputs in the economic equation. The restoration of PBC trust

in Government and industry and the ongoing dialogue inherent in partnerships is likely to ease the path of negotiations between the sectors.

#### 6.4) Agreement Enforceability

308. An issue of strong concern for Industry is that of agreement enforceability. A significant number of proponents reported that even though agreement had been reached with a native title party, when it came time to conduct heritage works, it was not unusual for native title parties to request updates to agreement and monetary terms, with the alternative being that services would be withheld if not agreed. While on many occasions these increases look to be a function of agreement age, inflationary pressures from within industry as a result of high demand for heritage works and traditional owner scarcity, there are instances shown to the Review where these demands look to be of a more vexatious nature.
309. This issue provides an illustration of a key property of the native title arena: PBCs are the only body authorised to manage native title on behalf of native title groups, which includes the management of heritage and heritage agreements. Faced with the prospect of an agreement not being honoured, the proponent does not have the ability to find alternate providers, rather it needs to find a solution otherwise works will not be completed. Alternatively, exploration work will commence without heritage clearances which is a risk proposition that is generally not preferred.
310. When pressed about agreement termination or enforcement by way of contract law following exhaustion of dispute mechanisms, proponents expressed strong hesitation. Firstly and most importantly, it was expressed that such action would impact on the ongoing relationship with a group and impact upon the ability to reach agreement in the future as well as to conduct heritage works in the future. Secondly, such a dispute would likely become public and impact on the reputation and social licence to operate of the proponent, issues to which many proponents are sensitive. Further to this, many proponents feel that proceeding with on ground activity without having these issues resolved and heritage works conducted, would not enable them to properly mitigate risks and ensure compliance with s 17 of the *Aboriginal Heritage Act*.
311. As a result of these factors, proponents feel they often have little choice but to acquiesce to the demands of the native title party. While many are philosophical about such instances while noting the impact on budgets, others expressed strongly negative views around being compelled to agree to changed terms in order to maintain future work programs and exploration. As can be expected, this also gives rise to strong feelings of mistrust and cynicism, a sense that the agreements are primarily about revenue rather than heritage and a series of questions surrounding the point of having agreements in the first place if they aren't or can't be honoured. This then serves as a disincentive to enter into HPAs in the first instance.
312. On some occasions, it could be the case that a proponent has an existing agreement with a native title party on a separate tenure. In these instances, this pre-existing agreement may be a useful starting point however if significant time has passed, it could be expected that updated terms may be sought. Each new matter is, after all, a separate process and while a new tenure may be included in an existing agreement via a deed of variation, new

terms or agreement may be preferred. Such instances simply need to be accepted and new terms negotiated as no party can be held to a previous contract on a separate matter.

313. Again, this speaks to issues with the broader environment and the decreased risk appetite of proponents of potentially offending against the *Aboriginal Heritage Act* during the operation of an agreement and into the future should the native title party withdraw cooperation.
314. An agreement not honoured is a matter between the parties and there is sufficient jurisprudence around contracts to govern this including that where one party to an agreement no longer agrees to be bound by it, in effect repudiating the agreement, the agreement may be considered to be at an end. Given the justifiable concerns of industry regarding relationships with native title parties, reputational risks and social licence to operate issues associated with the breakdown of a contractual arrangement with a native title party, a series of backstop measures should deadlock or breakdown arise would enable industry concerns to be mitigated while ensuring proper protections.
315. Again, there is a role for Government to play in developing an appropriate set of minimum requirements that balance the interests of the parties. In this situation, where a breakdown occurs and an agreement is repudiated, there would remain a set of actions that are required to be taken which provide certainty of process and appropriate protection, establishing a firm foundation from which parties may operate.

## 7) Focus Area 3: Heritage Surveys, Costs and Associated Issues

### 7.1) Survey Administration and Survey Costs

316. Over the course of the Review, a number of examples were shared indicating high and sometimes prohibitive costs for heritage surveys and associated activities. This is a related but separate issue to that of the costs associated with the negotiation of these agreements, with this section being more focussed on the costs of activity governed by HPAs.
317. A number of proponents raised issues around a lack of affordability within the context of their overall exploration budgets, citing examples of where request for heritage work is excessive and/or unnecessary leading to expenditure on heritage works rivalling that of exploration activity. While proponents note this expenditure is taken into account for expenditure targets set for exploration activity by the DMPE, it is not in itself exploration activity. The rejoinder to this point from a number of native title parties is their view that exploration companies and other proponents do not budget properly for these heritage requirements.
318. Leading from this, there are some indications provided that the issue of survey costs is in some cases so acute, that it is leading proponents to either drop tenure applications or increase their risk appetite and proceed with work programs without heritage surveys. There is not a clear view as to the extent of this practice, however a significant number of proponents expressed that Aboriginal heritage processes have become more burdensome in terms of time and expense than the risks they address, so it is clearly one that is of some significance.
319. If it is held reasonable to understand, mitigate and/or eliminate impacts on Aboriginal heritage as a result of on ground activity, then some type of heritage work should occur to allow this. If the costs and processes of HPAs are prohibitive to the extent that proponents feel it is worth the risk not to enter into a HPA and not conduct heritage surveys, then clearly, the HPA development system is failing in its intent.
320. It would be assumed that proceeding in the absence of a heritage survey involves instances where no agreement has been reached between the native title party and a proponent. If an agreement exists, there may be contractual terms that a proponent is in breach of should it proceed with works without due reference to the terms of the agreement, paradoxically given the previous discussion, exposing it to contract enforcement.
321. To be clear, it is not mandatory to conduct heritage assessments or surveys. Rather, conducting these activities enables a proponent to avoid impacts where they can or if they cannot, apply for a s 18 permit to make it lawful to disturb or disrupt a site. As such, a proponent may proceed without these assessments however risk offending against the *Aboriginal Heritage Act* if there is disturbance in the manner set out in s 17 of that Act. Additionally, when seeking a s 18 permit, the DPLH, ACHC and Minister will seek proof of consultation with affected Aboriginal parties.
322. This issue revolves around both the administrative costs of heritage agreements which include a number of personnel, mobilisation costs, consultant costs, the costs of heritage

surveys themselves in addition to reporting. Concerns were also raised regarding the need for a new set of these same costs following small work program changes giving rise to further heritage survey work.

323. Overall, these issues give rise to cynicism and mistrust from proponents in regard to both the costs involved and the necessity for the extent of the work sought. As many put it in the course of the Review, it is felt these costs are not centred on heritage and its protection, but rather the generation of revenue. Questions also arise in regard to where these revenues are ultimately directed, with evidence suggesting that in many cases, the majority is to corporate, legal or heritage consultants rather than the PBC or Traditional Owners.
324. Evidence of this was provided in a survey of members conducted by the Association of Mining and Exploration Companies (**AMEC**) which was submitted to the Review. The results of this survey show that just 40% of funds expended by these companies was directed to native title groups and PBCs, with almost 40% going to consulting costs for heritage consultants paid by the PBC and approximately 20% going towards legal counsel or support paid by the PBC. This would seem to indicate that direct traditional owner and PBC costs are the lesser issue.
325. It is important to note that the rates PBCs seek to build into their agreements are influenced by those set with major mining companies in more localised areas. Arrangements for heritage surveys in these cases are often contained in ILUAs, and these companies in general have a better financial position than junior miners, exploration companies and prospectors. These arrangements create inflationary pressures within the system which impact on smaller operators as well as in other sectors such as local Government and for pastoralists across the State.
326. During the course of this Review, the impulse of the smaller companies and in particular prospectors, was to place price or cost controls onto Traditional Owners. This alone is a difficult proposition, particularly when such controls tend to regulate traditional owner rates where all others are 'at market'. As mentioned, in a situation where the majority of funds seem directed to others, the day rate for Traditional Owners doesn't appear to be the most significant issue and such a focussed control could be racially discriminatory.
327. There is also a sense that the majors use, or are capable of using, their superior position to outcompete smaller companies. This Review has noted the very competitive nature of the mining and exploration industry, and it is not beyond possibility that the majors take advantage of longer term stable relationships with native title parties, alongside a superior budgetary position, to ensure they attain the status of partner of choice, in turn placing pressure on competitors. However it must be noted that majors also express their views through good neighbour policy and value exchange which were not common themes in consultations with smaller companies. In any event, in a number of proponent consultations, there is an implicit acknowledgement that many of the concerns discussed arise from competitive and inflationary pressures from within industry itself.
328. Native title parties also have strong views on this topic. In the first instance PBCs point out that the proponents are conducting commercial activity however felt they are routinely asked to subsidise proponent activities with resources they don't possess. Put simply, PBCs say, they can't engage for the benefit of a proponent without appropriate support from them, and it is unreasonable to expect that the activities of a proponent would come at a

net cost to the PBC given their generally poor budget position and given very little support is provided by the Commonwealth or the State. This is not a sentiment that proponents necessarily disagreed with during the course of consultations, rather the issues revolve around questions of appropriate or repeated costs.

329. During the course of consultations, it was also common for native title parties to express the view there was little acknowledgement of the fixed overheads and the development and maintenance of systems required to provide a PBC with the ability to respond to notices or requests. Additionally, native title parties expressed there seemed to be a lack of understanding of processes and costs in regard to co-ordinating and mobilising heritage survey activities, in addition to little acknowledgement of occupational health and safety requirements, consultant fees, supplies, transport and other costs that need to be covered.
330. Given these complexities, it is the case that many PBCs do not have the internal capacity or capability to fulfil these needs requiring them to outsource to consultants or consulting firms, thereby creating a circularity of increasing costs while not necessarily building capability. These capacity constraints lead proponents to the view that, while native title parties are generally open to engagement and seek to be cooperative, capacity constraints limit their ability to undertake action in a timely and cost-effective way. This sentiment was also echoed in the AMEC survey submitted to the Review.
331. It was also repeatedly pointed out to the Review by PBCs that heritage surveys can be difficult work in harsh conditions. They can involve being away from home for significant periods, staying in remote locations undertaking extensive walking through sometimes inhospitable terrain in hot or inclement weather while being long distances from medical assistance if this is required. This, they say, demonstrates that Traditional Owners are not insisting on these activities for personal enrichment, but out of concern for heritage and country.
332. With such a small amount of resources flowing to PBCs from the Commonwealth and the State, in addition to providing the ability to recover costs in right to negotiate matters as provided by the *Native Title Act*, it is apparent that Governments have preferred the development of a user pays system. As a result of this, there should be no surprise that financial and other demands are made of proponents to support the administration, coordination and conduct of heritage surveys. The questions put by proponents is, what is reasonable, what support should Governments provide and how may capacity constraints be overcome?
333. The idea that revenue generation should not be a focus of native title parties is in itself problematic. The activities that proponents are undertaking are intended to be revenue generating and profit making. It would not be undertaken if it were not or if there wasn't a high chance that it would be. Additionally, in a different context such as the conduct of environmental studies and survey associated with environmental impact assessment, no one questions that one of the strong motives of consulting firms who conduct this work is the generation of revenue. If it was not commercial or profitable, a proponent would not be able to engage a party to conduct the work. Care must be taken then, to ensure perspectives on costs and their potentially prohibitive nature are based on business activity issues rather than revolving around race.

334. The difference of course, is that in respect to native title and heritage matters, the native title party holds a sole provider position, whereas in the other example cited, providers are required to compete in order to be awarded the work. Such an environment drives standards, quality and delivery, pressures that aren't necessarily present in a sole provider situation.
335. As observed by a number of native title parties during the course of consultations, Traditional Owners have seen wealth built from their traditional lands for all others except themselves, and in the absence of good will and genuine relationships, the management of native title and the conduct of heritage surveys is viewed as a way to ensure this can at least be partially overcome. This, coupled with the general environment driven by the manner in which the expedited procedure is administered and other factors already explored, incentivise native title parties to leverage the strengths they possess in order to seek an outcome type the system in general does not provide.
336. In setting this out, it is important to acknowledge there are a number of traditional owner groups have been able to develop strong arrangements with mining and exploration companies that have generated strong benefits for Traditional Owners. While outcomes of this type cannot be said to be uncommon, it is also the case they are not ubiquitous, with many traditional owner groups not achieving similar outcomes, generating strong disparities across the state that native title groups in effect, would seek to address.
337. One of the issues exposed by the Review is, due to the absence of support from the Commonwealth or the State, a number of PBCs stated they needed the revenue generated by heritage activities simply to be able to survive and function as an organisation and to fulfil their statutory and regulatory roles. While this is not a universal experience on the part of PBCs, the fact that it is in a significant number of cases is a reflection on the state of affairs of the native title environment and illustrates the pressures and incentives native title parties are subject to.
338. This is not to minimise the issues raised by proponents, rather it is to recognise that a more complex picture has emerged during the course of the Review. Perhaps one of the main points to be recognised here is that, because the main external and commercial interaction of native title parties is with the exploration and mining sectors, at least in regard to the subject matter of this Review, it is these sectors who are asked to overcome deficiencies in Government support.
339. It is certain, however, that native title parties receive little to no support from Governments, which cause costs to be passed onto proponents and, from a Governmental point of view, this user pays system has been the preferred approach. It is also clear that the manner in which the system works overall in terms of the general environment, heightened sensitivity towards heritage matters, the administration of the expedited procedure, industry inflationary pressures, lack of evenness of outcomes across the state, proponent budgetary pressures and timeliness, amongst other things, has generated a series of call and response developments that have escalated issues on both sides to the extent that exploration activity may or have already been impacted, and heritage values may not be able to be fully catered for.
340. Ultimately, if operating from principles that Aboriginal heritage is to be adequately protected, that native title is to be properly managed, that timely grant of exploration tenure

is to be sought in addition to the conduct of exploration activity leading to productive mining, then a series of system improvements is required. Proponents need to accept the existence of native title and should expect expenditure on heritage works and budget accordingly and in doing so, it is reasonable to expect an appropriate exchange of value. This would come in the form of appropriate responses to activity notices, timely mobilisation, durable and cost-effective heritage surveys and reliable reporting.

341. There is not one simple solution to these issues and as such, it is felt that regulation around these costs is not the appropriate first response, particularly when regulation generally focusses on traditional owner fees when the bulk of the expenditure is to heritage consultants and other external advisors. The issues here seem more centred on PBC capability, PBC financial pressures, consultants, the imperatives brought about by the *Aboriginal Heritage Act*, an absence of guidelines and minimum requirements and, of course, the general environment of mistrust.
342. Notwithstanding any of these things, the parties exist in a user pays environment and in order to ensure compliance with the *Aboriginal Heritage Act* in light of s 17 and other provisions, heritage surveys are effectively a *fait accompli*. Along with this, native title holders possess property rights towards protection and management of heritage places which presents PBCs as effectively the sole agents of, and fiduciaries, towards native title groups. It is unreasonable to expect PBCs and native title groups to be out of pocket or placed into financial stress for external parties, just as it is reasonable for external parties to expect fair dealings, timeliness and proper exchanges of value.
343. Rather than take a punitive approach and regulating PBC and traditional owner costs, it is recommended that a series of actions occur which alleviate system pressures and instead provide a platform or incentive towards positive interactions and outcomes. In the first instance, this would come in the form of support for PBCs towards administration, processing and mobilisation within the terms of HPAs. This is the subject of section 11 which explores PBC capability and capacity, which itself is a multifaceted topic.
344. The issue of consultants and consultant capture is also an issue of some significance, given the high proportion of expended funds that flow towards them. In part, this is also an issue of PBC capacity in addition to consultant scarcity, however there is also a sense that a lack of guidance as to heritage survey standards and requirements lead to the ability to generate excessive bodies of work for the purpose of fee generation. The lack of professional and ethical standards exacerbates these issues. The topic of consultants is examined in section 10 and provides a number of recommendations which may assist to ease these pressures.
345. As in previous topics, the issues highlighted in this section would be expected to be a key topic of discussion in the dialogues recommended at recommendations 4 and 7. It would be hoped that more open discussion on this topic would build initiatives and solutions that build on or supersede those that are outlined in this reporting.
346. As in other topics, the absence of adequate minimum requirements in the event the expedited procedure is applied is also a strong contributing factor to the issues outlined here. Such a minimum standard would be expected to provide a reasonable pathway to follow in the event a HPA is unable to be concluded and would contain provisions to cater for issues outlined in this topic. This is addressed in section 12.

347. The main point being made here is that the issues articulated in this and previous sections are a result of a confluence of a series of impulses and imperatives that become focussed at the intersection of native title parties and proponents within expedited procedure processes. It may be that frustrations between these parties are entirely justified, and there are certainly examples of unconscionable conduct across the board. The issues aren't resolved by regulating one party or the other though, they are alleviated through system change and the establishment of measures to incentivise positive outcomes.
348. Individual programs and minimum requirements may of course set rates for different types of payments, just as they may ask if a heritage survey is justified in the circumstances or whether an archaeologist or anthropologist is needed. The shape and form of such things cannot be blind to the broader environment and the series of issues within it if they are to be of any success.

## 7.2) Survey Conduct

349. A variety of issues were raised by parties in regard to the conduct and result of heritage surveys, with a significant disconnect between proponents and native title parties on this topic.
350. As alluded to previously, proponents often feel there is a disconnect between the impact of activity that is to be conducted and the heritage processes applied by the native title party. That is, it is felt that often heritage surveys are sought for low level activities where they are thought unnecessary, raising questions as to whether a heritage survey is required in the first instance and if not, avoiding the cost altogether.
351. While this is a genuine concern on the part of proponents, given previous discussion regarding s 17 of the *Aboriginal Heritage Act* whereby it is an offence to alter a site in any way, this type of response seems more a function of the *Aboriginal Heritage Act* and risk management rather than anything else. In light of this, it would seem a heritage survey of some type is necessary in almost every circumstance if seeking to eliminate the risk of offending against the *Aboriginal Heritage Act*.
352. Proponents also raised concern in regard to the durability of surveys, citing examples where new heritage surveys are sought over areas of land that have already been surveyed and the need for repeated surveys in the event of changes in work program such as infill drilling. Examples were also provided in which formal agreement had been reached with native title parties that areas had been cleared for heritage values as part of larger projects, yet when works were to commence sometime later, native title parties insisted heritage surveys being repeated. Examples such as these go not just to perceptions of revenue raising rather than focussing on heritage, but also to the durability and enforceability of agreements.
353. In some instances, the methodology of survey itself is at issue, with some methodologies requiring further work in the event of small changes to work programs. Additionally, there is a view amongst proponents that significance is often assigned to factors by consultants that are not necessarily considered significant by Traditional Owners. This is a difficult issue to quantify, however it is said to be associated with the level of experience of the heritage service provider or their personal ambivalence towards mining activity.

354. Coupled with this, a number of proponents reported that on many occasions when a heritage find is made, the amount of information provided is simply that there is a find, the general area of the find but not the nature of or significance of the heritage values. During consultations, there was wide acknowledgement that a group may not wish to share the full cultural values of a place, however it was also expressed that in order to fulfil their internal requirements or to ensure those values or places weren't disturbed, vagueness in description can lead to s 18 application for risk mitigation purposes. It is often the case however, that the information upon which these applications are based do not enable a conclusion that s 5 of the *Aboriginal Heritage Act* applies and therefore does not lead to site protection.
355. It must be noted that there is a real issue of intellectual property here alongside cultural restrictions around the disclosure of certain information. The Review was provided with a number of examples where the handing over of cultural information and materials was required by the State and that information being improperly assigned as belonging to the State or the person reporting it. This may in effect be a compulsory acquisition of intellectual property without compensation and has created severe mistrust by PBCs towards the State around reporting and cultural information.
356. Compounding this, examples were also provided of proponents receiving cultural information via survey reports and asserting ownership of that information on the basis that they paid for the preparation of the report and may do with it as they please. There is often no recognition of the limited licence the State and industry hold in relation to the information.
357. There is a clear need for clarification that the intellectual property of any cultural knowledge imparted in any sort of survey or other report resides with the group providing it and the use of the information in the report is via a limited licence for it to be held and used solely for the purpose for which it was provided in order to overcome these issues.
358. On the matter of repeated surveys and survey methodology, a number of native title parties noted they worked closely with proponents to select the most appropriate methodology for a particular work program. It was reported that proponents would often prefer that an entire tenement or a large part of it be surveyed and cleared however this is not often feasible due to time and expense, so proponents are often advised towards more contained methodologies such as work area clearances which are less costly. The downside of this approach is that if there is a change in the work program, new heritage assessment is required in the new work area along with the attendant administration and mobilisation costs in addition to native title party constraints. This seems more an issue of proponent understanding whereas repeated surveys over the same ground signifies a different issue.
359. Native title parties made strong submissions to the Review on the heavy pressure from industry for compliance and risk mitigation purposes, diverting traditional owner focus to being on mining processes rather than on other native title and community matters. Additionally, a number of reports were made to the Review of the difficulty presented by a small number of proponents, seemingly in protest of heritage survey activity. These were cited as these proponents not providing appropriate accommodations, not meeting food and more importantly, water requirements and not meeting occupational health and safety requirements. Such reports are concerning irrespective of them being in the minority.

