Amalgamated Prospectors and Leaseholders Association of W.A. Inc.
PO Box 2570 Boulder WA 6432.

Representing Prospectors Since 1904

28/05/18

Submission or the rewriting of the WA Aboriginal Heritage Act.

Section One : The impact of the current Aboriginal Heritage Act on prospectors and small scale mining in Western Australia. Section One - originally issued in March 2018 as a response to DLPH request.

Introduction.

The Amalgamated Prospectors and Leaseholders Association (APLA) is a not for profit organization operated by volunteers. Its mandate is to protect and further the interests of prospectors and small miners across Western Australia. We have seats on several government department committees within the DMIRS and the DLPH to provide input to policies and represent the interests of our members to those departments. APLA is concerned about prospectors leaving the mining industry with the subsequent knock on effect on the State's economy. When in Opposition, the Aboriginal Affairs Minister indicated that he saw the need for a review of the current Aboriginal Heritage Act. This paper is designed to give perspective on the impact of Aboriginal Heritage Act on an overlooked but critical sector of the mining industry. In his time in Opposition, Minister Wyatt was strongly supportive of Aboriginal empowerment over indigenous culture and sites, with previous discussion focusing on legislative changes that make that empowerment the priority. In contrast, we as the entrepreneurial small business side of mining have never been consulted regarding our problems with the current Aboriginal Heritage and Native Title Acts. The Minister's concerns that indigenous people have similarly not had a say in their cultural future matches our concerns that prospectors and small miners have been similarly overlooked and disempowered . This begs the question, who of were the beneficiaries of any consultation? APLA's paper here, asks the Minister are we not similarly entitled? The criticisms of 2014 changes to the Aboriginal Heritage Act pointed to the failure of Aboriginal involvement within the proposed revised Act. Ironically, that criticism can also be applied to us as prospectors and small miners. APLA hopes that we will also be included should a review of the Act be tabled again.

Background.

APLA is currently being swamped by small scale miners and prospectors requiring assistance and advice about Native Title and the consequent Aboriginal Heritage issues. We are witnessing a huge escalation of demands by Land Councils and Heritage Groups that are causing a mass exodus from this small business sector, which is the non-corporate part of prospecting and mining. Individuals can no longer afford the imposed costs and administrative burden. The Australian Federal Government is partly accountable for this as it sponsors and financially supports the Native Title industry and indirectly, the Aboriginal Heritage Service providers. However, the imposts emanating directly from Aboriginal Heritage stem from the WA State

Governments and is similarly crippling. Federal Governments have created & nurtured the Native Title industry, the Land Councils and Traditional Owners and claimants. These are Federally funded beyond the dreams of us entrepreneurial prospectors but with a protocol of cost recovery.

Whereas, we prospectors have a 10 year old Landcruiser and an enquiring mind but not the wallet to afford to continue much further against the onslaught. Prospectors require and demand support from those that are currently supporting only one team in the game that was originally meant to bring the oft quoted "Procedural Fairness" to the Native Title regime, the Aboriginal Heritage regime and all government departments. It's beyond doubt that the Aboriginal Heritage Act and the Native Title are inextricably linked pragmatically if not legally, regardless of State or Federal statute source. The Native Title Act and all that emanates from it was predicated on it being "a fair fight". Consequently, the Native Title claimants were funded by our Federal Government. This was well intentioned as it enabled the Traditional Owners to present a legally compliant and competent case to the Native Title Tribunal versus a mining industry that has sufficient funds to overwhelmingly manage their case in their favour. It was felt at the time that the mining industry could fund its own legal disputes. While that point is arguable, corporate miners have adopted their own solution; a solution that has caused great hardship to smaller miners. Since inception in 1994, the management of Native Title and Heritage has changed and gone are the conflict and the protracted negotiations replaced by pragmatism. Companies now accommodate Native Title Claimants and Aboriginal Heritage Service Providers (HSP), tending not to endure court battles to ensure a project is timely and progresses to meet the cyclic demands of resources. Agreed settlement is now the order of the day from corporate miners. Unfortunately for the prospector and occupational small miner, the same financial expectations are applied to them by the Native Title Claimants and Heritage Service Providers, which as we have already mentioned are joined at the hip. These financial expectations are undiluted, unconcerned and without mercy or consideration for our financial resources. We don't have the funds for office staff or to defend ourselves with lawyers or pay settlements so that we can remain working and earning a living. Prospectors are being treated as having the same financial capacity as the big miners, but we haven't got that kind of money. It's time politicians were made aware of this threatening imbalance. We urgently need some backing as well, because the mines of tomorrow are in the hands of the dying breed of prospectors and small miners.