360. From the traditional owner point of view, surveys are often spoken of in cultural terms with a focus on cultural responsibility and with a heightened sense of concern regarding damage to heritage places post Juukan Gorge. It was strongly put by a number of Traditional Owners that this extended to the cultural protection of those proponent employees or contractors present in the area, with concerns for their safety in a cultural sense if damage to significant sites or entry onto restricted places were to occur.
361. This sentiment also extended to justification of numbers on heritage surveys, on which it was strongly put by Traditional Owners that a small number of survey team members do not possess the cultural authority to clear or make decisions about heritage matters. As such, it was a community and cultural requirement that a survey team have sufficient numbers to make legitimate cultural decisions, thereby protecting team members from the repercussions that would occur if too small a team were present.
362. It was also observed that the numbers of Traditional Owners on survey teams was the main issue for a number of proponents in agreement negotiations despite payments to these Traditional Owners being a modest component of the overall cost. In these situations, native title parties held the view that proponents preferred quick and easy surveys for compliance purposes or that haggling over survey team numbers was a device to create a barrier to reaching agreement for other purposes such as tenement parking or an unspoken preference for arbitration.
363. It can be observed that proponents for their part, are seeking to understand the values in the country and move forward with their works, which often reduces to statements such as 'just tell us where we can't go' - perhaps not an unreasonable sentiment. Proponents are seeking to conduct their activities in a timely and efficient manner, often viewing the survey processes as overly onerous, lacking in durability, being overly expensive and in some instances, contrived for revenue purposes only. Given some of the more egregious examples of native title party interaction provided to the Review, it is perhaps not surprising these are views that are widely held.
364. Native title parties and Traditional Owners see matters quite differently. They see heritage surveys as a step to ensure they can fulfil cultural obligations to country and heritage places and for surveys to be conducted in a way that provides cultural safety, often seeing proponents as undertaking a tick box exercise with no real concern for heritage, culture or country. Notwithstanding this, there are again clear examples of unconscionable conduct from both sectors in regard to the conduct of heritage surveys which are to be kept in mind.
365. In addition to these issues, it must be remembered that s 17 of the *Aboriginal Heritage Act* cannot be avoided, so a strict compliance approach would have it that heritage surveys are required in all circumstances. Even so, it is reasonable to expect appropriate methodologies and durable results.
366. There is a sense in which the norms and standards surrounding these things have evolved organically or in the absence of any guidance. For example, on the issue of repeated surveys over the same ground, the idea that a survey is conducted once has perpetual validity is unrealistic. Several proponents expressed agreement with the notion that a survey becomes stale with time as things change on the ground due to natural processes such as erosion, things may have been missed or a differently constituted survey team may

have a different set of knowledge. What is at question however is, over what time period this occurs.

367. There are no useful guidelines or policy instruments to assist parties to come to agreement on this question. Instead, it is left to the parties to debate where the boundary lies with the issue repeatedly arising before the DPLH, ACHC and the State in general. Similarly, there is no real guidance on appropriate survey methodologies in particular circumstances, what they provide for and what their advantages or disadvantages may be. This is generally left to the parties, some of whom have little prior or in depth knowledge, or consultants, which often then leads to conflict.
368. There is a strong case for policy leadership from the DPLH on these issues and more generally. Currently, there exists a standards document for the Aboriginal Heritage Survey Program (discussed at section 7.1) which is helpful in this regard, however has not been adapted for broader assistance. Also, while this is a useful tool for that program, it doesn't contain the breadth of in-depth information thought necessary to provide assistance on this issue. The DPLH also provide other guidelines, which are also useful to an extent, however these are more working guides and cannot be considered thought leadership on key policy issues.
369. It may be that there is a level of timidity on the part of DPLH in developing resources for use by stakeholders. If so, this Review would posit that this is inappropriate. The Regulator has a primary role in thought leadership, setting and promoting standards and establishing guidance for those who interact with it. As it stands, these issues continuously loop into the Department and remain contentious despite their long standing nature.
370. On the issues outlined in this section, the Review has formed the view that DPLH should take a proactive role in publishing technical information in the form of guidance notes, papers or guidelines on key issues to provide thought leadership, to establish foundations for operators, to guide debate and resolve issues, and to evolve the overall field of endeavour towards a more constructive set of working principles. A recommendation in regard to this is set out on the following page.

**Recommendation 9.**

The DPLH engage in a program to expand its public information base and in doing so, in consultation with professional bodies, proponents and native title parties as appropriate, develop and publish technical information, thought leadership, practice notes and guides and/or policy papers on the topics of:

- heritage survey methodologies, their advantages and disadvantages, when they may be applied, in what circumstances and why;
- duration of survey validity, reasons surrounding this and matters to consider on this topic;
- occupational health and safety requirements for heritage surveys;
- intellectual property issues with a view to establishing appropriate working principles for the sector; and,
- other key topics as nominated by native title parties, industry and professional bodies and as thought necessary by the Department.

371. For the avoidance of doubt, this is not the setting of requirements, it is the establishing of an information base to assist stakeholders. Additionally, while it is recommended that key sectors are consulted, this is for the purpose of tuning information rather than consulting for policy development purposes. There remains further need for technical information on other topics, this is subject to further discussion and recommendations. What is clear though, is a distinct lack of guidance and direction from the Regulator, despite these issues being long standing and generating significant difficulty across the board. Clearly, this needs to be remedied.

### 7.3) Survey Reports and Reporting

372. During the course of the Review, considerable proponent discussion occurred around the quality and timeliness of reports from heritage surveys. These concerns related to reports not providing sufficient information to allow an understanding of, or verify that, places identified were actually sites or are places to which s 5 of the *Aboriginal Heritage Act* applies.

373. There was also a significant narrative from proponents in regard to time lags and low quality standards of reporting, with it being not uncommon for heritage service providers to be asked to redo their work due to poor quality, factual errors and examples of cutting and pasting from previous reports. Strong views arose from proponents that this level of quality and standard of practice would not be tolerated in other fields.

374. Native title parties acknowledged this same issue, noting, along with proponents, a shortage of sufficiently experienced professionals. It was also noted that due to full schedules, it was not uncommon for consultants to have moved to the next job prior to completing the previous.

375. These issues are of significance to proponents in particular, due to a need to properly understand the heritage values that exist in a given area, to understand measures that may need to be applied within work programs given that insufficient reporting does not properly allow measures to protect or avoid heritage values. Additionally, insufficient or substandard reporting creates transparency issues and further drives mistrust between parties.
376. In part, this would appear to be a matter of contract fulfilment or may be a feature of inadequately constructed contracts or agreements in regard to survey reporting standards. There is also a relationship to the type and quality of consultants engaged, a topic examined in section 10.
377. Again, there is no set standard as to reporting requirements, level and quality of information, intellectual property issues and other reporting matters. As previously however, in materials associated with the DPLH heritage survey program, these issues are addressed but are not presented for broader application.
378. This is a further area in which DPLH may fulfil a thought leadership and stakeholder service function by presenting technical information on requirements and standards for heritage reporting. The Department has the most comprehensive view of any party in the state of what is adequate and what is not in terms of form and information, simply by virtue of the fact that it is in receipt of enormous volumes of material from around the state and given the consideration it undertakes in its regulatory role. From information gathered during consultations, it is clear that it would not only be of great benefit for DPLH to communicate its views, but there is a strong demand for it.
379. As in the previous discussion such information would not be for the purpose of fixing policy, but to provide a foundation for stakeholders to establish and meet expectations, resolve disputes on reporting issues and generate thought leadership to assist overall improvement in the field. For these reasons, and as an adjunct to Recommendation 9:

**Recommendation 10.**

In keeping with Recommendation 9, the DPLH, in consultation with professional bodies, proponents and native title parties as appropriate, develop and publish technical information, thought leadership, practice notes and policy papers on reporting requirements and standards arising from heritage surveys. Such information should be attuned to each survey methodology, consider intellectual property issues surrounding heritage information and illustrate information needs for submissions to the Department for approvals processes.

#### 7.4) DPLH Heritage Survey Program

380. The State through the DPLH have instituted the 'Aboriginal Heritage Survey Program' which is aimed at providing assistance for the conduct of heritage surveys by native title parties and Aboriginal people, landowners, small businesses (which are defined), not for profit

organisations and local Government. This includes guidelines around key considerations such as survey methodologies and reporting in addition to a rates schedule. These focus only on rates for Traditional Owners although as discussed previously, these costs look to represent a small portion of heritage survey costs while no such cost fixing is applied to non-Aboriginal participants such as consultants.

381. During the course of consultations, there was a very low awareness of this program from proponents and native title parties alike. For those native title parties aware of the program, some suspicion was expressed as to its intent given the level of information that is required to be provided to DPLH, with this being likened to an acquisition of intellectual property, and the manner in which sensitive or restricted cultural information is treated. Other native title parties expressed more positive views and regarded the program as having a facilitative function in that it provides an ability to build partnerships with external parties without needing to negotiate cost coverage.
382. From a proponent perspective, there are limitations to the applicability of the program due to the small business provisions, making it more suited to access by prospectors and small and perhaps private exploration companies. In some discussions however, smaller operators expressed a desire not to access the program, even though it would alleviate budget concerns, due to the view that it would normalise heritage surveys. The idea that decisions must be made to ensure heritage surveys are not considered a normal part of business despite the operation of the *Aboriginal Heritage Act* and the existence of native title perhaps speaks to a deeper suite of views towards Aboriginal people from these proponents more than it does about heritage survey program, so can likely be discounted.
383. In general though, the emergence of the program can be viewed positively. It is a proactive effort through which to address issues brought to the DPLH and shared with this Review as seen in the standards and requirements it sets within its materials. That it is not widely known about is a matter for concern, so effort should be made to ensure awareness and information in regard to the program is more widely shared. The concerns of native title parties in relation to their intellectual property and cultural information, and that it only seeks to control Aboriginal rather than non-Aboriginal costs are also matters that need further exploration if the program is to have broader appeal and achieve its aims. From this, it is recommended that:

**Recommendation 11.**

- a) The State continue to support and expand the DPLH heritage survey program.
- b) DPLH undertake a targeted consultation process with native title and Aboriginal parties on the terms of the heritage survey program to understand reservations, issues and improvements that may be made in order to overcome issues of cultural sensitivity where they exist and provide broader appeal to these parties with an aim to increasing program uptake.
- c) DPLH, supported by the DPC and the DMPE, conduct an awareness campaign to targeted sectors to increase program awareness and uptake.

## 8) Focus Area 4: Heritage Policy and Process issues

### 8.1) Section 5, Site Verification and Site Significance

384. An issue that repeatedly arose in the course of consultations were concerns surrounding significance being wrongly ascribed to small or individual finds, or in a way that defied verification. This is said to cast parties into unnecessary and uncertain approvals processes and gives rise to concerns regarding land sterilisation. This was often attributed to inexperienced consultants or those antagonistic towards industry, however irrespective of this there are features of the *Aboriginal Heritage Act* that would appear to make this unavoidable. This mainly relates to questions around the application of s 5 of the *Aboriginal Heritage Act*, around which there is significant confusion, the application of s 17 and subsequently s 18, which in turn generates a series of decision making bottlenecks due to the volume of approvals given rise to.
385. In regard to s 5, there is considerable confusion and uncertainty around the threshold for a place or area to be regarded as a site, or better put, a place to which s 5 of the *Aboriginal Heritage Act* applies, and how it then needs to be approached. Proponents for example, argue that places regarded as sites such as rivers, waterways, ranges and large landscape features is an over extension of the application of the *Aboriginal Heritage Act* by the DPLH and ACHC. Application of s 5 to these types of broad landscape features may not have been intended in the original drafting of the *Aboriginal Heritage Act*. According to the manner in which the terms of the *Aboriginal Heritage Act* are constructed however, landscape features such as these would appear to fall firmly within its remit.
386. As previously explored, s 5 provides a broad catch all approach and is framed as any place of importance and significance where Aboriginal people have, or appear to have, left any object for any purpose connected with traditional cultural life past or present, and any sacred, ritual or ceremonial site of importance and special significance to Aboriginal people. The use of the word 'any' is qualified in that for the *Aboriginal Heritage Act* to apply, these places must be of 'importance and significance' or 'importance and special significance, for which no definition is provided. As highlighted previously however, this is to be evaluated by the ACHC, most often in the context of s 18 decisions, having regard to the criteria in s 39.
387. While the construction of s 5 and the manner in which the s 39 criteria are to be applied would appear to be relatively unambiguous as a result of *Robinson v Fielding* and *Wintawari Guruma v Wyatt*, there remains a low level of understanding or perhaps confidence as to the threshold of these factors, leading every place to be regarded as being within the remit of the *Aboriginal Heritage Act* until an evaluation is able to be made by the ACHC. Equally, there is an absence of guidance as to the approach of the ACHC to these questions, leading proponents to take the lowest risk approach and submitting s 18 applications on all occasions. This overburdens decision making processes, creates decision making bottlenecks and increases uncertainties for all parties, including the State.
388. There is interplay here with s 17 of the *Aboriginal Heritage Act*. This section states it is an offence to excavate, destroy, damage, conceal or in any way to alter an Aboriginal site, the effect of which is that if a proponent is to take a risk averse approach and ensure strict compliance with the *Aboriginal Heritage Act*, a heritage survey must occur. In the low risk

environment that has arisen post Juukan Gorge, this looks to have given rise to a large and growing number of heritage surveys which appear to be of a more forensic nature, giving rise to the s 5 considerations discussed above and in turn, a significant body of reporting to, and s 18 decision making for the DPLH and ACHC.

389. At the point of heritage survey, it is not known whether s 5 will ultimately apply to a place however from a risk point of view, it must be assumed that it does. While it is able to provide informed advice, the DPLH is unable to make this determination. Although DPLH plays a key role in advising the ACHC, no determination of significance and importance is capable of being made at a Departmental level, this is only able to be conducted by the ACHC.
390. Ideally, this would occur in the context of considering whether a place should be entered onto the sites register, a confirmation that s 5 applies. Due to the enormous amount of information being provided to the DPLH and internal resourcing, this has been unable to occur for some time, having the effect that these evaluations are conducted in the context of a s 18 process. Within this context, issues of verification and significance are only able to be resolved by the ACHC and in many respects, renders the sites register irrelevant.
391. All parties draw attention to the opacity of the ACHC process and the lack of guidance which would enable a level of assessment to be made in the field, which would perhaps reduce the volume of decision making processes. It is the case that public guidance was provided in the past by the predecessor of the ACHC surrounding the operation and consideration of s 5, however these guidelines took the unusual approach of applying definitions that are not provided for by the statute. Due to the faulty nature of these guidelines, decisions based on them were overturned in *Robinson v Fielding* and the guidelines were subsequently withdrawn.
392. Perhaps because of this there may be hesitation to develop new guidance, however there would appear to be sufficient jurisprudence for both the ACHC and the Department to provide further guidance as to its approach in a manner which assists all parties and creates efficiencies with little risk of running afoul of the statute. Such guidance would revolve around the content and operation of the statute, incorporate jurisprudence and provide non definitional indicia as to approach and interpretation to assist in demystifying these considerations and provide guidance in the field. Additionally, concepts used to assess heritage and significance are well understood, are applied across Australia and in other areas of heritage management, so should be able to be articulated in this situation with relative ease.
393. It is worth noting the contrast in administration with the other main heritage legislation that operates in WA, the *Heritage Act 2018 (WA) (Heritage Act)*, even though this is within the same Department. This is legislation that provides clear factors that the Heritage Council must consider when making a decision regarding the cultural heritage significance of a place being considered for entry onto the heritage register.
394. While the ACHC is not obliged to provide reasons for its evaluations,<sup>29</sup> it is notable that s 40 of the *Heritage Act* requires the publishing of any recommendations and such decisions by the Heritage Council whereas the ACHC does not provide this. While this may reflect the larger volume of work to be conducted by the ACHC, such publication increases the transparency of processes and creates a public body of precedent that brings certainty and

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<sup>29</sup> *Wintawari Guruma v Wyatt* [171].

guidance to those engaging in processes under the *Heritage Act*. In contrast, evaluations made under the *Aboriginal Heritage Act* are opaque, leaving parties without clear guidance and precedent to inform their interactions with each other and DPLH in relation to Aboriginal cultural heritage and how to proceed.

395. Parties involved in *Heritage Act* processes are also assisted in their interactions with the *Heritage Act* by a number of guidelines and resources to help them to understand and navigate these processes through the extensive list of guidelines, policies, procedures and forms available on the DPLH website. These range from guidance regarding the criteria for the listing of a place on the heritage register, the manner in which heritage values and significance will be assessed, detailed processes about archaeological management plans and what they should contain, to technical information and specifications regarding the maintenance and repair of heritage places. There appears to be detailed information publicly available on all aspects of processes and interactions with the *Heritage Act* which provides certainty to affected parties about how the Heritage Council will deal with matters that arise and how the public should proceed in relation to heritage places in a way that is not provided in regard to the *Aboriginal Heritage Act*.
396. Consultees also raised issues surrounding the lack of clarity regarding information requirements or standards of the DPLH and ACHC, which is tied to reporting standards as discussed previously. Clarification of this will not necessarily alleviate the burden of assessments that are required to be made by the ACHC as there is no threshold of information that is required in the statute, meaning there is no lower cut off for assessment if there is a low level of information provided.
397. The main concern for the ACHC would more likely be the level and type of information required to assist an evaluation of importance and significance and if insufficient, s 5 would be evaluated not to apply. Even so, it would be of assistance for guidance to be provided on the ACHC's approach to this question to increase stakeholder knowledge, to assist assessment in the field on whether a feature of some type would be something to which s 5 would apply and to raise the quality of information provided to assist evaluation where required.
398. It is acknowledged that the DPLH has published a set of guidelines entitled 'Aboriginal Heritage Act 1972 Guidelines' dated to 2023. These guidelines are useful and should remain however they focus on the general operation of the *Aboriginal Heritage Act* rather than more technical guidance as to its properties and interpretation. Given the information provided to the Review by consultees, there is a clear need for more detailed and clarifying information and guidelines as to the application and operation of s 5 and the approach the DPLH and ACHC take to site verification, importance and significance to a level commensurate with the Heritage Council of WA as published by the DPLH.
399. As expressed previously, guidelines must be based on the statute and understood jurisprudence and not seek to apply *ultra vires* definitions as on previous occasions. Rather they should focus on providing information to stakeholders about the workings of the statute, the approach that may be taken by decision makers and provide commentary in the form of indicia that assist in evaluations such as that published by the Heritage Council. With the jurisprudence clear on these matters, this should enable workable and informative guidance to be developed.

400. As a result the Review recommends the following:

**Recommendation 12.**

In keeping with Recommendations 9 and 10, the DPLH develop and publish technical information, practice notes and guidelines surrounding:

- the application and operation of s 5 of the *Aboriginal Heritage Act*;
- the application and operation of s 17 of the *Aboriginal Heritage Act*;
- the manner in which evaluation of ‘importance and significance’ and ‘importance and special significance’ are approached through reference to the s 39 criteria and jurisprudence, including non-definitional criteria and indicia, in a similar manner to that provided by the WA Heritage Council; and,
- other technical information as needed or required by PBCs and proponents or as thought necessary by the Department.

401. Such information would serve to demystify processes and statutory application and assist in field assessments. This may in turn also serve to alleviate the administrative burden faced by the DPLH and the ACHC.