Prospectors and explorers have proven to be the backbone of today's mining industry. They are self-supporting, entrepreneurial and their discoveries often pave the way for corporate mining companies. This is recognized by the corporate miners but governments don't even know we exist. State budgets and treasury coffers just reap the benefits when the gold, the copper, the iron ore, the lithium comes out of the ground.

The reality of Western Australia's good fortune over decades undoubtedly stems from the prospector, with all but two gold mines producing today being initially discovered by a poorly supported prospector working in remote desert areas. (The exceptions are Boddington, a geological oversight and Tropicana).

However, the easy near surface gold and its gold indicators are gone, the gold having been found and sold thereby providing employment, income and State taxes and Royalties over many decades. But more importantly, the prospector transferred that data and information that led to the mines of today.

Today, the loss of surface indicators leads the prospector into using more intrusive methods to search for the deeper deposits. These methods involve earthmoving equipment and

surface disturbance. It's at this point where Native Title and Aboriginal Heritage are triggered and become problematic to the small miner and prospector.

The Issues

The outcomes from this lack of support, lack of awareness of prospecting and the problems created by the current Aboriginal Heritage Act are given below:
The best and yet the most concerning indicator of the parlous state of the Aboriginal Heritage affairs is indicated by the shocking response to APLA's request for case studies. We went out to our 2000 members and others that are non-members and the litany was the same across Western Australia. They gave us many reports of corruption, poor business behavior, absence of commercial sense, extortion, excessive demands, fraud, delays and often, project abandonment. However, only two people were prepared to allow us to use their case as an example. One is a 78 year old pensioner that is now in fear of retribution from her stance on her Native Title case which brought to light her serious accusations of fraud in the consequent Heritage Survey. The author knows the case well as I assisted her with the matter as she could not afford a lawyer. Similarly, we have another in which the author was involved where the prospector lost a cash investment of $28,000.00 plus 7 years of work due to the excessive financial demands of a Native Title Claimant acting as the Heritage Service Provider. This tenement holder walked away as she could not afford to go any further. The word "retribution" is the reason that nobody will say anything unless it's "in camera". This paper should be read with this uppermost in mind.

Prospecting is a risky business, often with no returns for years or maybe not at all, other than scraping a living. Some get lucky, but most don't. The mineralization targets are often of no use to corporate miners, being too small to be commercially viable propositions on a larger scale. However, should those small projects show promise, they can provide employment and income for individuals as well as economic input into regional economies.

A high percentage of these prospective geological enquiries fail after months of testing and financial outlay. But prospectors and the junior exploration companies are forced to pay out for Aboriginal Heritage surveys prior to surface disturbances despite the project may have no profitable outcome. Put simply, the Aboriginal Heritage parties, Traditional Owners and claimants have "no skin in the game". Such a system is counterproductive to an economy like Western Australia's and is not supportive of the exploration business model that is crucial to WA's future as a mining economy. Indeed, the current system appears to have been predicated on being obstructive and counterproductive to small project development. APLA contends that Aboriginal Heritage surveys and Native Title cost recovery should be tied to the outcome of the geological enquiries and the development but not before they have been proven to be viable and profitable. Surveys could be carried out free of charge prior to work commencing and not before, as is the case presently. If an ideology or a culture is worthy of protection, then arguably it is worthy of protection without profit being the primary motivator. I frequently hear that comment from the vast majority of prospectors. It's intuitive that the proposition that one party should be paying for another's ideological or cultural beliefs will fail to gain support in that discussion from a financing party that simply does not share those same beliefs. It's human nature at work. The issue then creates racial disharmony and mistrust when the thrust of government policy is to engender empathy, understanding and mutual respect. What we are doing at present is dividing and destroying those policies and hence our people.

In particular, the current WA Mining Act needs to be studied in detail on the issue of "Prospecting Licence to Mining Lease" (PL to ML) conversion. The importance of this connection to Native Title and Aboriginal Heritage must be recognized. Emphasis should be given to the connection of mining tenure, Native Title and Aboriginal Heritage as some in the DLPH don't seem to understand how one affects the other. This matter is creating a situation that compels the PL holder to apply for an ML purely to continue with a small but profitable small

mining operation that may only make $20,000.00 income. But to obtain the ML the proponent has to pay out far in excess of that amount in Aboriginal Heritage costs plus a royalty to continue working. Consequently, in many cases the application and continuation of the project is abandoned. Project equity created over many years of labour have been reduced to nothing as people abandon the ground and walk away. They often take the geological data with them which is a total loss to the State. APLA recognizes that the prime driver in this situation is the Native Title Act and the compulsion of "future act". Nevertheless, it's at this point that Aboriginal Heritage becomes an equally compelling driver due to the simple change of tenement nomenclature.