## 8.2) Section 18 Processes

402. With a precautionary approach taken by proponents, there looks to be an increased body of information submitted to the DPLH and ACHC that has been difficult to keep pace with, resulting in a backlog of decisions. The practical upshot of this is the DPLH and ACHC are unable to make preliminary evaluations of whether s 5 applies to a place or not and therefore whether it is capable of entry onto the sites register or should be subject to s 18 approvals processes. Instead, the DPLH record lodged sites which are those to which an assessment has not been undertaken which in the circumstances, is an appropriate action to take. In practice, these places need to be regarded as those to which s 5 applies until decided otherwise.

403. As a result of this and in light of the operation of s 17, proponents generally feel it necessary to lodge a s 18 application in areas subject to a heritage survey, even in the event of ambiguous finds, in order to force this assessment and to ensure works can proceed with the validation of the Regulator. The ACHC is then required to make this evaluation in the context of a s 18 permit, and if one is required, whether it should be approved and with what conditions. While this approach derisks work programs for proponents, one of the implications is that it is common for s 18 applications to be made even if it is ultimately decided a permit is not necessary due to an evaluation that s 5 does not apply.

404. As a consequence of this, the DPLH and the ACHC are overburdened. This occurs by proponents applying the precautionary approach and making s 18 applications, which in the event it is ultimately unnecessary, adds to the administrative burden on the DPLH and

ACHC, further contributes to the backlog of site assessment for registration which in turn contributes to s 18 applications and so on. The upshot of this is that the inability of the DPLH and the ACHC to overcome the site assessment backlog increases costs and time to the Department and proponents due to being required to engage in potentially unnecessary processes.

405. This is a long standing issue which is not necessarily a reflection on the ACHC or the section of the DPLH that deals with these matters. It is perhaps more a reflection on the statutory environment and possibly, Departmental resources or internal resource allocation. On this, there are very strong views from industry that a lack of Departmental resources are a significant issue in that it contributes to this backlog and in turn, the suite of issues currently experienced. This Review has not undertaken an examination of the resource allocation to or within the DPLH so is unable to form a view on this, however it would seem some consideration needs to occur on this issue as part of a subsidiary work program given the high impact and cost implications of these issues. As a result, the following is recommended:

**Recommendation 13.**

With a view to generating overall system improvement, conduct a functional review of the DPLH and ACHC resourcing, administrative, support and decision making arrangements in order to further understand and assist in addressing site assessment and s 18 backlog pressures and to improve process and decision making efficiency.

406. A further impact, reported by a significant number of proponents and confirmed by a number of native title parties, is that s 18 applications can cause disruptions in relationships with native title parties, which are difficult to accept when s 18 applications may be unnecessary in the first instance.
407. Many proponents operate under HPA terms in which consultation with or at least notice to native title parties is required prior to the lodgement of s 18 applications. Although proponents may be taking a precautionary approach to ensure they do not offend against the *Aboriginal Heritage Act*, Traditional Owners tend to form the view that the intention is to disturb or destroy a site, even if this is ultimately not the case. As reported to the Review, this can lead to tense discussion between parties that dampen or rupture relationships, on many occasions for no reason, and cause knock on effects which include withdrawals from cooperation, future HPA complexity and increased costs both in consultation, HPAs and heritage activities.
408. In a number of cases, native title parties seek consent provisions in regard to s 18 applications which many proponents will not agree to, as the proponent understands it may need to make s 18 applications simply for regulatory validation while disturbing places that are evaluated not to fall within s 5 of the *Aboriginal Heritage Act*. This tends to create insurmountable barriers for agreement making which brings with it all the down sides of not being able to reach terms on a HPA, or if agreement can be reached, add considerable

complexity and cost within an already difficult environment. Clearly, this is not simply an issue of Departmental decision making, it is one which has considerable and broad impact.

409. Issues such as that described above can also manifest within consultation processes. While not a requirement of the *Aboriginal Heritage Act*, as examined previously the terms of the Act don't displace common law procedural fairness, however this can be fulfilled in various ways. The DPLH has issued a 'Consultation policy for section 18 applications' to guide the approach of proponents, which is generally a useful guide however has elements of circularity. Issues arise when a consultation is prohibitively expensive or a native title party refuses to cooperate due to objections with a s 18 application, placing them in conflict with the proponent.
410. In these instances, proponents describe being caught in a loop between not being able to consult, and when issues are raised with DPLH on this, being advised to consult or asked for further information from the ACHC, and thereby being caught in what was often described to the Review as a non-decision loop. This is a difficult set of circumstances for each party. Clearly the Minister, ACHC and DPLH seek information from affected Aboriginal parties in the interest of procedural fairness but are confronted with the inability to garner this information.
411. The s 18 consultation policy alludes to a work around, highlighting possible consultation with people who are not a member of the native title group however while this may be appropriate in some circumstances, may cause issues for the State when the heritage values in question are squarely within the bailiwick of a native title party and form a component of the native title rights and interests. In other words, there may be compensation elements to disturbance of sites in a native title context due to permissions provided by the State, although this is uncertain.
412. Given the workload of the DPLH and ACHC, the rationale for making the proponent responsible for consultation is clear, although the Department and ACHC remain at liberty to seek further information from a proponent or Aboriginal party as they see fit. As submitted to the Review, frustration arises where a proponent is able to show genuine and consistent attempts to consult however has not been successful in fulfilling the information requirements of the DPLH due to views or actions of the Aboriginal party. In some instances provided to the Review, such actions were clearly vexatious and conducted with an eye to other outcomes which, generated significant operational difficulties.
413. As explored in a further section, this issue is not unique to this situation and emerges in other parts of Government. Clearly though, while decision makers need to engage in processes that support procedurally fair and legally durable decisions, this does not mean these processes should be open ended. Procedural fairness after all, is owed to all parties. As it stands though, there is little knowledge or guidance as to the thresholds the DPLH or ACHC will accept as adequate prior to accepting a s 18 application for recommendation and decision.
414. It is possible this is an issue of internal guidance to Departmental officers, the lack of which may generate low confidence in advice and decision making and in turn, excessive or repetitive requirements being placed on industry and native title parties alike. Officers should be supported in decision making and advisory functions. This occurs through the

articulation of clear decision making frameworks that take into consideration jurisprudence, administrative law, procedural fairness and which define clear thresholds for when a new or the next set of actions may be undertaken. This needs to be properly articulated within internal documentation and be supported by training in both the subject matter and administrative decision making.

415. Such frameworks should articulate thresholds for consultation and consultation effort, and where it is shown that best efforts have been undertaken in good faith, decision making can then occur. Ultimately, such frameworks provide officers with the ability to support procedurally fair, transparent and robust decision making and provide the confidence and support to do so. The absence of this on the other hand, is a driver of complexity and cost. As such, it is recommended that:

**Recommendation 14.**

Incorporating measures provided in legislation, jurisprudence, administrative law and procedural fairness, the DPLH review, update or finalise internal DPLH and ACHC decision making frameworks surrounding s 18 information and consultation requirements with an aim to developing a framework that supports robust and fair decision making. Such a framework should articulate necessary thresholds for consultation and consultation effort.

It is further recommended that officers and decision makers receive training to support the implementation of such a framework and to increase knowledge of procedural fairness within the *Aboriginal Heritage Act* context, in addition to requirements of administrative law and decision making.

416. In light of such action, further clarity may emerge in regard to the public facing information communicated in the s 18 consultation policy around consultation requirements, when decision makers will be satisfied with efforts taken and how this will be measured. Obviously, it is preferable for efforts to be successful however as mentioned, procedural fairness goes towards all parties and such thresholds should be communicated.

**Recommendation 15.**

In light of Recommendation 14, review and update the 'Consultation policy for s 18 applications' to incorporate measures arising from Recommendation 14 frameworks and to provide increased clarity and certainty of process to stakeholders.

### 8.3) New information provisions

417. During the course of the Review, proponents from a variety of sectors made strong representations in regard to the new information provisions incorporated into the *Aboriginal Heritage Act* in 2023. The reasons for these provisions are widely understood, given they would likely have been capable of modifying decision making and possibly preventing events such as the destruction of the Juukan Gorge site. It is however, felt to be poorly drafted which leaves these provisions open to being used vexatiously.
418. This is a significant claim regarding this provision. It is the case however, that a wide number of proponents independently reported similar issues, providing some weight. The issue arises following the conduct of surveys and the application and provision of s 18 permits where they are required. Based on this, proponents mobilise to conduct work programs, often undertaking significant mobilisation, when a further information report is made by the native title or another Aboriginal party. The new information report requires assessment, amounting effectively to a new s 18 process and finalisation by the Regulator and Minister. It also requires works to cease and mobilisation to stand down while this assessment occurs, often incurring significant cost.
419. Submissions from proponents included that on a number of occasions, there has been no substance to the reporting of new information and ultimately, no change to the advice or permit from the ACHC or Minister. In these cases, it is felt the new information reporting has been vexatious and made with the intent to cause inconvenience and expense to the proponent.
420. This speaks and contributes to the low level of trust between parties in addition to the generally negative broader environment in which these parties interact. These instances may also be a reflection of the relationship between the parties themselves. If this is poor, then the new information provisions provide an avenue for native title parties to express their frustration and exert power in a process they may otherwise feel disempowered within.
421. Perhaps a more significant issue here is that the instances in which these clauses may be being used vexatiously minimise or undermine those instances that are genuine and therefore have an overall negative effect on the management and protection of heritage. From a native title party point of view however, the new information provisions are felt to be a necessary measure to allow for new discovery post a s 18 approval and note that a s 18 approval and work program can be separated by a significant amount of time, in which new information can come to light. Misuse of the provisions undermine those instances where it is genuinely required.
422. It does seem clear however, that the provision is not well drafted, leaving open unintended consequences of the manner reported by proponents. Equally, it remains an important provision which allows needed flexibility in decision making, meaning it would be inadvisable to repeal or modify to the extent that creates dysfunction in the other direction. As such, resolution will need to be component of an overall balancing process in the manner expressed within this Review.
423. The Review provides no recommendation in regard to this issue and while it is a driver of cost, is beyond the scope of the Review to make recommendations on. Rather, it is noted as an issue and would highlight that some reconsideration of the new information

provisions or the processes surrounding should be taken. In doing so, care must be taken not to rework these provisions to the extent they are unworkable. The absence of these provisions has given rise to an event that has provided the impetus for the issues that are the subject of this Review to arise. Repeating this would only serve to amplify such issues and give rise to a new level of complexity.

## 9) Focus Area 5: State Government Consistency, Decision Making and Coordination

424. To this point, this reporting has focussed on setting out the issues that exist within specific statutory contexts and the heritage agreements and surveys that arise from them. This section focusses more on reporting issues communicated to the Review relating to the State, its decision making and the manner in which this drives cost and inefficiency.
425. During the course of consultation, a heavy emphasis was placed on issues surrounding approach and policy consistency across Government, in addition to the consistency or otherwise of Departmental decision making. This was a key issue with industry stakeholders in particular, given Government creates and administers the system in which approvals are applied for and granted. Native title parties also focussed heavily on Government leadership and decision making, and while the emphasis differed from that of industry parties and proponents, the effect of the issues raised was similar.

### 9.1) Consistency across Government

426. There are widely held views from industry that State coordination is poor leading to inconsistent advice between Departments and even between individual Departmental personnel. As a result of this, stakeholders reported it was not unusual for inconsistent and/or duplicative requirements to be placed on proponents by separate Departments on related matters, leading to the creation of separate processes for essentially the same matters.
427. From a proponent point of view, the effect of this lack of consistency is increased complexity, increased regulatory and administrative burdens, and increased time frames and costs due to the substantial inefficiencies that are contained within inconsistent approaches. Notably, native title parties also reported a strong sense of being overburdened by the variety of Government requirements, leading to increased expenditure and consultation fatigue. These requirements from different agencies are created for positive reasons, however a lack of coordination, the absence of an overarching process and a proliferation of requirements can have the effect of creating barriers to Government measures being successful.
428. As reported to the Review, this can in turn negatively impact relationships between proponents and native title parties who, viewing the impost on their time and resources as being overly burdensome and frustrating, tend to ascribe responsibility to the proponent rather than the Regulator.
429. Paradoxically, this was acknowledged as a difficult area of consideration for native title parties given that Traditional Owners seek to be aware of the activities that are taking place in their determination area. Even so, the proliferation of notices and consultation expectations from the State are reported by some to be counter productive, as either PBCs or Traditional Owners themselves are unable to keep pace with the multitude of varying Government asks and requirements.
430. The main areas discussed in the course of the Review were requirements and notices around future acts and in particular the expedited procedure, heritage matters, water

resources, environmental management and environmental impact assessment. As could be expected, each of these areas is managed by separate Government Departments, however even though there are strong interactions between these areas on the ground, there seems to be little harmonisation between Departments as to what is required of proponents and Traditional Owners. Rather, Departments appear to apply different standards and measures for similar or duplicated processes which serves to undermine the effectiveness of each of these processes.

431. During the course of consultations, native title parties commonly expressed the view that Government agencies and members of the public service generally have a low level of knowledge of native title, the nature of native title rights and interests, the *Native Title Act*, the various native title regulations and in particular the PBC regulations and the PBC environment in general, in addition to the manner in which this impacts on or interacts with each Departments remit. This would appear to compound the issues discussed in this section, highlighting the need for internal Government education processes for policy makers and administrators in an effort to generate a more harmonised approach.
432. In a sense, and as alluded to earlier, Government as a whole has not come to grips with native title and what it actually represents which is an issue that should be remedied. As a result of this and as a measure to support consistency, the following recommendation is made:

**Recommendation 16.**

- (a) Develop ongoing training to be delivered to relevant Government officers that provides a foundation in native title law, the *Native Title Act* (with a focus on future acts), *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth), PBC operations and the interaction of customary and Western law with its effects on PBC decision making.
- (b) All Government officers in roles that interact with, or make decisions affecting, native title parties and PBCs in particular, undertake this training as a component of supported professional development programs.

433. Such a measure mirrors that recommended in regard to industry in Recommendation 3, which is equally aimed at assisting proponents to come to grips with native title and its requirements.
434. One area of particular concern for proponents was the incorporation of social surroundings as defined in s 3 of the *Environmental Protection Act* into HPAs and by the State. This issue was also identified and discussed in the Vogel McFerran Review<sup>30</sup> and while a number of complexities were illustrated along with some cautions as to potential changes, to which this Review concurs, the limitations of the Environmental Protection Authority (**EPA**) and

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<sup>30</sup> Vogel P, McFerran D (2023). *Independent Review of Efficiency of Processes and Procedures of the WA Government's Environmental Approvals*, Streamline WA, p 32 – 33.

Department of Water and Environmental Regulation (**DWER**) in dealing with Aboriginal cultural heritage were noted.

435. The Vogel McFerran Review goes on to say that ‘there is clearly a need for better coordination across Government in relation to meeting different agency’s requirements for Traditional Owners/First Nations consultation. This should be a priority area for the Council of Regulators.’<sup>31</sup> This does not appear to have occurred given the prevalence of this and similar issues in the course of this Review. To this extent, this Review would endorse Recommendation 37 of the Vogel McFerran Review and underscore this as a priority.
436. Consistent with this, stakeholders from all sectors expressed the very strong views of the greater need for coordination across agencies. It was not uncommon for stakeholders from all sectors to hold the view there seems to be no overarching Government picture, characterised by a lack of cross Government thinking and a siloed approach leading to a greater administrative burden, higher costs, increased time for approvals and overly burdensome processes.
437. It seems likely that individual regulatory and Departmental requirements could be met with a coordinated and perhaps redesigned approach and reconsideration of State and PBC relationships and interactions. The development of a set of guiding principles that underpin an overarching co-ordinated strategy across Government will assist in the coordination and consistency of approaches across Government. This, in turn, will assist Government to work towards a whole of Government approach to increase consistency and efficiency while reducing duplication of process and requirements. This is further considered in 9.3.

## 9.2) Departmental decision making and decision making inconsistency

438. An extension of the issues outlined above, Departmental and Government decision making itself was a topic of heavy discussion. Proponents submitted that it appears that Departments are taking a very low risk approach and are hesitant to apply policy leadership, particularly following the repeal of the *Aboriginal Cultural Heritage Act (WA)*, which left a policy void and no doubt created hesitation to act. To be clear, this issue is not restricted to one particular Department, rather it is raised as a cross Government issue related to all Departments who oversee processes that require Aboriginal consultation, decision making or agreement making.
439. The submissions of proponents in particular are quite stark. There are widely held and strong views that there is a culture of risk aversion in which decision makers try avoid or worse, have abrogated decision making responsibility. This often leads to requests for more or further processes that are thought to be superfluous and often beyond statutory or regulatory requirements, which in turn generates a strong sense of confusion regarding the current state of policy and regulation and uncertainty about what actions may stand and what may not due to inconsistent or overly cautious processes. This conservative decision making environment, in addition to a lack of coordination, low level of policy or guideline clarity, adds to administrative burdens for all parties.

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<sup>31</sup> Ibid, p 33.

440. Perhaps the most significant issue to arise from this is the phenomena reported by a significant number of industry consultees of being caught in non-decision making loops, similar to that described previously. Information was provided to the Review outlining the circumstances in which this can occur, which is generally when native title parties engage in a way that stretches processes, seek that requirements already met are repeated (often a number of times), generating financial demands for consultation that are beyond the means of the proponent or simply disengage, which can occur for a variety of internal or external reasons.
441. When this occurs, which from information provided to the Review is not in isolated occurrences, proponents will return to the Department imposing the requirement for guidance however are then sent back to the same process, achieving the same results. This then results in further Departmental returns and being caught in what has been described as a non-decision making loop.
442. It is clear that a measure of reasonable effort must be taken before a Department should be satisfied that a proponent has genuinely endeavoured to fulfil requirements, however where a proponent has shown this, it is not unreasonable to expect that the Department concerned will be satisfied with efforts taken and provide guidance as to how a proponent may proceed. As it stands, this does not appear to be the routine outcome, increasing time frames and cost for approvals processes and, as some proponents would put it, conflating consultation with consent.
443. In some instances, industry consultees provided the Review with information showing requirements placed on proponents that go beyond the regulatory framework, either in the statutes a Department has carriage of or the future act provisions of the *Native Title Act*. In these instances, proponents have sought to fulfil these requirements due to sensitivity towards reputational or social licence issues should they not. It is difficult to contemplate however, that Departmental staff would be placing requirements onto proponents for matters that are not required by statute or regulation and which then place proponents in this non-decision loop.
444. There are a number of reasons as to why this may occur. In many respects, this comes from a place of good will from Departmental officers who are sensitive to contemporary expectations that traditional owner groups would be engaged in decision making for activities in their determination area or caution in regard to compliance with the *Native Title Act*. Unfortunately, this appears to be occurring in an environment with a low level of trust or inconsistent guidance as to what requirements may be and instead, overburdens all parties and generates inefficiency.
445. As mentioned this looks to be a cross Government issue and reflects a departure from a consistent Governmental approaches coupled with a lack of policy or guideline on Government thresholds for reasonable efforts, good faith engagement and consultation standards within regulatory frameworks. Decision making instead falls to officers who may lack adequate frameworks which incentivises overly cautious decision making based on risk mitigation to themselves and the Department. Ultimately, pressure builds within these systems and in turn creates political pressure in which decisions are deferred to the Minister or Government itself to mitigate risk to a Department. While this is not unusual in our system of Government, Departments and Departmental officers should be furnished with the tools to make balanced, timely and consistent decisions which are built on

procedurally fair and transparent processes via understood and robust frameworks across Government.

446. A component of this is a strong risk aversion on the part of Departmental officers to make reviewable decisions. This issue was also identified in the Vogel McFerran Review<sup>32</sup> in regard to the EPA and by extension DWER in which it was said that a common response to avoid difficult judgements was to request more and more information which in turn is to avoid appeal or judicial review, echoing what is termed here as the non-decision loop. This Department, alongside others, was identified in this Review as continuing this approach.
447. This issue is raised in the Vogel McFerran Review as a component of organisational culture, to which this Review agrees. The issues under examination here however are cross Government, which speaks to a broader issue, being the lack of a coherent or cohesive Government approach supported by strong frameworks to assist and provide support for officers and decision makers.
448. It can also be remarked, like in the Vogel McFerran Review, that in an environment where strong frameworks exist in support of decision makers, appeal and judicial review should not be feared. Currently, there would appear to be the view that should an officer make a decision that leads to judicial review, this will have a negative impact on that officer and their career, which leads to extremely conservative decision making and process paralysis.
449. While Judicial review should not be routine, it should also be viewed as a normal component of decision making and a cornerstone of our political system that leads to affirmation or refinement of interpretation of the law and process and, on occasion, necessary statutory change rather than a negative comment on an individual officer or decision maker. This is not to encourage cavalier decision making, but so long as an officer is able to make decisions that are procedurally fair, transparent and along the lines of understood frameworks, then it would be expected these decisions would be robust and stand up to scrutiny. As it stands, it would appear there is a low level of confidence that this is the case.
450. While these issues lead to increased complexities for both proponents and native title parties, it is beyond the scope of this Review to provide anything more than a general recommendation. It should be noted though, that this set of issues was the subject of strong representations by a large number of consultees who pinpointed this as a strong driver of cost and complexity in addition to overburdening PBCs. In light of this and the recommendations of the Vogel McFerran Review previously referred to, it is recommended:

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<sup>32</sup> *Ibid*, p 12.

**Recommendation 17.**

Alongside the measures set out in Recommendation 18, the State conduct a coordinated review across relevant Departments and Agencies of its requirements in regard to Aboriginal consultation measures in order to generate greater consistency of approach and reduce duplication. It is further recommended that administrative and decision making frameworks in this area of work are generated or improved on in order to provide support and confidence to decision makers and officers in their administrative and decision making functions.

### 9.3) Government Coordination

451. As a further component of the previous discussion, it seems reasonably clear in regard to the policy areas of native title, PBCs, consultation requirements, future act processes, interactions assorted interactions with the grant of mining title, that Departments, Agencies and utilities have to a large extent, been left to their own devices, leading to the variety of policy issues discussed across the breadth of this Review.
452. Industry made very strong submissions surrounding the need for Government leadership to resolve current issues, presenting a series of strong views surrounding the needs for clearer guidance on standards, processes and decision making in addition to consistency and coordination across portfolios.
453. There are also strong views on this topic from native title parties, with stakeholders from this sector presenting their view that there is a lack of reasonable mechanisms in native title and heritage management to provide confidence in a balanced system. Significantly, consultees from both sectors presented strong views that there is felt to be a relative absence of a coherent all of Government approach or direction to these matters and rather, an approach of issues containment rather than system improvement, which serves to compound the issues under consideration.
454. Based on information gathered during consultation, it is arguable there is no coherent cross Government policy, approach or narrative that properly considers and incorporates the relationships between native title, heritage management and administration, the grant and management of mining title (especially in regard to the expedited procedure), environment, water and the broader lens of Aboriginal affairs. It must be emphasised that this is not Aboriginal affairs in the way it has been previously perceived, this is within the more recently emerged context of the PBC sector.
455. It would be trite to suggest Departments don't engage in routine dialogue, however there seems to be no strong drivers from an all of Government perspective in these policy areas to harmonise approaches and address what has been described as the cascade of issues that current approaches give rise to, and neither does there seem to be the ability or mandate to provide this coordination. Instead, it would appear Departments are more focussed on managing or containing issues on an individual basis.
456. While this may seem advantageous from an individual agency perspective, it is clear this has enabled the present circumstances to emerge. Compounding this, in the absence of a strong cross Government approach or central coordination in regard to policy,

Departmental approaches have entrenched practice that look to be below reasonable standards, are sometimes overly burdensome for the Departments themselves, and in general generate an environment that is low trust, combative and difficult to work through.

457. In the view of the Review, there is a strong need for a more cohesive view of these policy areas and, given their interrelationships, a more coordinated management of them across Government. It is difficult to contemplate that agencies across Government would be managing native title and the associated heritage matters effectively separately. In doing so Departments are engaging in administration that creates excess process, bottlenecks and potential liabilities, and as a result, have effectively generated the environment that has been highlighted in much of this reporting.
458. It is clear there is a need for an all of Government view and narrative taking into account these interrelated issues and policy, and that this narrative should be coupled with a governance or agency mechanism with the imprimatur to oversee and properly coordinate policy and process reform. This would involve a more coordinated policy drive to facilitate the development of policy and practice across Government and to ensure a greater level of coordination is achieved. Such an approach would alleviate the significant pressures that a lack of coordination or lack of a whole of Government approach has given rise to.
459. In previous iterations of Government administration, there existed an Office of Native Title with a broad set of powers and influence across Government. It was perhaps due to the large amount of native title determinations in WA that its role was thought to be complete, leading to this Office being disbanded. As has been seen in the course of this Review however, it would be more accurate to say that the initial stages of native title have been completed, with its ongoing management and compensation matters becoming the clearer priorities.
460. As it currently stands, the DPC operates an Aboriginal Engagement and Policy Directorate in which sits the Future Acts Unit. It would be expected that such coordination would arise from this directorate or business units, although it is unclear which. The subject matter of this section refers to an all of Government narrative and approach which is centred on future acts but goes beyond this to other types of approvals and of course future acts related to Government's own activities, each of which interact with PBCs. At least before the Review, there isn't a clear picture of which entity possesses the cross-Government imprimatur to drive coordination, ensure the appropriate level of policy development and overcome any individual agency hesitation towards improved all of Government practice and approach.
461. The business unit that takes on such a task, whether it be existing or emerge as a result of needed reforms and activities, is ultimately the choice of Government. What is important in the context of this Review is that it is clear there is a need for an all of Government narrative, there is a need to overcome some considerable Government coordination and consistency issues and as such, there is a need for this to be conducted by an empowered and properly resourced business unit with cross-Government influence and authority. With this in mind, it is recommended that:

**Recommendation 18.**

Reframed in recognition of the PBC sector, Government initiate and implement a cross Government approach in regard to PBCs, native title, future acts, mining, environmental protection and regulation and other approval and regulatory areas as appropriate, with a view to building cross Government consistency and reducing duplication.

It is further recommended that Government build on existing or establish appropriate governance arrangements to provide cross Government coordination and policy direction in pursuit of this, and to ensure a cross Government approach is properly implemented.

462. It may be that a review of current arrangements is necessary, however this will be a decision to be made within Government.

## 9.4) Further Identified Policy Issues for Consideration

### 9.4.1) Tenement Parking

463. An issue raised by many native title party consultees was one of tenement parking. This refers to the practice by some proponents of applying for tenure but seeking to delay its grant due to various reasons such as cost, timing and strategic project reasons. A mechanism which can be leveraged to facilitate this is the negotiation process inherent in expedited procedure matters before the Tribunal which has a distortionary effect in expedited procedure processes. In many respects, this is the converse of the issue expressed by many industry consultees about the time it takes to have tenure granted and proceed with projects and is one which impacts upon the broader environment of HPA negotiation, effecting negotiation costs and process.
464. To further explain, due to the first-in-time nature of tenure grant prioritisation in WA, there is strong competition amongst proponents for land. Some proponents identify prospective areas of land that they wish to explore at a point in the future and lodge a tenement application in order to quarantine the land for themselves and prevent another proponent from securing it while not intending to proceed with activity on the tenure in the short term due to project priorities, financing issues, speculation and other such reasons. Additionally, tenure is not infrequently dealt with like real estate rather than for the purposes of exploration and mining and is secured with an intended purpose of on-selling rather than exploring.

#### *Abuse of Process*

465. In the Tribunal's expedited procedure objection processes, where the native title party and proponent indicate that they wish to negotiate an agreement, the Tribunal provides time and space for parties to progress their negotiations on the basis that it is a better outcome for all parties if a HPA can be reached. This is particularly so given the inquiry process for native title parties is resource intensive, and native title parties do not necessarily possess the resourcing to proceed to inquiry on all of their objections to the application of the expedited procedure.

466. As reported during consultations, proponents who are engaging in tenement parking use the process the Tribunal provides parties to try to reach agreement to delay the grant of the relevant tenure by drawing out negotiations in different ways with no intent for resolution. Some proponents fail to engage adequately or frequently with the native title party, not replying to attempts at contact by the native title party or the Tribunal through its case management processes until reaching a point where the matter is brought back before a Member or there is intervention by the DMPE threatening to commence refusal processes under s 111A of the *Mining Act 1978* (WA). Other proponents quibble over minor elements of a draft HPA over extended periods of time to ensure agreement won't be reached. All of these practices are designed to stretch out the process as long as possible in order to delay proceeding to grant of the tenure.
467. Usually, these proponents have no intention of reaching agreement with the native title party. Eventually when the Tribunal or the DMPE force the issue to a head, a request for the objection application to proceed through the Tribunal's inquiry process is made, resulting in further time to be expended, effectively reserving the ground against other exploration companies at little cost. This is ultimately an abuse of Tribunal and State processes and takes advantage of the Tribunal's reluctance to put native title parties to the time and expense of the inquiry process where a HPA may be reached given their generally poor financial situation or where a proponent is simply not engaging.
468. There is little the Tribunal can do to combat this practice. Under the *Native Title Act*, the Tribunal does not have the power to impose costs orders against any party to its proceedings which would generally be the case for abuse of process in other jurisdictions. Additionally, while the Tribunal has the power to dismiss an application on the basis of non-compliance with any of its directions, in expedited procedure objection applications, this penalty is only available against the native title party given it is the applicant.

#### *Native Title Party Views*

469. The views of native title party consultees in relation to this topic are varied. Some PBCs are ambivalent about the practice, with the view that while this delaying behaviour is occurring or there is no disturbance occurring to country. Other PBCs have very strong negative views, citing the impacts on their resources.
470. For native title parties, and PBCs in particular, this type of conduct consumes resources through their attempts to engage and negotiate with tenement parking proponents in a drawn out process. Given the resourcing constraints PBCs face, this is an unnecessary burden on limited resources and to cover losses, increases costs for other proponents in HPA negotiation and heritage administration.
471. Many PBC consultees were particularly critical of the role of the DMPE in tenement parking, given it is a stated aim of both Government and the DMPE to ensure the timely grant of mining tenure. DMPE faced heavy criticism from consultees for not holding proponents to account for tenement parking behaviour to the extent that in some instances, were perceived to support it. Consultees pointed out there are clear regular offenders who, they say, the DMPE make no real attempt to hold to account. As noted above, the Tribunal lacks the power to hold proponents accountable for delaying behaviour, this rests with the DMPE, who hold the ability to make recommendations to the Minister to refuse the grant of mining tenure on public interest grounds under s 111A of the *Mining Act*.

472. A number of PBC consultees pointed out the apparent reluctance of the DMPE to hold tenement parking proponents to account in Tribunal proceedings, despite having the power to do so. It is often the proposed DMPE solution that where a proponent is engaging in clear delaying behaviour, the Tribunal should set directions for inquiry, despite this having no real impact on a proponent intent on tenement parking. It is generally the case that such proponents fail to take the effort to lodge materials into an inquiry while significant resource impacts are felt by the native title party. In general, there was a significant view expressed by consultees that the burden is again placed onto native title parties even though the aims of the proponent are clear.
473. This seems anathema to the timely grant of tenure and as mentioned, creates a negative distortion within HPA negotiation and heritage administration processes for native title parties and other proponents who are engaging in best efforts. In short, it decreases trust, contributes to the overall negative environment and increases costs for the majority of proponents who are not engaged in this practice.
474. Despite this having negative implications across the board, it is difficult to make a recommendation given likely solutions simply push the issue onto PBCs and their resources. The recommendation expressed by PBC consultees was for the DMPE to monitor the behaviour of proponents in expedited procedure processes and proactively take action to address and discourage tenement parking by proponents through the use of their powers under the *Mining Act 1978 (WA)*. PBC consultees were clear in their wishes for the DMPE to not wait for the native title party or Tribunal to push them to act on proponent non-participation but for the DMPE to take an active role as a party in the proceedings and as a Regulator to support agreement-making.
475. Rather than make a direct recommendation however, it is the view of this Review that the establishment of minimum requirements to be applied to the tenure upon grant would either reduce objections or reduce HPA negotiation pressures, thereby reducing or eliminating the opportunity for proponents to use Tribunal processes for tenement parking processes. This issue then, reinforces the need for the measures set out in section 12.

#### 9.4.2) Excess Tonnage

476. An issue which also gained significant attention from native title parties during the course of the Review was that of excess tonnage applications for tenure to which the expedited procedure has been applied. Under the *Mining Regulations 1981 (WA)*, prospecting, exploration and retention licences and under the *Mining Act* for special prospecting licences, all have tonnage limits on extraction as follows<sup>33</sup>:

Tenement	Tonnage
Prospecting Licence	500 tonnes
Special Prospecting Licence	500 tonnes
Exploration Licence	1,000 tonnes
Retention Licence	1,000 tonnes

<sup>33</sup> See s 56A *Mining Act 1978 (WA)* and regs 14, 20 and 23G *Mining Regulations 1981 (WA)*.

477. Should a proponent wish to extract more than the allowed tonnage limit for their tenement, approval by the Minister or their delegate is required<sup>34</sup>. In practice, this looks to require an application to the DMPE, which considers and determines approval for these applications as the delegate of the Minister.
478. The determination of whether to grant the application is made by assessment of the location of the activities, the activities proposed, the volume of excess tonnage requested and the justification that the proposed activities and tonnage is for exploration or prospecting purposes<sup>35</sup>. There is no requirement to for the proponent to consult with the affected native title party unless the cumulative amount of the application or applications is for 10,000 tonnes or more after which the excess tonnage guidelines stipulate there is a requirement to have the agreement of the native title party. This seems an arbitrary limit which implies a type of right to negotiate applies when it is exceeded. There do not appear to be any limits to the amount of excess tonnage that can be applied for or how many applications can be made over the life of a tenement.
479. Given the strong submissions made on this topic, the Review thought it necessary to understand the factual basis upon which it was made. To this end, a request was made for the provision of statistics from the DMPE via the DPC regarding the numbers of excess tonnage permits granted per year, levels of excess tonnage applied for, regions of applications and tenement type to which the applications applied to assist this Review. The DMPE declined to provide this information.
480. In any event, given the types of tenure to which excess tonnage permits apply and the State's approach to the application of the expedited procedure, the tenure most likely to be subject to excess tonnage applications are those to which expedited procedure has been applied, in which, as has been explored, there are no obligations towards native title parties upon grant of tenure.

#### *Impact of Excess Tonnage Permits on Land*

481. While the initial tonnage limits are considered by DMPE to be low impact, justifying the application of the expedited procedure, the view expressed by a number of native title parties was that an additional 500 tonnes or more from an area the size of a prospecting licence in particular, is no longer low impact. Additional tonnage up to 10,000 tonnes therefore, represents a significant impact on the land, however DMPE policy does not require consultation with the affected native title party as excess tonnage permits are not notified pursuant to s 29 of the *Native Title Act*.
482. From the perspective of native title party consultees, the lack of consultation requirements for excess tonnage permits up to 10,000 tonnes is highly problematic given the impact on country. This also leads to the view that excess tonnage permits allow proponents, prospectors in particular, to change the nature of their operations into small mines and in doing so, avoid the regulatory engagement processes that would be attached to such activities were they the subject of the right to negotiate procedures pursuant to the *Native Title Act*.

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<sup>34</sup> See ss 48(c), 56A(6)(d), 66(c), 70(6)(d), 70J(c) and 85B(3)(d) *Mining Act 1978* (WA).

<sup>35</sup> See DMPE's Excess Tonnage Guideline: <https://www.wa.gov.au/media/126949/download?inline>.

483. Given the application of the expedited procedure to the vast majority of tenure subject to excess tonnage permit applications, there is often no underlying agreement between the proponent and the native title party that would ensure processes to protect the underlying native title rights and interests. Native title party consultees confirmed that the only way excess tonnage permits are known about is when they come across the work on those areas of tenure in the field. This is a concerning issue given the administration of the expedited procedure in WA provides no underlying safeguards for native title rights and interests.
484. As noted elsewhere in this Report, native title parties often lodge objections as the only way to bring proponents to the table to negotiate an agreement to protect native title rights and interests where the expedited procedure applies. This remains the case even in relation to the lower levels of activity initially permitted for prospecting licences, as native title parties are aware of the risk of application for excess tonnage permits following grant of their tenure. For native title parties, this is the only way they can seek some form of protection given the lack of consultation requirements by DMPE for excess tonnage permits.

#### *Risks to the State of Western Australia*

485. It has become apparent during the course of the Review that this issue is a further source of mistrust towards the State. This is due to perceptions that the State, through DMPE, is using the expedited procedure in addition to the well known resource constraints of native title parties, to circumvent native title rights and interests in support of the development of small mining operations.
486. Unfortunately, it may also be the case that the current approach to excess tonnage permits by DMPE has the potential to create significant risks for the State, the first being that of compensation. As discussed, the issue of compensation in relation to future acts has not yet been settled by the Federal and High Courts, however guidance will emerge as a result of the Yindjibarndi People's compensation claim against the State of Western Australia and Fortescue Metals Group Ltd in the coming years.
487. Whatever the outcome, it is likely that as a result of the decision there will be some level of compensation liability to the State caused by excess tonnage permits, although any estimation of quantum would be speculative at this point. Even if the State seeks to pass liability on to proponents, whether this succeeds depends on the relevant proponents still existing (either corporately or personally) and having the means to meet that obligation. Potential liabilities for the State then, are of concern.
488. A further significant risk to the State is in relation to whether excess tonnage permits should be notified under s 29 of the *Native Title Act*. As it stands, the State currently holds that excess tonnage is a right created by the grant of the title, so the application for and grant of excess tonnage does not change the nature of the future act. The alternate view is that, while the future act provides a right to apply, it does not provide an inherent right to excess tonnage so must be notified. It seems likely that native title parties will seek to litigate this question. If the latter view prevails, such a decision would likely render all excess tonnage permits issued without notification as invalid future acts. This in turn, complicates the already vexing question of compensation for the State.

489. Native title parties have submitted that there is a strong argument to be made that excess tonnage permits should be notified pursuant to s 29 of the *Native Title Act*. Prospecting, special prospecting, exploration and retention licences are currently all notified under s 29 of the *Native Title Act* as they involve the creation of a right to mine, which makes them subject to Subdivision P of the *Native Title Act* and the right to negotiate processes therein<sup>36</sup>. All of these types of tenure have inherent tonnage limitations by their creating statute however access to additional tonnage amounts is not an inherent right as this can only be granted upon application to the Minister or their delegate.
490. Nowhere in the *Mining Act* or the *Mining Regulations* is there an obligation upon the Minister or their delegate to grant excess tonnage, which is exemplified in DMPE's Excess Tonnage Guidelines which discuss the consideration and determination process for such applications. It has therefore been submitted to this Review that any application for excess tonnage is an application to vary the underlying permit and is therefore a variation of the original future act. Section 226(2)(b) of the *Native Title Act* defines the variation of any interest in relation to land or waters as an "act" under the *Native Title Act* and in this context is a "future act" pursuant to s 233 of that Act. Further, if it is the case that excess tonnage permits change the nature of the underlying future act, this also erodes the basis upon which the expedited procedure was initially applied.
491. There is perhaps a parallel with the renewal of a valid mining lease or other mineral licence on terms which create new rights in relation to the tenure that were not created in relation to the earlier tenure. In that situation, s 26D of the *Native Title Act* is clear that such a situation would require notification of the renewal due to creation of the new rights. The argument presented to the Review is that the situation created by excess tonnage permits differs little from this in that excess tonnage is not a right that was created at the grant of the licence, the right is only created upon the grant of the permit by the Minister or their delegate after the grant of the licence and therefore is a variation of the original licence. It is in this light that it may be inferred that the grant of an excess tonnage permit is a future act that requires notification under s 29 of the *Native Title Act*.
492. One of the main rationales behind Subdivision P of the NTA and the right to negotiate is to provide the highest level of rights to native title parties to protect their native title rights and interests in the face of activities deemed to have the highest level of impact on those rights – i.e. the creation of a right to mine. These sentiments are reflected in the preamble of the *Native Title Act* as well as subsequent Court and Tribunal decisions. The current manner in which DMPE administers the expedited procedure and excess tonnage permits may circumvent the protections offered by the *Native Title Act* to native title parties and the right to negotiate, potentially opening the State to an unquantified compensation liability in addition to a number of invalid future acts.

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<sup>36</sup> S 26(1)(c)(i) NTA.