Land Councils as representative bodies are currently demanding $30,000.00 to $40,000.00 payments in advance, ostensibly to recover legal and administration cost using the excuse that the Native Title Act demands "cost recovery wherever possible". As we can clearly see from the above, such cost recovery causes project loss and abandonment. Note should be made of the phrase, "cost recovery wherever possible" because blood cannot be extracted from a stone. This results in nobody making any money from WA's smaller mining opportunities. The abandonment of small projects plays into the hands of Native Title & Traditional Owners that see a better opportunity to secure a larger payment from corporate miners. Mining companies have openly admitted that they use a "in house negotiated financial work around" scheme. This is implemented in the shape of a negotiated payout so that work on their projects suffer no delays. It is therefore in the best interests of the Native Title Claimants and Traditional Owners to dispose of the smaller miners and prospectors by using cost pressures. At this point, when the small miner's ground is abandoned and swallowed up by the larger corporate miners, the Traditional Owners receive far more compensation and more quickly, than if they had to deal with a smaller operator. It is often opined seen that Aboriginal Heritage is a profit driven ideology rather than a cultural belief system that values heritage protection. Cynical perhaps but that is the perception.

Following from this is the issue of regional economics. Today's mining companies have very limited input into regional towns for provisions of any type. Food, fuel, spare parts and people are all mainly "fly in, fly out" (FIFO) or "truck in, truck out" (TITO). They mine the resource, pay the tax, pay the royalty and take the profit. Meanwhile, the smaller operators exploiting the deposits in which the companies have no interest must use regional providers wherever possible. This assists with regional prosperity and social health and regional town survival. Examples of such survival would be the smaller towns of Sandstone, Cue, Wiluna, Laverton, Menzies, Mt Magnet, Coolgardie, all of which were a created for and are now based on one thing and that is prospecting and small-scale mining. In these days of e-communications, large capacity aircraft, huge supply road trains, companies don't use these towns as dormitories for employees. The days of company built and financed mining towns are things of history. FIFO is the order of the day.

It naturally follows that with social health & regional habitation come regional services. Such services are those that are used by Aboriginal people and non-indigenous alike. These include welfare, health, law enforcement, shops and fuel. Logic dictates that if regional social health and economic input withers, population also withers, then so must the supply of regional services as they are withdrawn due to lack of demand. Furthermore, when regional services wither the population remove to cities. It has been the author's experience of 30 years working as a prospector alongside indigenous people that many Aboriginal people generally aren't comfortable with city living, preferring a "bush life" with less pressures. However, with no regional social health and the services that follow, then there will be no long term "bush life" available. Prospectors are a vital part of regional economies that benefit everybody by simply being there, living there and doing what they do best which is looking for more mineral deposits.

Western Australia relies heavily on these discoveries so that the State's standard of living and our ability to assist the indigenous population is strengthened. Lose the prospectors and small miners and we damage our ability to support our own State and those that live in it.
In effect, it's ironic that by killing a small mining industry that has local focus, we are damaging the support to regions and the "bush life" that indigenous people are desperately protecting. It simply doesn't add up that Traditional Owners and Native Title Claimants are forcing us out of the game when it's our sector of the industry that is, in part, sustaining their support systems by our very presence and our labours.

The current modus operandi of Land Councils, Traditional Owner and Native Title Claimants attracts no support from those in our industry sector. It's very much the opposite when onerous financial burdens are lodged on those that are contributing to the economy of WA and yet can least afford to pay. Companies can afford the outlays whereas our sector cannot. But we are dealt with by Land Councils and Traditional Owners in the same manner as corporate miners when we simply don't have the finances to give. As a result, and people being people, emotions always play a big part in opinions. Sadly, those opinions are being realised in the form of ever increasing racial tensions. Companies have no feelings and no right to vote; only humans have those. The outcomes are evident today in the shape of racial disharmony across the West Australian Goldfields. That animosity clearly also filters itself into city life as well.
APLA has taken note of many comments and accusations regarding Aboriginal Heritage and the industry built around it by lawyers and Land Councils. These are summarised below:

1. A study of the Aboriginal Heritage Act reveals a biased legislation that protects the heritage of aborigines but contains no compelling regulation to proceed with that protection using timely business processes, commercial practices and in a manner that includes mutual procedural fairness. Similarly, the Aboriginal Heritage Act contains no compliance sections for the Traditional Owners and Native Title Claimants by which they must abide. Therefore, if there are no compliance measures, there can be no compliance monitoring of negotiation and survey timelines, outcomes or procedural appeals. Agreements, surveys and reports take far too long and detract from the productivity of the State of WA. This is often caused by Native Title Claimants and Traditional Owners having no regard for commercial or procedural realities. This contrasts starkly with the WA Mining Act or the Environmental Protection Act both of which have numerous provisions for timely procedure compliance combined with strict and enforceable punitive measures for lack of compliance.
2. There are no restrictions on duplication of surveys either by repetitive claimants such the current Maduwonnga claim around Kalgoorlie or by new claimants going over the same ground that a failed claimant has already inspected. The excuse for the latter is often the new claimants' justification that the former surveyors were not of the same family, mob or tribe. Thus, the survey is repeated again and again, often with nothing being found by any party but paid for yet again by successive tenement holders before they've even turned a sod or made a dollar.
3. The matter of confidentiality is yet another problem that assists repetitive claims. When a survey is conducted, any scrutiny of the outcomes is not available to any parties outside of the Traditional Owners or Claimants and the tenement holder. This just adds fuel to the fire of discontent but provides regular income that sustains and perpetuates the Land Councils, their clients and the heritage survey providers (HSP). These clients include the legal profession, anthropologists, archaeologist and of course, the Traditional Owners and Claimants themselves. It's a revenue stream that the corporates can afford as simply a

cost of doing business, but it's a revenue stream that an ordinary working prospector cannot afford.

4. As the author I have been told by indigenous elders that Land Councils and Native Title Representative bodies often select people to carry out surveys that have had no connection with the land that they are looking at. This is perceived as a successful attempt to bolster support and ensure loyalty to the leader of the NTC/TO party. The survey suffers as result and heritage items and locations are often missed by those that "don't know this country". In turn this leads to a loss of credibility in the heritage process and outcomes.
5. Many small prospectors have been driven out of the exploration business as a consequence of the many facets of the Aboriginal Heritage and Native Title industries. They've collectively lost hundreds of thousands of dollars of investment and gained nothing in return except a propensity to give up trying and simply abandon exploration projects. This leads to the less effective and passive, non-intrusive prospecting that has far less chance of discovering the profitable mines of the future that Western Australia must have. Some prospectors have stories of fraud and misappropriation to tell, heritage surveys having been paid for but no report was received, project delays caused by Traditional Owners that don't want to understand that time is money and without money, the very social systems that support them are simply reduced to the point of collapse. Alternatively, we could have the situation where electoral power votes down any improvement for the Aboriginal people of WA based purely on racial grounds. That's the tragedy of all this. It's simply human nature at work. It's a case of the small miner and prospector not understanding Aboriginal culture and indigenous people not understanding the Western Business Model. Unless the two are brought together things will only become worse than they are now.
6. Previous Act changes of 2014 failed as it was thought that the changes diluted empowerment and control over Aboriginal Heritage. Criticisms at the time from the current Minister, then in Opposition, were aimed at that precise point. However, empowerment of one party in a two-sided arrangement should not be done at the expense of one side. Such a course is fraught with the danger that political power may once again defeat any proposals and an opportunity to get it right first time is lost. This creates an unaffordable loss to the State Government finances and another failure of legislation to accommodate both the mining industry, prospectors and the Aborigines of Western Australia. Empowerment of Traditional Owners and Claimants should not be at the expense of aggravating the parlous state of those that already have no power at all, ie. prospectors and small miners.

Recommendations.

1. That the DLPH conduct stakeholder conversations with prospectors and non-corporate miners with regard to any proposed review of the Aboriginal Heritage Act.
2. That DPLH makes itself knowledgeable about the inextricable intertwining of the WA Mining Act with the Aboriginal Heritage Act and the Native Title Act and the impacts therein.
3. That the DLPH improves its engagement with other State Government departments regarding the impact of its sector governance on other statutes.
4. That the APLA is invited and involved in securing workable outcomes that have mutual and lasting benefits to our sector the West Australian mining industry generally.

5. That the DLPH reviews the current Aboriginal Heritage Act with a view to introducing increased oversight legislation reinforced by compliance and monitoring regulation that meets the requirements of modern business practices.
6. That the State Government provides resources and financial support for the small business prospectors and miners to assist with the intrinsic demands within the current legislation.

Response to questions within the Consultation Paper.

1. **"The Long Title"**
   Nothing to add.

2. **"Consultation by appropriate people".**

   The use of "appropriate people" will enhance the credibility of the consultative process, the credibility of the finding and will go some way to enhancing respect for aboriginal culture and people. To ensure "appropriate people" only are being used for surveys and consultation, a Register of Accredited Aboriginal Peoples for Survey should be set up in the Regulations of the new Act. Accreditation of any group or individual must prove beyond doubt that they have lived at one time or another for an extended period of years in the relevant survey area. Such a domicile provision should not be based on tribal, family or "mob" connections. Once accredited, only this group can be utilized as heritage surveyors. Aboriginality is to be a mandatory pre-condition.

3. **"Honorary Wardens".**

   APLA cannot comment on the use in practical applications as we have no experience of this. However, the term "Honorary Warden" should not form any part of a peak level Act of Parliament. The term "honorary" carries with it the definition of having no powers and is purely ceremonial. Furthermore, the Act contains no requirements for subject matter training, legal training and does not specify any formal or recognized qualifications for these positions yet they carry with them more power than the WA Police. This lack should be rectified if the Warden status philosophy is to carry any credibility that should match the responsibility and accountability of the position. At present, a warden could be anybody with the certification provided by the State but no training. Assurance is required that any such appointee is suitably qualified. If not, then the State could be held liable for damages should the training of a Warden ever be questioned. The Act should also contain powers of cancellation of a Warden's certification where appropriate. If the State wishes such Wardens to exist within the Act, it has to make a choice. Either describe the title of "honorary" as "having no powers" or use the term "Warden" in isolation, but ensure that training, examination and testing occurs in aspects ranging from personal suitability, criminal record, stability, historical connection to legalities, responsibilities, obligations and limitations of such title and position. If such steps are not taken, then the credibility and respect expected for the position will not transpire.

4. **“Roles and functions”.**

The Aboriginal Cultural Material Committee (ACMC).

The committee has lost credibility and its reason to exist. It has proven to be another “QUANGO” that has shown little regard for the WA State Government’s role in ensuring any other government departments obligations to WA’s society, economy and mining industry are to be considered. Put simply, it is inefficient and has lost direction.

The backlog of material currently within the ACMC system is beyond manageable by the committee. It has been suggested that “bulk processing” be carried out to reduce this backlog. APLA feels the idea has merit but it carries the risk of loss of credibility of any item that enters the regime of the ACMC. Industry and the Aboriginal advocacy would express serious concern if this were to be adopted. However, how this serious matter should be resolved is the WA Government’s problem, as it is this institution that allowed the matter to become so threatening.

The composition of the ACMC shows indications of bias in that there is no industry representation within the esoteric and cloistered offices of the committee. This is lacking in the transparency often demanded by government and expected by industry and society. There should be no part of government operating in such a secretive manner.

Recommendation 1: Suitably qualified and totally unbiased anthropologist and archaeological specialists should be employed promptly to reduce the workload to manageable proportions.

Recommendation 3: All assessment process, results and reports including item detail to be publicly available.

Recommendation 4: Full statistical reporting to be publicly available. These should include all reasonings why progress has not been made in any aspect of the ACMC’s operation.

Recommendation 5: The ACMC to be answerable to the State Administration Tribunal and subject to regular oversight by the Auditor-General to ensure efficiency, accountability and satisfactory use of funds provided by the taxpayers and royalty providers from the State’s resource sector.

Recommendation 6: Enforceable time constraints to be prescribed in the proposed Act and its Regulations specifying completion dates for assessments. These constraints should have prescribed penalties for non-compliance. Default judgements should be made by the Minister in the event of unacceptable delays that breach the prescribed times. Such prescriptions would and should meet similar key performance indicators (KPI) specified in almost all other Acts of Parliament. The WA Mining Act is offered here as an example.

Recommendation 7: ACMC Ex-officio positions as prescribed in Sect 29 of the Act, should have mirror positions from DMIRS and the mining industry within the assessment panel. This would give some truth to the demand for transparency from the proponents of the new Act, specifically, the WA Government itself.

Sub-Summary: Overall, the WA Government needs to be accountable for this debilitating performance lack from the ACMC. Major steps need to be adopted to overcome this

unsatisfactory performance from the ACMC. Such underperformance is now adversely affecting the economic contribution of the mining and prospecting industry that is so vital to Western Australia. The Minister has stated that the new Act must reflect the demands of WA's economy and the expectations of the public. The ACMC fails badly in that respect and such is demanding of a complete restructure.

4a: "The clarity of the current Act in preserving and protecting objects and sites"

APLA feels that the current level of legislation to protect objects and sites is more than adequate. However, we take the view that the prescriptions of the current Act are heavily biased towards compliance and offence punishment of any proponents of surface disturbance. This contrasts heavily with practically no compliance requirements by those tasked with explaining the significance of such objects and sites. Similarly, there are no compliance prescriptions for prompt and timely processes when inspecting, surveying and assessing such sites. This is unacceptable and contradicts concepts of procedural fairness and transparency that are the heart of the current State Government's ideology. Such deficiencies also fly in the face of modern business practices that are being sought by the Minister in order to produce a new Act that reflects the requirements of the State.