493. Strong indications were provided by several native title parties that litigation on this matter was either being contemplated or prepared for. While the correct approach will ultimately be decided by the Courts, should such action be made, there are considerable risks for the State and proponents should it be decided that excess tonnage permits are required to be notified. Given this, it is the following recommendation is made:

**Recommendation 19.**

The State reviews its approach to excess tonnage and excess tonnage applications to ensure it is in compliance with the *Native Title Act*.

## 10) Focus Area 6: Consultants

494. The issue of consultants in native title and heritage matters was one that featured prominently amongst consultees, particularly amongst smaller industry proponents. It is clearly a vexed issue that has multiple components and significant impact for industry and native title parties.
495. The term “consultants” covers a range of people involved in native title and heritage processes outside of the proponents, native title parties and Government. Consultants in this space can include heritage professionals such as archaeologists and anthropologists but also legal practitioners, external tenement managers and environmental consultants. There are also companies that offer a holistic range of services to PBCs to assist with future acts and heritage work, including legal services, anthropology, archaeology, environmental advice and co-ordination/logistical services for surveys. In effect, consultants can be considered to be anyone outside of the parties and their employees who are hired to provide services to assist the parties in aspects of native title, heritage and other related processes.

### 10.1) Consultant Capture

496. The issue of the role of consultants and the influence they exert over PBCs was a strong theme during the consultation process with industry participants and in particular, the issues of “consultant capture”. Consultant capture refers to the situation where a consultant holds the ear of a PBC to the exclusion of other advice or voices. Industry consultees frequently reported instances of unethical practice by some consultants who hold influence in affected PBCs through the preferential treatment of people of influence on boards or within the native title group. This phenomenon, while not ubiquitous, was reported commonly enough to be a cause for concern as it has impacts at various levels for PBCs and proponents.
497. What became clear during the consultation process is the vulnerability of newer PBCs to this phenomenon. Newer and under-resourced PBCs generally lack the knowledge, staff and resources to deal with the volume and complexity of work coming from mining and exploration activities. In order to deal with this, such PBCs are likely to bring in external consultants to assist, however without the necessary knowledge and experience, PBC boards are more likely to place heavier reliance on these consultants. Unfortunately this makes them vulnerable to those that act in their own interest through seeking to derive income from services that may be unnecessary and potentially behave in unethical and problematic ways without likelihood of challenge from the PBC board. During consultations, a number of PBCs also reported they had become victim of what they described as predatory consultants, which had a strong negative impact on the function of their organisation and on relationships with Traditional Owners and external parties.
498. Mature, experienced and well-funded PBCs are the least likely to fall victim to such consultants, having the knowledge, skills and experience internally to not require such levels of assistance. Experienced, mature PBC boards with strong internal procedures are also able to exert better oversight of any consultants contracted to assist. Even so, some

of these PBC consultees also reported their concerns regarding the activities of predatory consultants in the sector.

499. To be clear, there is a large body of consultants of all types who act ethically and in the interests of their clients. These consultants are committed to assisting PBCs to build capacity and capability, provide balanced advice and as noted by consultees, act as mediators between parties rather than gatekeepers.

## 10.2) Impact on Costs

500. One impact of consultant capture is the manner in which the functions of a PBC are outsourced and mirrored, requiring proponents to engage directly with the consultant for decisions rather than the consultant facilitating a process with a PBC. By inducing the PBC to delegate its functions, a consultant is able to bill its fees for those services to proponents and harvest income from those activities.
501. It was submitted to the Review that in the event a consultant is not acting ethically or in the interest of their client, a disincentive to reach agreement is created given fees are derived from ongoing negotiation processes and where proponents have funding agreements with the PBC. Even in expedited procedure matters, many proponents are willing to provide a level of funding for negotiations to facilitate the reaching of agreement and grant of the tenure, however many advised that the costs charged by predatory consultants were excessively high and often created barriers to reaching agreement with PBCs.
502. Other reports are made of consultants inserting themselves into agreements between proponents and PBCs in order to create ongoing fee for service opportunities for themselves, amongst other exploitative practices. This brings forward an issue of conflict of interest between the consultant and the PBC. Where the consultant and their fees become an issue in negotiations with a proponent, the question arises as to whose interests the consultant is serving. There is a strong argument to be made that where a consultant's fees are the only issue impeding the reaching of agreement between the proponent and the PBC, or where the consultant has inserted themselves into the agreement, the consultant is serving their own interests rather than that of the PBC.
503. For those consultants who are legal practitioners, this is highly problematic and becomes a question as to whether there is a breach of legal practice standards. The legal profession is highly regulated and this issue could be dealt with by the Legal Practice Board of Western Australia. For other consultants, there do not appear to be the same enforcement bodies that can take action. What is clear is that consultants have a duty of care to act in the best interests of their clients. Where a consultant engages in behaviour that brings a conflict between their own interests and that of their client, equitable principles would dictate action must be taken to remove that conflict.
504. While the above concerns relate to representatives of native title parties, one of the most significant sources of concern for industry is the costs associated with conducting heritage and other surveys. Proponents frequently reported consultant costs to be excessive compared to costs where those services were provided by PBCs directly, and as reflected in the AMEC survey submitted to the Review, consultant costs far outweigh PBC and traditional owner costs on heritage surveys. Other proponents reported concerning behaviour by consultants that leveraged tight time frames in some projects to extract the

maximum amount of fees from the proponent while in other instances, consultants had issued correspondence on behalf of PBCs to proponents increasing fees, despite there being agreements in place between the proponents and the PBC.

505. While the place of external advisors is understood, a number of industry consultees advised their discomfort with large fees being paid to consultants with little, if any, money flowing to the PBCs or Traditional Owners. The vast majority of industry consultees expressed support for benefits flowing to PBCs and Traditional Owners from their projects, particularly where it would assist in building PBC capacity and improving communities. Many proponents reported little of the funds provided for heritage and other surveys going to PBCs or Traditional Owners where those surveys were organised and run by external consultants. These concerns were also expressed by a number of PBCs.
506. Other industry consultees reported a lack of choice for archaeologists and anthropologists on surveys, with some being required to use those provided by the consultant company. Proponents advised that this lack of choice led to a monopoly occurring with inflationary impacts on fees charged. This was contrasted to the situation where an agreed panel of archaeologists and anthropologists could be chosen from, which regulated the levels of fees charged and allowed a choice of preferred service provider based on cost, skill and delivery.
507. It is worth recalling there are also other pressures in this field. A peak professional body consulted submitted that it is reasonable for suitably qualified and experienced archaeologists and anthropologists to charge fees that reflect their level of skill and experience. They advised that work in these professions requires significant time spent in remote locations in difficult environmental conditions, away from families. Not only is this something that impacts on the longevity of people continuing this field of work, but it is also reflected in the fees charged. These are reasonable matters to take into consideration in relation to the costs of suitably qualified consultants in this type of work. The peak professional body also spoke of proponents needing to consider appropriate scopes of work for surveys to ensure they are best suited to what is required, as discussed previously, with this being a source of disputation between parties in the event of work program changes.

### 10.3) Blocks to Building Relationships

508. Industry consultees report some consultants blocking the formation of relationships between proponents, PBC boards and Traditional Owners, making it difficult to build trust and understanding. Proponents often expressed a sincere wish to build good and lasting relationships with Traditional Owners, with a strongly expressed desire to see the benefits of their projects flowing to communities and building capacity within PBCs, however many expressed a view that consultants act as gatekeepers to PBC boards and they are unsure if the views being communicated to them by consultants are the views of the board or the consultants.
509. It is clear that some consultants place barriers between PBC boards and Traditional Owners. As previously alluded to, unethical practices that some consultants employ to embed themselves in PBCs involve favouring influential people within PBCs and their boards with things like preference for surveys, flows of benefits and other such inducements. Practices such as these cause division within PBC boards as well as conflict

with membership. This challenges the stability of PBCs and can lead to harmful internal conflict and division. Unfortunately, this ultimately impacts on the ability of PBCs to deal with matters brought by proponents through the erosion of internal capability within the PBC or slowing development in the case of new PBCs.

510. Issues also arise in those situations where a consultant places themselves in a monopoly position to deliver services on behalf of a PBC. In this situation a proponent is denied the opportunity to seek alternative or complimentary consultants, either of their own choice or by mutual agreement with the PBC. In these situations, proponents report some consultants souring relationships between the proponent and the PBC, which then leads to delay and increased costs, often in favour of that consultant. Some proponents noted that where they previously had a good relationship with a PBC, this then changed once new consultants were engaged by the PBC.
511. Some native title party consultees also reported similar concerns regarding such consultants, however were at pains to point out that they should be able to retain the consultants they trust and don't want ethical consultants to be cast in the same light as unethical or predatory consultants. It was further submitted that it was not unusual for proponent issues to be raised even when a consultant is operating ethically and under instruction from PBCs. On these occasions, it was put to the Review that proponent approach or inflexibility is a greater issue than consultant conduct. Even so, there are clearly issues that require some focus and unfortunately, this is a suite of issues that have existed in native title for some considerable time.

#### 10.4) Impact on Quality of Heritage Work and Reporting

512. There is general agreement amongst industry and native title party consultees that there is an issue with the standard of work produced by some heritage consultants and that it has been too easy for low quality heritage professionals to be operating in Western Australia.
513. Industry and native title party consultees reported significant issues with the quality of surveys and reports conducted by some heritage consultants. Both pointed to a lack of experienced anthropologists and archaeologists available with too many inexperienced consultants conducting surveys resulting in reporting that is insufficient, leading to a requirement for further work.
514. It is a well-known issue across Australia that there is a lack of experienced archaeologists and anthropologists, with an insufficient number of graduates coming through and working with experienced professionals to gain the relevant knowledge and experience to replace those who are retiring from the sector. There is also an issue with graduate anthropologists and archaeologists being recruited by industry directly from university and placed into senior roles, resulting in a lack of graduates gaining field experience and knowledge with seasoned and experienced mentors. One peak professional body consulted during the consultation process advised that there is also a significant problem within WA of poor quality practitioners operating in the heritage space, sometimes with no formal qualifications in the field, with no recourse or way to regulate them.
515. Some of the issues pointed to by industry consultees with heritage work completed by some consultants include:

- poor quality reporting and data from surveys leading to the need for resurveying;
  - lack of participants with suitable knowledge and qualifications leading to inconsistent outcomes from surveys;
  - heavy redactions from survey reports, impacting the ability to understand or verify survey outcomes and recommendations;
  - inconsistent outcomes and conflicting reports in the same or similar areas of land;
  - areas being flagged as sites when further investigation reveals they are not; and
  - disputes between consultants and Traditional Owners as to what are sites and what are not.
516. For proponents, heritage and other surveys are required for all manner of applications and approvals across heritage, environment, and other regulatory spaces. Poor quality heritage work has negative impacts on proponents, PBCs and Traditional Owners. For proponents, poor quality heritage reports are of little use in assisting project planning and can lead to increased disputes with PBCs. A lack of quality data impacts the ability of proponents to understand what is located in the project area and where they can carry out activities. This can lead to the need for resurveying and further expenditure.
517. Both industry and native title party consultees also agreed that there are no standards applied to heritage reporting, resulting in a wide range of quality between various heritage consultants and disputes between proponents and PBCs on reporting that arises from heritage surveys. There is consensus between industry and native title party consultees regarding the need to apply standards or publish guidance as to appropriate reporting standards. Such standards will need to consider and incorporate measures to protect culturally sensitive and restricted information that may need to be redacted from the report due to cultural protocols or sensitivity.
518. It is the case that cultural information provided by Traditional Owners during heritage surveys to heritage consultants will be subject to cultural protocols. Such information also remains the intellectual property of the native title party, with it being at their discretion as to what they choose to release to proponents. This is in many ways no different to sensitive commercial information that proponents hold and their right to choose what to disclose within the bounds of the law. Strong guidance on this is required in any reporting standards or guidelines produced (see Recommendation 10).

## 10.5) Standards and Regulation of Consultants

519. There is a broad consensus between industry and native title party consultees regarding the need for regulation of consultants and the setting of standards as part of that regulation, although views as to what that should look like vary between consultees. There will also need to be differing standards depending on the type of consultant in question.
520. Legal practitioners are already subject to restrictions as to who may practice and the standards to which they must adhere. There is an existing system of registration and requirements for training of junior lawyers as well as continuous professional development for all legal practitioners as well as complaints and disciplinary processes and sanctions for those who do not meet the requisite professional standards through the Legal Practice Board of Western Australia. These rules and processes have the force of law through the *Legal Profession Uniform Law (WA)* and the *Legal Profession Uniform Law Application Act*

2022 (WA). Severe enough breaches of the rules and standards can result in a legal practitioner losing their ability to practice law for a period of time or even permanently. There are no such measures however, for non-legal practitioners who fulfil a representative role or provide advisory services for PBCs.

521. Archaeologists and anthropologists both have peak bodies that have vetting processes and standards for membership, however there is no regulation of who can work in those professions or disciplinary mechanisms and sanctions for bad actors or poor standards of work. There also do not appear to be any requirements around continuing professional development for those outside the membership of peak professional bodies. All consultees agree that poor standard consultants tarnish the reputation of others in their fields and there is a need for a system to regulate and apply standards. For proponents and PBCs, it is difficult to verify the qualifications and experience of archaeologists and anthropologists who are not members of their peak organisations.
522. There is a general consensus amongst consultees that there should be some form of accreditation for consultants which should be tailored to their area of service. The logical conclusion would be for Government to work with peak professional organisations for anthropologists and archaeologists to work on an accreditation process and a set of standards that these professionals must adhere to in order to remain accredited. While legal practitioner regulation has the force of law supporting it, new statutory measures for other professions may not be something that is the focus of Government at this time.
523. Industry consultees were keen to put forward the concept of a Government accredited panel of heritage consultants. Such a panel would require the development of accreditation processes for the different professions included in the panel, such as anthropologists and archaeologists. Any accreditation process for such professions should be developed in concert with the peak professional organisations for those professions to ensure the process is reflective of best practice standards and is appropriately tailored to each profession's unique practice area. To not do so risks undermining faith in the accreditation process, may interfere with proper practice and risks a lack of uptake of any accreditation from those within those professions.
524. A note of caution should also be made regarding impediment to PBCs selecting heritage consultants of their preference and the development of an accreditation process. The nature of the cultural information to which heritage consultants are often privy as well as their position of providing advice to PBCs means they occupy a position of trust with PBCs and Traditional Owners. In order for heritage consultants to undertake their work properly, they must be people PBCs and Traditional Owners trust. Without such trust the heritage work needing to be completed to progress mining and exploration projects cannot proceed effectively. Therefore, any accreditation process development must include a level of co-design with PBCs as much as it should include the views of industry. PBCs must trust the accreditation process for it to work and be of any benefit to PBCs, industry and Government.
525. The issues outlined in this section are long standing in the native title sector, and following the determination of native title claims, are closely related to PBC capacity. This has been exacerbated by the absence of a systematic approach to support the development of PBCs despite their very apparent significance in contemporary legal, approvals and community settings.

526. Because of the variety of consultant types, it is unlikely that regulation would be of any real effectiveness. In the absence of overarching PBC bodies however, there is a role to play for Government in the establishment and promotion of standards and ethical practices for consultants and advisors of PBCs and native title groups.
527. In the first instance, it is thought there would be value for Government, in consultation with native title parties, possibly through the dialogue proposed at Recommendations 4 or 7, to generate a code of ethics, conduct and practice for consultants or advisors of any type who work with or seek to work with PBCs and native title parties. Commitment to this would serve as an accreditation or certification.
528. Such a code would be envisaged to be voluntary, acting as a mark of quality assurance on the part of the consultant. Its effectiveness would rest in an increased ability for a consultant to gain clientele due to quality assurance or otherwise, as an indicator for PBCs to find alternatives in the event a practitioner or firm has not committed to it.
529. In the absence of existing structures and in order to establish such an initiative, a code such as this would likely be required to be administered by Government within an appropriate Department. Appropriate requirements would also need to be put in place in order for a consultant to be able to gain certification and to show they have volunteered to abide by it in addition to mechanisms to investigate alleged breaches and remove certification where appropriate. Measures would also need to be built in for ongoing renewal and professional development in the area of certification, although a formal points based professional development system is not proposed.
530. A certification such as this would have significant utility for PBCs, particularly for those who are new or emerging. Currently, consultants simply pitch to these organisations for work with no real ability for PBCs to test or verify whether a consultant is committed to ethical practice and conduct. A certification of the type proposed would also enable the field of those being selected for work to be narrowed to those who have taken the effort to become certified. To that end, it is recommended that:

**Recommendation 20.**

The State, in consultation with PBCs and professional and industry bodies as appropriate, develop and implement a code of conduct, ethics and practice for consultants and advisors of all types, who seek to or are working with the PBC sector. It is further recommended that voluntary entry to this code act as a certification program to be administered by the State within the appropriate Department, and provisions are made for entry and decertification.

531. It could be the case that such a measure brings to light the need for regulation. As this point however, given the early stage of development of this area, this will be a useful place to commence.
532. As highlighted, there are a further set of issues in regard to archaeological and anthropological consultants surrounding conduct, work quality and reporting. While these

professions have professional bodies who apply standards, membership or otherwise has limited impact on individual or firms ongoing ability to operate in the field.

533. These professional bodies have expressed a strong desire to work with Government to implement appropriate standards, however report they have gained little traction. Considering standards around these professions has been a considerable topic of discussion within this process from all sectors, including Government, it would seem useful for this engagement to now commence, with an aim to establishing professional and reporting standards. Given the previous sections relating to reporting standards and Recommendation 10, such an engagement would seem likely to alleviate a number of issues identified in this reporting.
534. The style of outcome would be determined by discussion, so in this instance a higher level recommendation is made. That is, it is recommended that:

**Recommendation 21.**

The State engage with archaeological and anthropological peak bodies in WA, and in consultation with PBCs and industry as appropriate, to develop and implement professional standards concerning conduct and activity in regard to these professions and for consultants who conduct activity in the Aboriginal heritage field.

535. As in previously, a framework such as this would also be of great utility for PBCs and industry and would be expected to raise standards in the sector across the board. Even so, it should be noted that these are effectively preliminary measures and although these issues are long standing within the sphere of native title, little effort has been taken to address them.
536. It could be expected that with increased and organised dialogue between Government, industry and PBC sectors in the manner recommended in this reporting, in addition to the recommendations made in this section, that a series of further issues will be made apparent that have not been able to be addressed in this Review on this topic. This being the case, continued attention will be needed in this area, with further Government leadership and work programs likely required in order to overcome both long standing and newly emergent issues.

## 11) Focus Area 7: PBC Capacity and Capability

537. A common theme of discussion amongst both industry consultees and native title parties during the course of the Review was the impact PBC capacity and capability has on mineral explorations and mining in Western Australia. Industry consultees often pointed out the willingness of PBCs to engage with them but the inability of PBCs to do so due to capacity and capability constraints. As noted earlier in this Report, this has significant impact on the ability of PBCs to negotiate agreements, undertake consultations in regard to statutory processes and engage in heritage protection work with proponents and is a driver of both time and cost pressures.
538. While PBC funding is an often-cited issue by industry and some PBCs, it became apparent during the Review that funding is not the only issue affecting the ability of many PBCs to deal with the volume of work coming to them. These complex issues are explored further in this section.

### 11.1) Resourcing

#### 11.1.1) The PBC Operating Environment

539. There is consensus between consultees across industry and native title parties that funding for, and capacity of, PBCs is highly constrained. The Commonwealth currently provides a limited amount of funding to PBCs through the National Indigenous Australians Agency (NIAA) to support basic operations and functions however on average, basic support funding provides between \$50,000 and \$80,000 per annum to PBCs for basic administration and compliance activities<sup>37</sup>. Further support for other activities such as strategic planning and development must be accessed by PBCs applying for funding via the NIAA's PBC Capacity Building grant funding.
540. Additional resources must be accessed through disparate State and Federal grant programs for operations, requiring PBCs to have the skill, time and resources to be able to draft the required applications and manage the various grant processes. While some established PBCs may have the knowledge, skills and resources to undertake this, small, new or inexperienced PBCs who are in most need of this funding, often lack the requisite ability. As a result of this, many PBCs operate on the most basic of budgets with limited assets and income streams.
541. While there are notable exceptions, many, if not most PBCs, operate on a largely voluntary basis as the support funding available barely covers basic governance functions. Many PBC directors are unpaid and serve in their roles on a voluntary basis. When these directors are required to attend board meetings and deal with PBC business, they must take time away from their regular employment other responsibilities, knowing there will likely be little or no recompense for their time or endeavours. This naturally limits the amount of board meetings PBCs can have, which in turn slows the rate at which matters can be dealt with. Several industry consultees noted the difficulty of getting sufficient (or sometimes any)

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<sup>37</sup> [Capacity building for native title corporations | NIAA](#)

time with PBC boards to discuss projects, progress negotiations and engage in appropriate consultation.

542. While some PBCs operate with a strong financial position due to higher levels of future act activity and long term agreements with bigger proponents, most PBCs across the state do not have access to such resources. Even those PBCs with significant agreements point out that the compensation paid under those agreements to be for the benefit of Traditional Owners not PBCs, so this doesn't necessarily resolve the issue of funding for PBC operations and activities.
543. The poor resource environment of PBCs also affects their ability to attract and retain talented staff. Workloads for PBC staff are high due to the role of PBCs in relation to mining and exploration activities with minimal funding limiting staff numbers and remuneration as well as limiting opportunities to provide training and development.
544. Workloads, particularly in relation to future acts and heritage, are high for PBC staff where they exist. The high workload along with pressures both inside and outside the workplace as well as limits on pay scales result in a relatively high turnover of staff for many PBCs, compounding issues regarding knowledge retention, progression of matters and continuity of business.
545. Effectively, the low level of funding for administration and compliance provides no capacity for PBCs to engage in the variety of work they are required to undertake in their roles as the trustees holding and protecting Traditional Owners' native title rights and interests. Given the impact of the grant of future acts on those native title rights and interests, PBCs are required to take action to protect them as part of their fiduciary duties. The difficulty for PBCs is that this requires appropriate staffing and resources to undertake this work, including the engagement of legal and heritage professionals. Current federal and State funding arrangements that are available to PBCs do not provide for this.
546. The lack of funding options available has required PBCs to develop business models focussed on raising income to support this work from industry and third parties and leaves them vulnerable to predatory consultants.

### 11.1.2) PBC Costs and Approvals Processes

547. As has been examined, PBCs often face a high future act workload through the application of the expedited procedure along with the trend within Government Departments to require consultation with, if not consent or support from, PBCs for a range of processes. There are no sources of federal or State funding available to PBCs to support their engagement in this work, leaving PBCs with no option other than to seek to recover their costs from those seeking to engage them.
548. The cost impost of future acts and heritage processes on PBCs and the shortage of funds for PBCs were noted by a large number of industry consultees as a key driver for many of the issues the subject of the Review. A strong sense of grievance was also conveyed by native title party consultees that both the State and Federal Governments fail to provide even basic support to PBCs for their role in these statutory functions and responsibilities.
549. PBCs conveyed that they are now an essential part of the State's approval processes through future acts and heritage, however no or little funding is provided to support this activity, effectively requiring PBCs to supplement the State and proponents' commercial

activities or at the least, cost recover. This is coupled with the manner in which the expedited procedure is administered in WA in which there is a strong feeling that costs imposed on PBCs to support the commercial activities of the State and proponents are being passed on to the most impoverished people in the country.

550. Even where PBCs have strong agreements with proponents that provide long-term compensation payments, PBC consultees noted that compensation paid by one proponent is to compensate Traditional Owners for the impacts of activity on their native title rights and interests and should not necessarily be used to support the approval processes of another. Several proponents echoed this sentiment.
551. The lack of funding support for PBCs exposes flaws in the economic model and approach upon which these processes operate in WA in regard to native title. The lack of funding for PBCs to participate in approval processes and to manage native title rights and interests indicates a failure to assign appropriate (or any) real value to native title rights and interests. Nevertheless, these rights and interests exist and the *Native Title Act* recognises and regulates impact on them under the future acts regime, providing for a right to compensation for such impact.
552. The failure to assign any real value to these rights and interests has led to an outcome where the true costs of the impact of proponent activity such as mining and exploration are not accounted for, either in State modelling or in many proponents' project planning and budgets. This is evidenced by a strong sense of aggrievement from industry consultees regarding the cost recovery efforts and pressures exerted upon them by PBCs. The drive to recover costs by PBCs is entirely rational though, in an environment where they are a component of the State's approval processes which aim to commercially benefit the State and proponents but are, themselves, without any commercial benefit from proposed future acts nor funding to carry out their role.

### 11.1.3) PBC Responses to Funding Constraints

553. Many native title party consultees expressed a feeling of being set up to be in conflict with other parties due to the lack of support and the need to cover their costs. In an already adversarial system, the funding constraints and the need for native title parties to cover their costs adds a new site for dispute within approval processes. The lack of funding for PBCs to participate in native title and heritage approval processes incentivises a survival-based approach which can be combative, particularly with prospectors and junior explorers who operate with tighter margins and have usually not budgeted for the cost recovery efforts of PBCs.
554. This survival based approach leads PBCs to seek remuneration in a number of areas. This can include charges to meet with Boards or decision making committees, cost recovery for negotiation, fees for HPA and heritage survey administration and cost recovery in other areas. As put by a number of PBCs, they are already in financial distress trying to accomplish basic functions, extra activity with extra cost only adds to this.
555. In setting this out however, it must also be acknowledged that there are some instances in which PBCs take advantage of their monopoly position or are subject to consultant capture and as a result, seek excessive or unreasonable levels of remuneration. While this may be the case in those instances, the main drivers remain financial distress, capacity

constraints, volumes of matters, traditional owner scarcity and industry driven inflationary pressures.

556. Given the duties of directors to be good stewards of PBCs, including in a fiscal sense, it accords with their duties for directors to prioritise higher paying proponents. PBCs are reacting in a rational way to the system and environment in which they operate. Punitive or imposed measures in regard to PBCs should be avoided and systemic solutions need to be focussed on.
557. Some PBCs consulted have accessed funding via the DPLH's Native Title Party Capacity Building program. Those PBCs reported the funding they received assisted them to employ additional staff, provide access to training and development, develop new opportunities and build self-reliance and internal stability. These are positive outcomes that increase the capabilities of these PBCs, with this program providing an example of positive approaches that may be taken.

## 11.2) Boards, Staffing, Human Resources and Processes

### 11.2.1) Difficulties with Staffing

558. As has been noted, most PBCs struggle not only in relation to fiscal resourcing but also in relation to human resourcing. PBC consultees consistently noted the competitive employment environment caused by funding constraints that make it difficult for PBCs to attract and retain staff. PBCs also operate in a unique environment that blends two different cultures which can be difficult to reconcile, presenting challenges for employees. Further challenges are presented by limited resources and competing demands on PBC time.
559. Decision-making in PBCs is often complex and can be multi-layered, navigating cultural as well as regulatory requirements. PBC consultees frequently noted the complexities of these decision making requirements and expressed a view that often this is not recognised or understood by proponents and Government. This was acknowledged amongst some industry consultees, however this was often in the context of delays to work programs.
560. In order to function effectively, PBCs need staff with the right skills to be able to work in a high pressure environment with the right technical knowledge and expertise to competently navigate a number of regulatory environments and multiple proponents with competing needs and capacities. Finding staff with the rights skills is challenging, particularly where a PBC is located in a regional area. It also takes time and resources to properly train and develop staff, which most PBCs don't have. Once staff are employed and trained, retention is often an issue due to high workloads, a sometimes challenging work environment and limited resourcing for competitive remuneration. Turnover can be high, causing disruptions to PBC operations and efficiency.

### 11.2.2) Board Stability, Skills and Capacity

561. Regulated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**CATSI Act**), PBCs are subject to a similar regulatory regime as other corporations under the *Corporations Act 2001* (Cth). Directors of a PBC are also subject to similar duties under the CATSI Act as their corporate counterparts under the *Corporations Act 2001*. However, PBC directors are also subject to cultural and customary duties and pressures which can

conflict with their duties under the CATSI Act and the PBC's own rules. A PBC's capacity to operate effectively and efficiently is affected by the ability for a board to understand its obligations and undertake its responsibilities. This requires a board that has capacity to understand the matters coming before it as well as principles of good corporate governance.

562. For many PBCs, particularly new and inexperienced PBCs, there are often limitations to the knowledge and capability of boards and their access to upskilling. During the native title claim phase, native title claimants are supported by representative bodies with funding (although limited) to support native title claims through to determination. Following determination of the native title claim and the registration of the PBC, this support becomes limited due to the funding issues already identified, or ceases due to directions chosen by the PBC.
563. New PBCs must establish themselves with staff and directors who often have very little experience. PBC boards have to effectively learn as they go with what limited support they can access through representative bodies, who often provide much of their support pro bono. This lack of knowledge and capability is also compounded by the rotation of directors in short time periods with outgoing directors taking corporate knowledge with them as the new directors find their feet. As already noted, aside from relatively few PBCs who are in strong financial positions, directors on many PBC boards are unpaid and volunteer their time.
564. Instability and a lack of capacity at the board level of a PBC slows down, impedes and delays decision making, increasing costs to proponents and PBCs. It also contributes to difficulties in proponents accessing time with PBC boards, which was a widely reported issue by industry consultees. This compounds issues already faced by PBC boards who struggle with overwhelming demands from proponents in relation to mining and exploration projects and makes PBCs vulnerable to consultant capture.
565. A number of PBC director consultees expressed a need for access to explanatory and educational materials that cover a wide range of topics such as various aspects of future acts processes, State processes, legislative structures and requirements and governance information. Consultees advised that materials such as these in easy to read and access formats would enable them to better understand the matters before them and the regulatory environment in which they are operating. It would also enable new board members to come up to speed faster and assist in the transition from one board to another.
566. There is a clear need for PBC assistance to include components that support and augment board capability in the interest of improving function, stability and effectiveness in addition to creating efficiencies and cost savings in decision making processes. This could likely extend to executive development for PBC CEOs. While some programs currently exist, these appear to be accessed seldomly and from a state perspective, there appears to be a lack of strategy and co-ordination within Government around support for education and capacity building for PBC boards.

### 11.3) Commentary and Recommendations

567. Having examined the broad range of subject matter that has arisen in the course of this Review, it has become clear that it is in the interest of the State and industry, just as it is in

the interest of native title holders, to have a stable, well run, effective and efficient PBC sector. To this point however, assistance to PBCs from the State has been limited. Perhaps this is because native title and its content has not been fully appreciated across Government, PBCs have been seen as a stakeholder to consult with rather than as a sector managing property rights or that PBCs have been seen as adversaries. As should be apparent as a result of this Review however, PBCs are more than this and their lack of function as well as Departmental ambivalence towards them has real world impacts for proponents and Government alike.

568. While some support programs exist, during the course of the Review as set out previously, it became apparent there is no overarching Government strategy in regard to PBCs. Instead they have been effectively left alone in their development and to deal with the variety of processes they are required to manage. This, combined with the State's administration of the expedited procedure in WA, has led to a variety of costs and pressures being passed to other sectors, hence this Review. To facilitate a more comprehensive view of PBCs and support for their good function, there are a number of main areas to consider and within these, clear priorities.
569. The first of these is resourcing and funding. The extent of current organised support seems to be the Native Title Capacity Building Program administered by the DPLH, which is seen as a positive program and initiative. This program is mainly focussed on the ability to employ and support what may be termed as Heritage Officers to support heritage processes and does not necessarily consider the broader future acts context. While it has been received positively, it is still not known whether this, alongside the Heritage Survey Program, has had an effect on the cost and time pressures of proponents and Government, although it seems likely to provide at least some relief.
570. Feedback from PBC consultees indicates that while it is of value, it does not consider or assist in the areas of fixed overheads, systems, decision making processes or other costs resident in PBC heritage and future act costs structures, requiring extensive cost recovery to be maintained. Even so, the program is valued and is one that should likely be expanded.
571. While issues coalesce around heritage matters, the main underlying driver of this Review and the subject matter it has been informed of is that of future acts, particularly those to which the expedited procedure has been applied. At this point, the State will need to decide whether a continuation of the user pays system is the best way forward and therefore accept the issues that arise from it, or whether to focus PBC support around future act activity within a reformed expedited procedure process. In its current form, the State's expedited procedure process for PBCs represents a significant impost on their time and resources, diverting from other core functions. It cannot be overstated that without significant reform of this process, assistance from Government to PBCs would likely be fully utilised in managing expedited procedure matters.
572. In addition to reform the State's expedited procedure process, this Review suggests that as a component of a more comprehensive approach towards PBCs, support is provided in this area, perhaps as a matter of urgency, as this is likely to ease a significant number of the issues reported on. In doing so, it must be kept in mind that this may be interpreted as an industry subsidy via PBCs, however this could be countered by the fact that the State resources a wide range of activities to support approvals and hence industry and communities, and the notion that a role of Government is to facilitate timely and durable

approvals processes. There are limitations to this of course, and there are costs or activities that will need to be accepted by industry and proponents.

573. Focussing first on future acts and heritage, it is recommended that:

**Recommendation 22.**

As a component of a more comprehensive approach to PBCs and in recognition of their functions, the State develop a funding support program for PBCs to assist the future act and heritage functions of PBCs. This would include but not be limited to:

- the negotiation of heritage protection agreements relating to the proposed grant of tenure under the expedited procedure;
- administrative activities and fixed costs associated with future acts and future act associated heritage activity, particularly in instances where the expedited procedure has been applied;
- decision making processes;
- the administration and carrying out of heritage survey and reporting activities where there is a shortfall in cost recovery from the relevant proponent; and,
- other needs as required.

574. Given the more comprehensive terms of this recommendation, this may be in addition to and separate from the DPLH Native Title Capacity Building Program or through renewed terms which incorporate the lens of future acts. If through this broader lens, thought will need to be given to the appropriate Government entity through which to administer such a program.

575. The second main area of focus is that of corporate development and stability. As far as the Review is aware, there are no or perhaps ad hoc State programs that focus on corporate development, director support, governance support or the variety of other factors that combine to assist a PBC to develop and operate effectively.

576. In some ways, this is surprising given the extent of native title determination across the state and the large number of PBCs that now exist. While there may have been ambivalence towards PBCs across a series of Governments, it should now be clear that a well functioning and stable PBC sector is in the interest of the State and that an overall strategic approach is an appropriate response.

577. Given all of the information before it, the Review has come to the view the State should, as a matter of priority, develop a comprehensive strategy and set of programs to support PBC development and operation. This would include support in the areas of governance, director support and education, decision making, executive development, corporate development, human resources assistance, executive recruitment and a series of other elements that go towards enabling an organisation to be well functioning and effective.

578. This does not necessarily mean intervention is appropriate or required, rather it is to generate a series of supports both through financial support or existing programs in a comprehensive and coordinated way. The implementation of such a strategic approach would also seek partnership with the Commonwealth and industry where appropriate.
579. This comes with the realisation that PBCs are a sector unto themselves and need to be regarded as such. While this may be the case, it remains a sector in the relatively early stages of its development with acute needs, Governmental supports and initiatives have the opportunity to be influential in its positive development. Given the impact that PBCs are clearly having and will continue to have, the need for such programs would seem clear. Given this, it is recommended that:

**Recommendation 23.**

In consultation with PBCs, the State develops a coordinated and cross Government strategy in regard to its approach to, and support of, PBCs including the development and resourcing of programs to support corporate development, governance, decision making, operations, training and the series governance and operational factors that support and enhance a well functioning and effective PBC sector.

## 11.4) Further Cost Drivers - Constraints Within the Native Title Group

### 11.4.1) High Proponent Demand

580. Both industry and PBC consultees have noted the high volume of demand on PBCs due to the large number of proponents requesting time and services from them. A number of industry consultees understood that PBCs are being overwhelmed by these demands but reported this makes it difficult to engage with PBCs, causing high levels of frustration. These difficulties then lead to lengthened time frames for projects due to PBC boards and staff having competing priorities and minimal amounts of time for engagement. As previously noted, some larger proponents are able to pay higher sums to secure more engagement time with PBC staff and boards and shorten engagement time, which triggers inflationary pressures for smaller proponents.
581. PBC director consultees reported having to schedule limited slots of meetings with their boards per proponent, with those able to provide funding for these meetings being given priority over those who can't or won't. PBC boards reported trying to schedule meetings with several proponents over the course of a day and share costs of these meetings between proponents on a pro rata basis in order to facilitate proponent demands in relation to time and costs, however this limits the amount of time a proponent can have with a PBC board. This also takes a toll on PBC board members who have to digest and understand vast amounts of information on different projects and proponents in short spaces of time, limiting their ability to engage with proponents in the way they wish and fully explore the impacts on, and implications for, their country and member native title rights and interests.

582. PBC consultees also reported struggling with the levels of activity on their country and the demands on them from proponents and Government. It was commonly reported by these consultees that they are having to schedule heritage survey work up to 18 months in advance due to the high level of demand from proponents. Many PBC consultees advised their feelings that many proponents arrive with an expectation that they will be prioritised over other proponents. This creates tension between proponents and PBCs which, in an already adversarial future acts process, adds a layer of conflict to relationships between PBCs and proponents that has already been made tense during the initial tenure application stage and then compounded over the term of the project through various State approvals processes.
583. While this is largely an issue of PBC capacity, it is also a function of the series of cascading effects outlined in this reporting such as the administration of the expedited procedure which incentivises the making of objections, the operation the *Aboriginal Heritage Act* and the lower risk settings in regard to Aboriginal heritage in the post Juukan Gorge environment. Strategies to address or at least ameliorate stresses caused by a high volume of matters or proponent demand are likely to be found in a number of areas. Firstly, that of expanded PBC support as addressed in the previous two recommendations, system reform such as that suggested in regard to the application of minimum requirements as outlined in following sections and better coordination across Government in an effort to reduce demand as discussed in section 9.
584. Additionally, it would be anticipated that as a component of Recommendation 23, corporate advisory services could be provided to PBCs to assist in the development of efficient systems and decision making processes which reduce workloads and administration.

#### 11.4.2) Constrained Traditional Owner Availability

585. PBC consultees advised there are significant constraints due to the limited number of Traditional Owners with the appropriate knowledge to undertake heritage surveys. Those with the requisite knowledge and cultural standing can be more elderly or advanced in age, and not all suitably qualified Traditional Owners can or wish to undertake this work due to its physically demanding nature, health concerns or competing demands. In essence, on many occasions there are simply not enough Traditional Owners to cater for the demand for this work with a high burden placed on a small number individuals.
586. Some traditional owner consultees also report they are limiting their time available for cultural business due to the high demand from proponents. This impacts on the time these consultees have available to engage in cultural activities, time with family and time strengthening their communities by passing on traditional knowledge. With less time for cultural business and passing on cultural knowledge, this impacts the numbers of emerging younger people emerging with sufficient standing and traditional knowledge to engage in future surveys, in many respects sacrificing the future for today's proponent demands.
587. There are no particular ways to resolve this in the context of a Review such as this, however this does need to be noted as a constraint which leads to delay and potentially increased cost while also impacting negatively on community. It also leads back to the discussion on

whether the volume of surveys is required, however the function of the operation of the *Aboriginal Heritage Act* and the current risk settings of industry play a significant role in this.

### 11.4.3) Seasonal Limitations

588. Further constraints are presented by the seasonality of heritage surveys due to hot summers and in many areas, obligations to law and culture business during summer months. Summer temperatures in particular, limits the ability of survey work to proceed.
589. Where surveys do proceed during summer months, additional resources are needed such as water, more frequent breaks, shade and cooling and access to medical aid. This increases the time surveys can take as well as the cost of conducting them, with some surveys needing to be shortened or abandoned due to inclement weather conditions, while others cannot be completed in the time allotted. For proponents, this causes frustration and sometimes a deterioration of the relationship between the proponent and the PBC.
590. Proponents can face delays to projects due to surveys being unable to be either conducted or completed as scheduled as well as increased costs due to both the survey logistical requirements and the delays. Given the tightly packed survey schedules of PBCs, where a survey has to be either cancelled or not completed, there is usually no opportunity to reschedule or complete the survey for months, causing further delays to projects and increasing the frustration of proponents. Those larger proponents with more resources are sometimes able to negotiate preferential access to heritage survey time slots, however this can have an inflationary impact on survey costs. Smaller proponents are generally unable to match the resources of larger proponents and can experience longer lead times on their projects as a result.
591. For some proponents, access to capital funding for their projects is somewhat dependent on constrained budgets and timelines, which affect the calculation of risk and return on investment. For proponents reliant on funding from both domestic and international investors, such delays and increased costs impact on their ability to service funding agreements already in place as well as access to additional sources of funding on capital markets when a project's risk profile and return on investment is affected by increased timelines and costs. These increased risk profiles have the potential to affect the viability of various projects into the future, which industry consultees have pointed to frequently during the consultation process for this Review.
592. As in the previous section, this is difficult to resolve in the context of this Review given it is a feature of the operating environment due to factors beyond the control of any party. It is hoped however, that the suite of measures proposed in this reporting alleviates overall system pressure, creating conditions where capacity constrains such as this have a lesser impact.