4b: "The role of the Minister and his Department"

Recent discussions within aboriginal advocacy are seen to be supportive of autonomous self-regulation of the heritage process. APLA feels this should not be supported in any manner under the terms of the new Act. If acceptance of a new Act is expected and its credibility isn't to be challenged, it should adhere more closely to the accepted Westminster system of governance whereby all laws apply equally, are administered, regulated and dispensed by a government department that is subsequently headed by an elected Minister of the State of Western Australia. The current Act and the proposed new Act is intended to be an Act for all citizens, as are all Acts. Secrecy and autonomy is totally unacceptable. Any Act or Bill predicated on such standards would be legally challenged and APLA believes such a challenge would succeed.

Recommendation 8: That limits be prescribed in the new Act to ensure timely inspection and surveys are carried out. Such prescriptions to include financial penalties and default determinations to be made in the absence of or late production of assessment results.

Recommendation 9: That a judicial Heritage Tribunal be set up to determine, in a timely manner, the default decisions as mentioned in recommendation 8. An example of required governance here would be The Native Title Tribunal when using it's timeline requirements for Determinations.

5. **"Section 5 of the current Act – site descriptions".**

Section 5 of the current Act contains no burden of proof or any inference that any proof is required. This leads into the subsequent sections of the current Act having an overriding requirement or intention that such proof is not a requirement. It can thus be legally pursued, challenged and interpreted in the manner that such proof is not required for any subsequent part of the Act. Therefore, the word "proven" should be added to prior to any sub clause in Section 5. e.g *Clause 5(b) – " (b) any sacred, ritual or ceremonial site, which is of* ***proven*** *importance and* ***proven*** *special significance to persons of Aboriginal descent;".*

6. **"Section 6 of the Act and Part V – Application to objects"**
   Section 6 (2) should be removed entirely. Such arbitrary vagueness is open to any and all types of misleading claims right through to deliberate corruption or fraud. As is in our submission at 5 the word "proven" should be inserted here. There has to be a a burden of proof here. It has been displayed and even admitted to APLA that some "objects" such as a rock outcrop could be construed as having sufficient significance as to be a site, when it fact it has none at all, other than being attractive or different. The same has been pointed out when it is simply a flat area of non-descript ground. The terms used in Section 6 (2) actually makes that observation, thereby making the protection of a mistake or a deception a strong probability. Such a clause or section should not form any part of the proposed new Act.

7. **"Protected Area"**
   Section 19 provides adequate Ministerial oversight providing changes are made to the structure and membership of the ACMC as described in Recommendation & above.
   Section 19 (5) should be amended to include a requirement for survey and precise demarcation. The demarcated spot should be a matter of publicly available knowledge. This would ensure that there can be no excuse for any damage caused by lack of awareness. Far better to ensure the area and location is known rather than have someone punished following irrecoverable destruction. Public knowledge also assists with awareness campaigns across WA and the world to ensure the acknowledgement that WA's Protected Sites are crucial to aboriginal culture and are clearly apparent. Section 23 (3) should be removed or totally reconsidered. If a Protected Area is not surveyed and/or demarcated as in Section 19 (5) it is unfair practice and lacking in transparency. APLA maintains that such esoteric, secretive, obfuscation should be a thing of the past if the new Act is not to perpetuate the current lack of credibility of Aboriginal Heritage within the public eye. Sect 23 (3) would be severely tested under Common Law despite what any Act stipulates.

   Whereas, Sect 62 provides the defence of "lack of knowledge". Therefore Sect 23 is invalidated by Sect 62 by virtue of the secrecy surrounding Protected Sites. This is contradiction bordering on duplicity. It's either one or the other.

   Protected Area assessments should be given highest level of priority by the ACMC when making attempts to clear the current backlog.

8. **"Aboriginal Remains"**
   Nothing to add on this point.

9. **“Activities affecting Aboriginal Sites”.**
   In determining any activities on Aboriginal Sites full consideration should be given to the economic contribution of such activities compared to the level of significance of the site. This may require properly qualified economic expertise on a revised ACMC membership. Alternatively, a second parallel committee, based on economic impact should make recommendations to the Site Assessment Process and the Minister as required. Furthermore, full consideration should also be given to those that have business interests in the site area. A more robust assessment using the above guidelines is far better than a process of appeal after any adverse decision.

10. **“Criteria evaluation”**
    As above.

11. **“Assessment of sites lacking in physical presence”**
    Such sites are beyond the understanding and judgment of non-indigenous people. These sites should have full disclosure, description and reasoning by indigenous people provided to the public and to a process described within the proposed new Act. These claimants must prove their connection with and knowledge of such areas using Affidavits. Following this, the documents are to be submitted for consideration by the revised ACMC containing neutral archaeological expertise.