## 12) Focus Area 8: Expedited Procedure Minimum Requirements and Longer Term Arrangements

593. To this point, reporting has focussed on the manifold suite of issues that arise within the current system, regulatory framework, administrative approach and capacity constraints, each of which combine to create the difficult environment that is the subject of this Review. Much of this has been directed towards the very numerous set of instances for when an objection is made by a native title party to the application of the expedited procedure, as the primary interaction point between the native title and industry sectors on heritage matters, which then sets norms and practices in other sectors.
594. Given the primary role of the administration of the expedited procedure in these issues, it is clear that reform is required in order to apply a more adequate suite of minimum requirements for when it is applied. The aim of this is to provide a higher level of confidence to all parties that systemic features exist to cater for their interests and lead to reasonable outcomes. In turn, a system that produces higher confidence should simplify processes, lead to timely and cost effective outcomes and reduce the rate of objections to the application of the expedited procedure itself.
595. This Review suggests there are two separate approaches to this, one which can occur and be implemented in the short term and a more comprehensive set of measures that may be implemented in the long term. The shorter term solution proposed is the implementation of a set of minimum requirements to apply to grant of tenure to which the expedited procedure is applied, with the longer term solution being through ILUA and based on the existing model of the Tjiwarl ILUA.
596. Both the Queensland Native Title Protection conditions, NTPCs, and the Tjiwarl ILUA contain provisions that may guide both these short and longer term arrangements.

### 12.1) NTPCs

597. As previously described, the NTPCs are a set of processes and procedures that are applied as a series of conditions upon grant of tenure for all instances in which the expedited procedure has been applied. The primary feature of the NTPCs is that they are a regulatory device, that is, they are a regulation of the *Mineral Resources Act (Qld)*, which lends the gravitas, formality and enforceability that components of a regulatory environment possess.
598. The NTPCs are framed as conditions to satisfy the requirements of the expedited procedure and set out that minerals exploration must not proceed in a manner which may cause the interference or disturbance set out in s 237 of the *Native Title Act* unless it is in accordance with the NTPCs. Further, the NTPCs are linked to the duty of care guidelines which hold that the duty of care towards Aboriginal cultural heritage values is fulfilled if the NTPCs are complied with. If they are not complied with, this removes defences in any prosecution.
599. The NTPCs may be contracted out of, that is, native title and proponents may agree to their own arrangements, as is commonly the place. Parties often reach their own arrangements prior to notification pursuant to the *Native Title Act* or within the expedited procedure objection period, resulting in no objection being made. On other occasions, but at a

markedly lower rate than in WA, an objection is made and a HPA is negotiated without an expedited procedure determination needing to be made by the Tribunal. Ultimately, if there is no HPA settled upon, the NTPCs operate as a set of minimum requirements through force of regulation.

600. It is important to note that the statutory environment in Queensland differs from WA in that it creates in interlinked series of statutes and regulation which articulate what a proponent is to do in certain circumstances, without needing to define specific activities. This is not the case in WA; instead the *Aboriginal Heritage Act* and regulations effectively stand alone with s 5 and particularly s 17 setting a fixed scheme for potential offences and giving rise to subsequent approvals processes. Even so, it is the case that the NTPCs contemplate a cultural heritage site inspection in the case of all ground disturbing activity. Whether this inspection occurs or not is a result of working through the processes the NTPCs contain.
601. As a further note, the NTPCs focus on minerals exploration and do not contemplate prospecting in the same manner it is considered in WA. This is due to tenure difference, with those activities viewed as prospecting in WA, with the exception of fossicking, considered small mining operations in Queensland. These require the equivalent of a mining lease and consequently, are subject to the right to negotiate. This is presumably in recognition of potential compensation liabilities from this type of activity, which the State of Queensland has moved to protect itself from. This is a key difference between the jurisdictions and looks to be a large reason the expedited procedure is applied less in that State.
602. The NTPCs contain provisions for:
- Notice to native title parties including information requirements for proposed exploration activities and programs of work.
  - Requirements for meetings with native title parties when required by the native title party.
  - Whether a heritage consultant is required or not, and agreement as to their rates.
  - Field inspection requirements.
  - Field inspection report requirements.
  - Monitoring.
  - Administrative Payments.
  - Processes for when a cultural heritage find is made while conducting exploration activities.
  - Cultural heritage awareness requirements for minerals exploration personnel.
  - Requirements when exploration activities change.
  - Payments to Traditional Owners and the rates of these payments.
  - Dispute resolution mechanisms at multiple stages.
  - Exclusion zones.
  - Time frames for each step for proponents and response times from native title parties.
  - Activity to proceed in the event a native title party fails to respond in the required time frame.
603. To outline these provisions, prior to the commencement of activities, the proponent is required to provide the native title party with a notice which includes details of the

proposed exploration activities, the area in which they are to take place, and a detailed program of works in addition to further details. The activities in the notice must not be for a time frame exceeding one year, after which new notice is required.

604. The native title party is provided with a time frame in which to reply and may request a meeting occur for the exploration activities to be explained, that a field inspection occur or both. If no reply is provided, the proponent may proceed with the exploration activities in accordance with the work program and continues to be subject to the duty of care guidelines as it does on all occasions.
605. If a meeting is requested, provisions detailing how this is to occur and in what time frame are provided, in addition to reporting requirements for that proponent arising from the meeting. Should the native title party fail to attend such a meeting due to no fault of the proponent, the exploration activities may proceed.
606. Arising from the initial notice or this meeting, the native title party may nominate that a field inspection is to occur along with a field inspection team of up to eight members. The native title party may also nominate that an anthropologist or archaeologist is to attend and if doing so, a reasonable hourly or daily rate for them to be remunerated. Where the proponent disputes the amount the anthropologist or archaeologist is proposed to be paid, and where this may not be able to be resolved between the parties, the proponent may refer this dispute to the Land Court of Queensland for arbitration.
607. Once these steps are complete, a field inspection may proceed. The approach of the NTPCs is around the work area clearance methodology over the area in which each individual program of works is to take place, with the aims of the field inspection set out at cl 5.2. This includes inspection of areas of ground disturbance including road and access routes, drilling, trench and camp sites and any other area where disturbance is to occur.
608. To conduct a field inspection, the proponent provides notice after which the inspection is required to occur within 25 days, or longer if agreed by the parties. The proponent also nominates a representative to attend the field inspections, and provisions are made to ensure the ability of the native title party representatives to confer privately should they wish to. The field inspection is at the proponent's cost, which includes transport, accommodation, meals and other items. If the field inspection does not occur within the specified or agreed time, the exploration activity may proceed, again in compliance with the work program and the duty of care guidelines.
609. As a note, the idea of a field inspection looks to be distinct from a full heritage survey, being aimed at more of a binary "clear or not clear" outcome for areas of ground disturbance rather than the more comprehensive accounts that may arise from heritage surveys. This also looks to have the effect of greatly simplifying reporting.
610. In regard to reporting, following a field inspection, an inspection report is required to be provided by the native title party, which likely anticipates that an anthropologist or archaeologist would be present on most occasions. At a minimum, the inspection report is to include recommendations on whether an exclusion zone is proposed along with coordinates for its location and boundary, recommendations for site protection measures and management of any proposed exclusion zone, recommendations for conducting the program of works in a way that minimises impact on the exclusion zone and

recommendations for monitoring. As a further note, in this context, an exclusion zone is a buffer around a cultural heritage place or find and is applied after a field inspection.

611. If an inspection report contains no recommendations, the exploration activity may proceed. If there are recommendations and the proponent intends to comply with them, the proponent modifies the program of works and provides this to the native title party. The exploration activity may then proceed.
612. If the inspection report contains recommendations the proponent does not intend to comply with, the proponent must, within 10 business days, provide to the native title party a recommendations objection notice providing full details of what it disputes. The parties must take reasonable steps to resolve the dispute, and if unable to, the proponent may refer the dispute to the Land Court of Queensland for determination. The proponent must then undertake its exploration activities in accordance with the program of works modified by the decision of the Land Court.
613. The most notable feature of this part of the NTPCs is the clarity and certainty they provide around a range of features of heritage surveys and processes which are absent in WA. Processes, costs, timelines, survey structures, methodologies and survey reports are provided with a clear framework in which to occur, removing the cause of many of the issues remarked upon in this reporting around the WA context. What is also notable is there is a clear resolution process for disputes between parties with the Land Court of Queensland providing a mechanism for final resolution.
614. Similar provisions apply in the event a cultural heritage find is made during the course of the conduct of exploration activities. Notice is to be provided to the native title party to which they may respond within a specified time and request that a further meeting occur. At that meeting parties may agree to the actions that should be taken after which the proponent modifies the exploration activities and provides a copy of the modified program of works to the native title party. If the native title party fails to attend the pre-arranged meeting, the proponent may proceed with exploration activities in the vicinity of the find while remaining subject to the provisions of the *Aboriginal Cultural Heritage Act (Qld)*.
615. If the meeting occurs and the parties are unable to agree on the appropriate course of action resulting in a dispute, the proponent may refer the matter to the Land Court of Queensland for determination, which it is then required to comply with.
616. Further provisions are provided for monitoring, changes to exploration activities, requirements for cultural heritage awareness on the part of proponent employees or contractors and what are termed 'Inability Notices.' These are notices that are able to be provided by the native title party if unable to meet their obligations due to occurrences of weather such as cyclone, fire or flood, or due to ceremonial or cultural activities according to tradition. This must include an alternate date for the native title party to meet its obligations. If a dispute arises, this too can be referred to the Land Court of Queensland for determination.
617. The NTPC schedules contain adjusted rates for the payment of administration fees to PBCs in addition to daily and half daily rates to be paid to members of the inspection team.

## Commentary

618. The primary feature of the NTPCs is their operation as a minimum set of requirements in the event the expedited procedure applies to the grant of tenure. Parties are capable of creating their own arrangements, however in the absence of this, the NTPCs apply as the set of requirements a proponent is to meet, alongside a set of requirements for native title parties. The high level of process detail contained within the NTPCs generates strong or perhaps onerous obligations on all parties and sets a genuine standard for all parties to reach. Because of these strong obligations, an incentive is created for parties to reach their own arrangements which is routinely accomplished, often without the need for an objection to the application of the expedited procedure.
619. While the provisions of the NTPCs are somewhat onerous and are often replaced by an arrangement between the parties, they provide a standard that is thought to be workable by parties from both sectors. In essence, both parties feel some assurance their needs are accounted for. This being the case, it is not unusual for parties to proceed simply within the procedures provided by the NTPCs.
620. A further observation is that the NTPCs anticipate a field inspection whenever there is to be ground disturbance and potentially when low impact activities are to occur. Whether this occurs depends on responses from the native title party however it must be understood that, like the operation of s 17 of the *Aboriginal Heritage Act*, a field inspection is anticipated on every occasion there is ground disturbance. The key difference is that the NTPCs and the broader regulatory framework enable some flexibility when defined low impact activities are to occur, whereas s 17 of the *Aboriginal Heritage Act* does not.
621. As previously remarked, the notion of field inspection is also somewhat different to the notion of heritage survey. While still a formal activity, it appears to be more focused on the simple question of whether or not there is Aboriginal cultural heritage at the place ground disturbance is proposed to occur. This then leads to what looks to be simplified reporting focussed on key questions which includes recommendations on management. This is not to say that HPAs entered into by the parties instead of the NTPCs do not contain a higher level of on ground inquiry, a broader focus on landscape cultural values and a higher level of reporting, as they may. Rather, the requirements of the NTPCs are a minimum standard, so focus on those factors that are thought most necessary to understand.
622. The NTPCs provide certainty for both native title parties and proponents by bringing clarity to survey type and methodology. Further, by entrenching the concept of heritage inspections as a standard part of the process, it removes what is often a source of conflict in the WA context (particularly with smaller explorers and prospectors) about whether a survey is required. By simplifying the process and reporting requirements for low level disturbance activities, it also addresses some of the cost and delay issues so prevalent throughout this reporting in the WA context.
623. The NTPCs also settle other areas of contention that have been highlighted in this reporting. Firstly, they set the maximum number of field inspection participants at eight, which is at the discretion of the native title party, overcoming the issue of when a proponent seeks a much lesser number or when a native title party seeks a much higher number. Secondly, there is the ability to nominate whether an anthropologist or archaeologist must be present, also at the discretion of the native title party, and a process around agreeing on the

rates this person is to be remunerated, including when a dispute arises around this remuneration.

624. There are also a number of features aimed at breaking deadlocks or non decision loops that are common in the current system of operation in WA. In the first instance, as with proponents, native title parties are provided with a set amount of time to undertake certain actions. If action isn't taken within these time frames the exploration activities may proceed in compliance with the *Aboriginal Cultural Heritage Act* (Qld), the duty of care guidelines and the provisions of the NTPCs that outline what is to occur if there is a cultural heritage find when exploration activities are occurring.
625. The key difference to WA is that compliance with the provisions of the NTPCs fulfil the duty of care guidelines and serve as a risk mitigation measure for impacts upon Aboriginal cultural heritage in addition to a defence if strictly adhered to, creating a level of operational confidence. No such feature exists in WA law. Instead s 17 of the *Aboriginal Heritage Act* provides its blanket coverage and s 62 provides a special defence for lack of knowledge that may be difficult to show in the context of native title and the high degree of interaction with native title parties. Similar measures to the NTPCs in WA then, may not overcome the risk of offending against the *Aboriginal Heritage Act*.
626. A further area in which deadlocks are overcome is the provision for dispute resolution procedures including arbitration. Several types of dispute are named within the NTPCs, and on each occasion where the parties are unable to resolve these disputes, they are able to be referred for arbitration to the Land Court of Queensland. This overcomes situations where a disagreement or dispute may revolve through cycles of deadlock with indeterminate advice as to approach from Departmental officers with no outcome. This is not to be read as a criticism of Departmental officers, who often lack the tools or authority to ask anything more than a proponent continue to undertake best efforts to resolve an issue until it is put beyond doubt or escalated politically. Unfortunately, as has been discussed, this is inefficient and can take a considerable amount of time and resources.
627. It should be noted there is no parallel to this Court in WA, however the Mining Wardens Court may be analogous in the WA context regarding this subject matter. Whatever the instrument, the key point is there is an intermediate ability to arbitrate a dispute which negates the need for injunctive action or application to a superior court.
628. A further key feature is the need for the proponent to provide detail of activity through notice with this notice being valid for 12 months, after which new notice is required and the process starts afresh. In each notice, the proponent is required to provide detail of the exploration activities that are proposed to occur in addition to the program of works, describing when and where these activities are proposed to occur. This also includes types of machinery, mapping, dates, duration and other details for the purpose of enabling the native title party to understand the impact of the exploration activities on the land. This then enables decisions to be made about the appropriate response on the part of the native title party. Arrangements such as these would seem to be in keeping with the good neighbour policies utilised in regard to pastoralists in WA.
629. What is notable throughout the NTPCs is the equity and certainty they provide both native title parties and proponents on multiple issues. A key component of this reporting has been the uncertainty inherent in native title and heritage processes in WA, which has had

ongoing effects on costs, delays, relationships and resourcing for native title parties, proponents and Government.

630. As has been emphasised, while the NTPCs contain detailed provisions and real obligations on the parties, they are a set of minimum requirements which may be replaced by parties through HPAs. Because of this status as minimum requirements, there are a number of issues they do not resolve.
631. Firstly, there is no resolution of the compensation issues that have been described in this reporting. Again, it is unknown whether these liabilities will be substantial or otherwise due to the current lack of jurisprudence, but it must be noted the NTPCs focus solely on whether cultural heritage values exist in areas of proposed ground disturbance and the series of procedures it provides to manage or mitigate impacts on these values. This leaves any questions on the compensation liabilities of these exploration activities open. However, given the NTPCs require attention to heritage matters and minimisation of interference with native title rights and interests, it can be surmised that this is likely to have at least some level of mitigating effect on any future compensation liability.
632. A further limitation is that presented by the matters that the expedited procedure is applied to in Queensland which is not directly applicable to WA. These are limited to the equivalent of exploration licences whereas WA also applies the expedited procedure to prospecting and other licences. As explained, types of activities that are permitted by prospecting licences in WA are considered small mining operations in Queensland, are permitted only through mining leases and are subject to the right to negotiate. As such the NTPCs do not apply to these types of activities. This may be overcome by the addition of extra provisions into minimum requirements within the WA context, however again, while heritage issues may be overcome, the issue of compensation for impact on the set of property rights that constitute native title would not be.
633. There are also a number of practical issues that are confronted in a WA context that are not considered in the NTPCs. Perhaps the most impactful is the high level of activity that exposes the severe capacity constraints of Traditional Owners themselves and leads to long lead times for scheduling, simply because there is an insufficient number of Traditional Owners in some determination areas to service high demand. While it would not be unreasonable to incorporate a level of expectation around time frames, any system that does not properly consider the capacity constraints driven by the amount of activity, in addition to the needs of other proponents who have entered into HPAs with native title parties, would lead to unjust outcomes and expose proponents to reputational risks.
634. This point could be extended to PBCs themselves, who are confronted with difficult operational environments and remoteness, are required to manage complex decision making environments, often have a large number of matters before them and often with limited resources. For a system to be properly workable, the time frames for native title party response need to properly account for these factors, and it is suggested the time frames provided by the NTPCs are insufficient for a WA context.
635. PBCs, of course, have other resource intensive tasks in conducting heritage surveys in addition to decision making and administration, such as mobilisation and deployment. These organisations should not be left out of pocket as a result of a set of minimum requirements in the manner that occurs with the RSHA. Such an outcome would not make

minimum requirements attractive and would simply reinforce current approaches and the perception by PBCs that the system is not designed to encompass their needs.

636. On this, and having examined the WA context, the administrative payment required to PBCs by the NTPCs looks to be well short of sufficient, as do the rates offered to Traditional Owners. Again, if a similar set of minimum requirements is to be applied in WA, it must incentivize a move away from current practices to be successful and should be accompanied by the capacity building measures outlined previously in this reporting. Many of these issues could be dealt with in the design process by utilising the cross-sector consultative and communication meetings in Recommendations 4 and 7 to ensure both native title party and proponent needs are adequately catered for.
637. Perhaps most importantly however, the statutory and regulatory environment within which the NTPCs are situated differs significantly from that of WA. The NTPC regulatory environment contains a suite of interrelated measures which seek to ensure mining and Aboriginal heritage laws operate in a complimentary manner with a series of backstop provisions, although the efficacy of such provisions has not been the subject of analysis in this Review. Even so, this differs considerably from the approach set out in WA in which the statutes operate independently and create a more siloed compliance regime.
638. The impact of this is that in Queensland, compliance with the NTPCs, a regulation of the *Mineral Resources Act*, provides compliance with the duty of care guidelines, a regulation of the *Aboriginal Cultural Heritage Act* (Qld) which itself applies principles and provisions that differ in approach to WA. Effectively, the NTPCs outline a series of actions that may be taken to conduct exploration works with ongoing provisions and guidance in regard to regard to Aboriginal cultural values, finds and reporting in the event there is no native title party response. Adherence to these provisions also provide a tangible legal foundation from which to operate.
639. In WA, the operation of s 5, s 17 and subsequently s 18 of the *Aboriginal Heritage Act* create the main framework of operation, which is inflexible. This effect of this is that, even where there is a suite of minimum requirements in place, where a survey is not able to be conducted, a proponent remains vulnerable to offending against the *Aboriginal Heritage Act*. There is no particular way around this in a WA context; it is simply a feature of the operation of the *Aboriginal Heritage Act* which potentially draws all parties back to the suite of issues discussed in this reporting. However there is scope for guiding parties' actions and behaviours in relation to the operation of ss 5, 17 and 18 of the *Aboriginal Heritage Act*. The creation of guidance and policy documents around how the DPLH and the ACHC interpret these sections, as well as the publishing of decisions of the ACHC and the Minister can build a level of certainty and jurisprudence that parties can rely on to guide their actions and practices.