12. **“Consent or authorization for use”**
    Consent or authorization must always rest with Minister or/and with his delegated authority. This is accepted practice in any Acts in Western Australia and should not be changed here. Any Ministerial decision can be challenged within the court system. There should be no suggestion of autonomy within the new Act.

13. **“Section 18 improvement”.**
    The best contribution to the operation of Sect 18 is outlined in the recommendations responses to Question 4 “Roles and Functions”. However, APLA has discovered from attending several of the recent workshops that the TO’s are lacking an understanding of the operation of the ACMC. They feel that it is the mining industry that simply pushes ahead with projects with scant regard for heritage when in fact it is the ACMC that studies the evidence and provides an positive or negative outcome. The TO’s are unaware that the ACMC is staffed by their own indigenous people and yet mining is being blamed for all the problems connected with Aboriginal Heritage. A statewide education process if required at ground level about who actually is the umpire.

14. **“Provisions for no alternative statutes”.**
    No comment on this point. However, much greater departmental cross-pollination is required if all parties are to attain integration and understand the overall impact of heritage on the economy of WA.

15. **“Enforcement improvements”**
    Section 56 “Secrecy” stipulates a fine of $1,000.00 for disclosure of mining or trade secrets. This should be increased to $10,000.00 for an individual and $100.000.00 for any Body Corporate.

16. **“Penalties”**
With the exception in para 15 above, the penalties should be increased to reflect contemporary values with respect to Bodies Corporate. A fine of $100,000 for first offence; $250,000.00 for second offence. Daily penalty increased to $10,000.00 per day. Criminal actions be taken against Directors of PBC Land Councils wherever possible with jail sentences that match of the penalties for individuals in Sect 57 (1).

Penalties as above should be prescribed for:

- False representation of aboriginal heritage sites and objects.
- False reporting of survey results.
- Non-provision of a survey report after the proponent has paid for it.

17. **“Defence against disclosure due to customary laws and protocols”.**
This is issue is at the very core of the discontent of miners and explorers in the current Act. The use of this defence has destroyed any remaining credibility of the current Act and its administrators. It exists within the Aboriginal Heritage survey business to glean further search fees when the existence of a site is already known or the lack of any sites is known. This defence clause is used to create a revenue stream. If transparency is the order of the day, such a practice must stop. If credibility of the current proposal to empower Aborigines is to have any regard, then this defence must not form any part of a new Act.

A large part of the problems is caused at the stage of Heritage Surveys at the point of Native Title (NT) proceedings such a Prospecting Licence conversion to a Mining Lease (ML). In order to satisfy the requirements of “Right to Negotiate” rather than a second Expedited Procedure after 8 years, a Heritage Survey is a requirement. The State of Western Australia must capture these initial Heritage Surveys that are required under the Commonwealth Native Title Act and ensure that they are deposited with the Registrar. This is vital to ensure that the Heritage Register is available when the demands of a Programme Of Works (POW) or similar is assessed by DMIRS for the proponent. It is at the point “Right to Negotiate” that the most difficulties, delays and costs are encountered by the small prospecting and mining business operators. The vast majority of these are sole operator businesses. At present, this interface of a required survey within Native Title regime conflating with the subsequent Programme of Works is suffering a procedural gap. The State has to assume authority over this gap to ensure that surveys that are done at the Native Title stage are carried over into the DLPH/DMIRS mining operations assessment stage. It is not an excuse that a survey done for NT purposes to achieve PL to ML conversions cannot be used as a later stage for POW or similar operations.

18. **“Sect 39 (2) and 39 (3)”**
Current criteria are adequate.

19. **“Steps to report, assess, amend etc”**
Nothing to add

20. **“Missing from the Act”**

1. There are no provisions for determination of false representation of aboriginal heritage
2. There are no punitive measures or penalties for false representation of aboriginal heritage
3. There are no prescribed time lines, limits or deadlines for the ACMC or Heritage Service Providers by which survey reports and decisions must be made.
4. There are no punitive measures or penalties for non-production of survey reports following a survey of aboriginal heritage sites.
5. There is a need for a Determination Tribunal for the Heritage determinations that are out of time, as above, or are disputed**.** e.g the Native Title Tribunal mandatory determination method is an example here.
6. There is no legislated Process Procedure which the proponent and the Heritage Provider must follow in order to achieve fairness and timely outcomes.
7. A serious overhaul is required of Section 15 of the Act regarding the reporting of sites and objects. The definition of “reporting a site” that was heard from DLPH staff in the Bunbury workshop is disputed by APLA. The view from the DLPH, heard at that workshop, was that reporting a heritage site to an official such as police officer was sufficient to meet the stipulation in Sect 15. APLA maintains such a simplistic interpretation disavows any responsibility or concern for a heritage site or object. Section 15 implies far more than that and should be strengthened to legally oblige the holder of the knowledge to do more to take responsibility for that knowledge. This matter requires more thought and application if we are serious about avoiding duplication, double dipping, uncertainty, lack of transparency and the problems created by confidentiality in the context of the RSHA.
8. Heritage Service Providers (HSP) must be registered as follows:
    a) Provide to the DLPH, full details of individuals of their relevance and association with the land and area undergoing a survey.
    b) Penalties to apply for false representation of the above
    c) All survey participants must meet the above criteria of association and relevance.
    d) Local Elders to be involved directly with the payee regarding who are the right people to be carrying out the surveys.
    e) Registered Local Elders to be the decision makers in the veracity of claims, surveys and surveyors.
    f) Database held and maintained by the DLPH of individual AH Elders surveyors and Service Providers. Database to include names, addresses and full contact details.
    g) Database to be held and maintained by the DLPH.
    h) Database to be publicly available
    i) HSPs to be Sole Traders with Australian Tax Office oversight
    j) Elders, surveyors or anthropologists or archaeologists must not be connected financially or commercially to any Land Council.
    k) All transactions and contractuals must be “arms length” from any Land Council.

l) Must report in the first instance to the payee for the survey
m) HSPs to be liable under penalties in the new Act in the event of false representation or no provision of report.

21. **"What could be removed from the Act?"**
The current Act provides protection for aboriginal heritage as it stands now. What's needed are more modern provisions as APLA has described here. We see no reason to remove anything. The current Act would be a good starting point for the new Act.

General comments section.

1. ACMC to have a large increase in funding and resourcing. Ideas to overcome the backlog:

    - Instigate several temporary ACMCs.
    - Prioritise assessments based on commercial and economic imperatives and level of importance and potential site impacts.
    - Bulk processing. However, this is not ideal as it leads to loss of credibility.
    - Dismantling of the ACMC and move to Native Title style tribunal.
    - Enforce timeline legislation on assessment process.

2. The precise location of sites to be publicly available. This would allow smaller buffer zones and increase credibility.
3. More importance to be placed on the words and decisions of Elders.
4. Land Council influence to be much reduced.
5. State Government to provide financial assistance to local Elders to empower them to lead the surveys.
6. State Government to legislate for an alternative of a combined entrepreneurial system whereby payment for surveys is tied to profitable outcome of small mining projects. This would be voluntary between the proponents and the HSP. The current system stifles prospecting for more gold deposits.
7. State Government to pay for all surveys as the results of those of those surveys become a valuable State Asset. As such, the costs of discovery and registration of that asset should be the responsibility of the State.
8. A disparity exists between local government heritage survey cost being covered essentially by the State and the private funding model paid for by prospectors.
9. State Govt to fund a statewide Register project.
10. Proof of transparency and fairness to be publicly available
11. All survey reports to be publicly available
12. Statutory Guidelines, standards and procedures for conducting surveys to be publicly available.
13. Once an area is surveyed and lodged no further surveys are required or permissible.
14. Surveys, sites and objects to be evaluated against State economic imperatives and private commercial perspectives.

15. Only static objects or sites should be candidates for site registrations. Trees to be subject to rigorous levels of scrutiny and archaeological assessment integrity.
16. Permit system for Low Impact Activities that do not require the RSHA process.
17. Register of previously "blanket cleared" areas.
18. Rates for surveys to be standardized in the new Act. Rates to reflect the generally accepted cost of local labour. The DMIRS Expenditure Form 5 reporting is an example here.
19. Areas that have been subject to extensive surface disturbance or damage, such as legacy mining areas and locations should not be subject the RSHA regime or further survey requirements.
20. The Register to be the subject of an audit by the Auditor General's Office to prove that all current sites are in the correct location and actually exist.
21. DMIRS rents and shire rates to be suspended if delays are created by AH Surveys and or Native Title negotiations. "Force Majeure" provisions to be included in the new Act and across all other government agencies affected in this regard.

Summary.

The author has over 30 years of prospecting alongside Aborigines in many of the Goldfields of Western Australia from Kalgoorlie to Nullagine. Many of those that are still alive are my good friends, even advising me of the realities of heritage business model and its impact on them as people. They often told me, "It not to do with heritage, it's all about money and power". This is the divisive system that successive State Governments have allowed to develop, perhaps unwittingly. It's time for a revision of the Aboriginal Heritage Act such that accountability, regulation, monitoring and compliance is made an intrinsic part of what is a commercial business reality that is currently devoid of any such constraints.
If that revision doesn't happen and our views are ignored, then the status quo will not be an option. Instead, it will become worse than what we are seeing today.

For and on behalf of the prospectors and small-scale miners of Western Australia,

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