## 12.2) Tjiwarl Palyakuwa (Agreement) ILUA

640. The Tjiwarl ILUA contains perhaps the primary example of a suite of arrangements in WA that have legal force, owing to them being contained within an ILUA agreed between the State and the Tjiwarl people. Schedule 4 of the ILUA is titled 'Mining Business' and establishes processes and procedures surrounding the application for, and the grant of, various types of minerals and petroleum title. It is similar but distinct in its intent from the NTPCs as while the NTPCs set minimum requirements for those instances that the

expedited procedure applies to the grant of exploration tenure, the Tjiwarl ILUA provides this in addition to a range of other circumstances and tenure types.

641. As an outline, the Tjiwarl ILUA includes provisions for:

- The grant of exploration tenure, which also applies to prospecting and retention licences where the expedited procedure would generally be applied.
- The grant of other mining tenures which includes mining leases and general purpose leases where the right to negotiate would apply, in addition to exploration and prospecting licences in prescribed areas where the expedited procedure is agreed not to apply.
- The grant of miscellaneous licences referred to as 'Mining Infrastructure Licences'.
- The grant of mining water licences.
- The grant of petroleum exploration title where the expedited procedure may otherwise be applied.
- The grant of other petroleum tenures such as leases, drilling reservations and other title where the right to negotiate would generally apply.
- A mining exploration focussed HPA entitled the 'Tjiwarl Exploration Agreement' for circumstances where the expedited procedure would be applied.
- An engagement protocol establishing parameters for engagement in right to negotiate matters.
- A further HPA entitled the 'Tjiwarl Heritage Agreement' for those instances where the right to negotiate applies

642. Focussing on those matters the expedited procedure would generally be applied to, i.e. exploration and prospecting licences, the ILUA steps out a number of preliminary processes commencing with notice to Tjiwarl following an application by the proponent for tenure, which includes a number of information requirements. Following this, a negotiation period is entered into in which the parties may arrive at arrangements suited for that particular circumstance or, alternatively, simply execute the Tjiwarl Exploration Agreement. If there is no agreement, the matter can be notified through s 29 of the *Native Title Act* as an act to which the expedited procedure applies in which the normal process applies, including the parties being capable of reaching agreement prior to a determination by the Tribunal. In practice, s 29 notices for Tjiwarl matters are very rare, attesting to the effectiveness of this system.

643. If a determination is made by the Tribunal that the expedited procedure applies, the tenure is granted with a condition made by the Minister that the Tjiwarl Exploration Agreement is required to be entered into by the proponent. However if Tjiwarl fail to execute this agreement within 40 days, no conditions apply. As such, the exploration agreement does not entirely serve as a set of minimum requirements. If on the other hand, the Tribunal determines the expedited procedure does not apply and the licence is subject to the right to negotiate, the engagement protocol and the Tjiwarl Heritage Agreement then apply.

644. The exploration agreement is of the type described in this reporting as a land access agreement, in that it contains broader provisions than those regarding heritage. It also contains provisions regarding compensation, thereby overcoming the compensation issues referred to previously, in addition to provisions surrounding payments to the PBC and Traditional Owners, cultural protection and respect, cultural awareness training, environmental protection and rehabilitation, employment and contracting amongst others.

645. The heritage protection component of the exploration agreement requires a proponent to provide notice prior to undertaking both non ground disturbing and ground disturbing activity and contains a set of information requirements for these notices. In all instances, notice is required on an annual basis.
646. In the event of non-ground disturbing activity, Tjiwarl may consider it likely to disturb a site after which parties are required to seek resolution on any issues. In the event of ground disturbing activity, consultation occurs on whether a survey is required, and if so, a heritage survey is conducted. A series of provisions then apply as to the conduct of a survey, the constitution of a survey team, survey payments and costs, survey reporting and the content of survey reports, with intellectual property to reside with the PBC or the Traditional Owners. If an area has been cleared in a previous heritage survey, the ground disturbing works may proceed.
647. Further provisions are provided for monitoring and requirements for the proponent in the event of a discovery of a potential site or object. Additionally, the agreement sets out that the proponent will not make an application under s 16 or 18 of the *Aboriginal Heritage Act* without the prior written consent of the PBC. Underpinning these heritage provisions and the remainder of the Tjiwarl Exploration Agreement are dispute resolution clauses which include reference to mediation and arbitration.
648. As mentioned, in those instances where the right to negotiate are determined to apply, parties are required to negotiate in accordance with the Engagement Protocol through which process, funding and other measures are set out. Generally, this would lead to agreement on all aspects however in the event agreement is not reached and a determination is made by the Tribunal that the act may proceed, the Tjiwarl Heritage Agreement is applied as a condition on the tenure unless, similar to the previous example, Tjiwarl fail to execute the agreement within a specified time frame after which no conditions apply.

### *Commentary*

649. While its measures do not apply in all circumstances, the Tjiwarl ILUA goes beyond what might be considered minimum requirements in that it contains compensation provisions, although it may be ultimately decided that these too are necessary in a set of minimum requirements. Even so, there are elements from the heritage components of the Exploration Agreement and the Tjiwarl Heritage Agreement that are applicable in the development of minimum requirements.
650. During the course of consultations, a significant number of industry consultees supported the broader application of Tjiwarl ILUA type arrangements as they bring certainty to process, timing and cost. There were strong views however, that the amounts applied are excessive, being a per annum administrative payment to the PBC which depends on the number of graticular blocks covered, and in terms of native title compensation, \$150.00/km<sup>2</sup> (indexed from the ILUA registration year) and the greater of 7% of the annual exploration expenditure or 30% of the annual rental. Given prospecting is production based, it is uncertain how native title compensations are calculated, although prospectors are required to make an administrative payment of \$1000 per annum to the PBC, indexed from the year of ILUA registration.

651. From the native title party point of view, these arrangements are said to ensure application for exploration and prospecting licences are made by those who are serious about conducting activity which, in turn, resolves tenement parking issues by circumventing the need for a matter to progress through the Tribunal's objection application processes. Because of these advantages, native title party consultees were also supportive of a broader implementation of Tjiwarl type arrangements.
652. The Tjiwarl ILUA arrangements are also distinct from the Queensland NTPCs in that they are not procedurally driven to the same extent. Of course, they contain procedure within them, but in many respects are simpler and clearer than the NTPC's, covering as they do, the main areas of contention that often arise in HPA negotiation settings.

### 12.3) Establishing Minimum Requirements

653. As stated, this Review proposes the development and implementation of a set of minimum requirements in regard to heritage protection and management in those instances where the expedited procedure has been applied. Unlike the Queensland example, this would need to take into account a broader range of circumstances due to the tenure differences, however there should be little difficulty in making provision for this.
654. During the course of consultation, measures regarding minimum requirements were proposed by a number of proponents and native title parties and supported by others. This is due to the views that the absence of such requirements has the effect of increasing complexity, time and cost due to the lack of an appropriate suite of guidance and regulation from the State. As a result, many consultees expressed the view that the implementation of an appropriate set of minimum requirements will greatly assist to provide confidence to all parties and in turn, improve relationships, reduce the need for objections to be made to the application of the expedited procedure, reduce costs, delays and inefficiencies and lead to better outcomes for all parties.
655. In considering minimum requirements, there are a number of things they should provide. These would include but not be limited to:
- Real measures that create a set of arrangements that act as a genuine set of standards and requirements.
  - Balance between the interests of the parties, that is processes that do not entrench disadvantage of one parties interests in favour of another.
  - A framework to support statutory and regulation compliance.
  - Appropriate financial supports.
  - Consideration of PBC capacity constraints.
  - Clearly defined expectations for all parties.
  - Clear notice and information requirements.
  - Dispute resolution and arbitration provisions so as to enable resolution of deadlocks.
  - Clear resources for protection and management of Aboriginal heritage.
  - Clear measures for the conduct of work programs.
  - Provisions for ongoing review and annual indexation of any cost provisions.

656. Such minimum requirements should also be capable of being replaced by parties' own arrangements but continue to operate in the absence of these.
657. As in other areas of mining tenure and activity management, these should also rest on principles of good neighbour policy and value exchange and be developed in recognition of native title as a set of property rights. It is also important that minimum requirements depart from the lowest common denominator style of system that currently operates in WA. It is more appropriate to implement a system of reasonable standards, and where smaller operators may have difficulty reaching them, provide industry support through measures such as the DPLH Heritage Survey Program or in other ways as deemed necessary.
658. The manner in which minimum requirements would be applied was the topic of some conjecture during the course of consultations. The NTPCs are of course a regulation of the *Minerals Resources Act (Qld)*, and this may also be the best measure in the WA context through making minimum requirements a regulation of the *Mining Act*. Alternatively, minimum requirements could be applied as a condition of all title to which the expedited procedure has been applied. There would appear to be little difficulty on this regard for exploration licences, however the ability of the Minister to apply such conditions to other tenure types such as prospecting licences appears more constrained. Irrespective of the measure of implementation, what is clear is that minimum requirements need to be exactly that and should apply in all circumstances.
659. The manner in which the minimum requirements will be enforced and by who should also be given careful consideration. While this may eventually be determined as a result of the manner in which they are applied, consideration should be given to which Department is best placed to enforce them, whether that be the DPLH, DMPE or another body created for the purpose. In any event, the body tasked with enforcement of minimum requirements will need to be suitably resourced to undertake this task in a manner that inspires the confidence of native title parties and industry.
660. In regard to the development of terms, given the impact upon proponents and native title parties, this would be required to be conducted through a formal mechanism that includes participation and input from each of these sectors. Given the breadth and depth of issues examined in this Review and the urgency expressed by a wide set of consultees, a Task Force convened by Government would seem to be an appropriate instrument through which this can occur. Such a Task Force would best be independently chaired and consist of a balanced number of representatives from each sector, preferably with good representation from each region to encompass region-specific issues. Such a Task Force would need to be properly resourced and will require legal, research, administrative and logistical support.
661. The work of this Task Force should draw from the NTPCs, the Tjiwarl ILUA and other sources as required. It will need to operate through a clear terms of reference in regard to the development of a set of minimum requirements and will need to examine effective means of implementation, whether this is via conditions, regulation or is required to be supported by statutory change.
662. There is no doubt this will be a difficult task with a variety of contentious issues to be resolved and a number of stakeholder processes to be catered for. Even so, it is clear that action is required.

663. The end result of this process should aim to be the implementation of measures that provide general satisfaction to stakeholders and confidence in its measures going forward. Consensus may not be entirely easy to gain given the state of the broader environment in which this would occur, however if measures properly balance the interests of the parties, an easing of the pressures within the broader system should be attainable.
664. To this end it is recommended that:

**Recommendation 24.**

- a) The State develop and implement a set of minimum requirements in regard to native title and heritage protection and management to apply to all tenures to which the expedited procedure has been applied.
- b) These minimum requirements draw from the provisions of existing examples such as the Queensland NTPCs and the Tjiwarl ILUA, aim to properly balance the interests of the parties and apply the principles and requirements articulated in this Review.
- c) Minimum requirements are enforced through conditions, regulation or are enabled through statutory change to ensure they stand as an enforceable set of minimum requirements.
- d) The State convene an independently chaired Task Force consisting of equal numbers of representatives from PBC and industry sectors to develop these minimum requirements and their implementation measures, including which Department or body is to be tasked with enforcement.
- e) This Task Force be appropriately resourced and supported to assist in reaching its aims.
- f) The Department or body tasked with enforcement of the minimum requirements be appropriately resourced to carry out its functions fairly, effectively and efficiently.

## 12.4) Indigenous Land Use Agreement Based Arrangements

665. While the setting of minimum requirements would assist the mitigation or resolution of a series of the issues outlined in this reporting, it does not resolve the issue of compensation, although there remains considerable uncertainty around any liabilities. Additionally, a minimum set of requirements is exactly that, a minimum, and it is likely there will remain a demand for a higher standard or those which are more tailored to the particular circumstances or regions in which PBCs operate.
666. As has been explored, arrangements already exist in relation to the Tjiwarl group through the auspices of the 'mining business' component of the Tjiwarl ILUA. Also as mentioned, a number of industry consultees referenced the Tjiwarl ILUA as an example of a more comprehensive set of arrangements that could be made in order to establish agreed

processes and to resolve compensation issues, although some disapproval was expressed towards the monetary components of these arrangements.

667. There are strong advantages in this approach. In the first instance it establishes agreed measures around where the expedited procedure would be agreed to apply and those areas of higher cultural and heritage value in which the right to negotiate is agreed to apply. This creates certainty around processes that are to be entered into and the approaches that need to be taken in each circumstance.
668. Following this, after understanding the approach to be taken, the ILUA then steps out processes in a clear manner through the creation of a series of arrangements that are to apply in either right to negotiate or expedited procedure matters and for the management and undertaking of heritage surveys. This provides to all parties a high level of certainty around steps to be undertaken, time frames and outcomes. In addition to this, costs associated with the administration of each of these agreements are agreed within the ILUA, providing a further level of certainty.
669. The Tjiwarl ILUA also provides for administrative fees and compensation. While there is some controversy around these figures, particularly those that are compensation focussed, the compensation provisions of the Tjiwarl ILUA effectively settle the matter for all parties. This is particularly advantageous for the State which, depending on the results of upcoming future act compensation court actions, may be subject to a number of complex and possibly substantial native title compensation actions.
670. Perhaps the main advantage for all parties is that the establishment of agreed processes eliminates the need for individual negotiations each time the grant of mining, petroleum or other tenure is sought. This would overcome a very significant number of the issues raised in this reporting and enormously simplify the administration of the system overall. This in turn would very significantly reduce costs for PBCs, proponents and the State, increase trust between the sectors, improve relationships across the board and assist greatly to overcome issues of consultant capture and challenges brought about by limitations to PBC capacity.
671. Importantly, embedding procedures in ILUAs would also overcome the issue of bad faith actors across all sectors, and through the establishment of agreed processes and procedures, disempower those who are currently able to manipulate systems for their own advantage. It would be expected that activity would continue to be undertaken by those proponents who are serious about conducting exploration or other activity and issues such as tenement parking would be addressed. Similarly, both proponents and native title parties would be assured that the influence of unconscionable conduct on the part of either party is greatly reduced, if not overcome.
672. The development of an ILUA based system would also facilitate the ability of proponents to maintain their social licence to operate and ensure measures are in place for native title and heritage protection in which native title parties can have confidence. In short, there are very significant upsides for all parties, and the prospect of removing complexity and cost through the simplification of the administration of the future act system and the heritage activities that arise from it should be one that is very attractive. Such a system would serve the needs of all parties and in turn, lead to improved outcomes across the board.

673. The major disadvantage of this approach is that it would require a significant investment from the State due to the processes involved in ILUA development and authorisation in the form of funding, personnel and time. This is compounded by the large number of native title determination areas that exist across WA and the acknowledgement that ILUA authorisation processes are complex and resource intensive.
674. Nonetheless, given the material before the Review it seems clear there are very strong advantages to this approach. In the main, this would be through the realisation of enormous cost savings for all parties in terms of both money and time, the reduction of complexity, assurance that proper measures are taken in regard to native title and heritage values and assurance that proponents maintain the ability to conduct activity. As a result, it would be expected that Government investment in such a program would enable savings, efficiencies and economic activity that far outweigh its initial investment.
675. In some ways, given the wide range of issues that have been canvassed in this reporting, the prevalence of native title determinations across the state and the significance of the mining industry to WA's economy, it is difficult to understand why these measures have not already been taken. Perhaps it is ambivalence towards PBCs, that the realisation that PBCs are a sector unto themselves has not been made or that PBCs have only recently emerged. Perhaps it is because current economic models do not properly factor in native title. Whatever the reason, the upside of an ILUA based system across the state such as that set out by the Tjiwarl ILUA seems so considerable that it should be prioritised.
676. Such action is not unprecedented in WA. Currently the Department of Biodiversity, Conservation and Attractions (**DBCA**) is working through a series of ILUA processes with a variety of native title groups on protected area joint management arrangements. It is suggested that such a program is emulated in the future acts area in which the need seems far greater.
677. It should also be considered that, having already experienced the process of negotiating the Tjiwarl ILUA and being currently engaged in compensation negotiations with other native title groups, the State already has a set of learnings and guideposts to assist the development of future ILUAs. These learnings and guideposts can be expected to grow and develop over the course of future negotiations, potentially improving the efficiency and effectiveness of each subsequent ILUA development. This should have a positive impact on the time and resourcing aspects of these negotiations.
678. In light of this, it is recommended that:

**Recommendation 25.**

As a matter of priority, Government resource and implement a program to develop and negotiate ILUAs with native title parties across the state to establish agreed future act processes for the administration of the grant of mining, petroleum and other tenures. This will also include measures for the management of heritage values and the administration and conduct of heritage surveys in addition to measures for administrative support and native title compensation. Although final terms are a matter for the State and native title parties, such ILUAs should also be developed in consultation with industry.

## 13) Appendix 1 – Terms of Reference

### **Purpose**

Focussing on mining and exploration processes, conduct a review of the intersection between the Commonwealth Native Title Act 1993 (NTA) and Western Australia's Aboriginal Heritage Act 1972 (AHA), with a focus on improving the efficiency, effectiveness, and equity of Aboriginal heritage processes in Western Australia (WA) for both native title and industry parties.

The review should have regard to:

- the unique nature of Aboriginal cultural heritage and the need to protect, preserve and properly manage that heritage;
- the significance of the mining industry to the WA economy and the overall prosperity of the nation, and the critical role of exploration in the future of mining in WA;
- the role which has emerged for Prescribed Bodies Corporate in the exploration and mining approvals environment;
- the WA Government's commitment to economic diversification, the energy transition, decarbonisation and the 'Made in WA' plan;
- the importance of providing certainty and timeliness to landowners and land users in undertaking works that have the potential to destroy, conceal or alter Aboriginal cultural heritage;
- the findings of the Joint Standing Committee on Northern Australia's 'A Way Forward' report in response to the destruction of sites at Juukan Gorge; and
- the deep connections of Aboriginal Western Australians to country, which is recognised through native title determinations and settlement outcomes across the State.

### **Objectives**

1. Within the mining and exploration context, identify the interactions and points of intersection between exploration approvals processes, native title and Aboriginal cultural heritage regimes, including overlaps, gaps, and areas of conflict or inefficiency.
2. Consider the extent to which the native title and Aboriginal cultural heritage regimes and relevant State processes and policy settings achieve the objects and support the practical implementation of the NTA and the AHA, with particular focus on:
  - a. Future act processes and their interaction with State legislation, including the right to negotiate and the expedited procedure in the context of the Mining Act 1978 (WA) and the Petroleum and Geothermal Energy Resources Act 1967 (WA).
  - b. The role and scope of heritage agreements in the context of the future act provisions of the NTA, particularly the expedited procedure and right to negotiate, where it is applicable, and alternatives that may be considered.
  - c. The interaction between native title processes under the NTA and the management of Aboriginal cultural heritage under the AHA.
3. Evaluate the capacity of Prescribed Bodies Corporate, native title claimants, native title representative bodies, regional corporations, land users and industry proponents to

engage in native title and Aboriginal cultural heritage processes, including funding arrangements, access to expertise, governance capability and institutional support.

4. Assess the adequacy, consistency, economic impact, timeliness and cultural appropriateness of consultation processes involving native title parties, government agencies, land users and industry proponents, with regard to the objects and operation of the NTA and the AHA.
5. Identify the financial constraints and administrative burdens associated with native title and Aboriginal cultural heritage processes for all stakeholders, including native title parties, government agencies, land users and industry proponents, and assess their impact on timely and equitable outcomes.
6. Propose options to enhance the effectiveness, efficiency, and equity of the native title and Aboriginal cultural heritage frameworks in Western Australia.