



31 May 2019

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Dear Vaughan

Aboriginal Heritage Act 1972 Review Consultation Paper

Thank you for the opportunity to provide comment on the *Aboriginal Heritage Act 1972 Review Consultation Paper – March 2019*.

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

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

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

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

Despite the opportunity of having a briefing session between Departmental staff and several AMEC members on 7 May 2019 there remains uncertainty within industry on how the proposed conceptual framework will actually work in practice, and whether there will be any unintended consequences. This observation is made in the absence of more detailed information which will need to be provided through the draft legislation, regulations, guidance material, checklists, standards, forms and systems should this pathway to reform continue.

Pending development of that documentation and clarification on numerous unanswered questions members continue to consider that various business improvement initiatives can be undertaken now, and well in advance of the development and passage of a new

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Aboriginal Heritage Act. Particularly important is the need to improve the accuracy and integrity of the Sites Register; and the issuance of improved guidance material on due diligence and procedural fairness processes.

As requested, specific comments and points of clarification on the Consultation Paper are contained in the **attached** Table for your consideration and response please.

Members wish to highlight that they are very concerned about the potential unintended consequences from a redefinition of what constitutes protected Aboriginal heritage. It is unclear on how, for example, such redefinition might affect existing survey reports, clearances and Heritage Agreements and whether any may be deemed invalid or redundant. Should this be the case, extreme uncertainty will be created for current mining and mineral exploration projects as well as possible duplicative costs and unnecessary delays if Agreements are to be re-negotiated or clearances reassessed.

Members are also concerned as to just what might constitute the Department's or the Aboriginal Heritage Council's oversight of heritage management; or the nature or level of what "standards" might apply when assessing or 'ratifying' Heritage Agreements. Heritage Agreements can be time consuming and expensive to negotiate. Community benefits, training packages, employment, scholarships, compensation and more may be negotiated between the parties to finalise an Agreement. If the Department or the Aboriginal Heritage Council is to then apply a filter of perceived "best practice" before approving a final Agreement, a set of guidelines as to what might or might not constitute an acceptable Agreement would be essential. Members with experience of such negotiations and the variables that might apply in a final Agreement have expressed concerns that such a guideline might be impossible to prepare and might fetter flexibility in negotiations and create further costly delays.

Given the uncertainty arising from numerous unanswered questions and requests for clarification we would appreciate an urgent written response to the issues raised in this submission prior to further progress being made.

We do however look forward to working with you to discuss how the details of the proposed reform will work in practice.

Yours sincerely



Warren Pearce
Chief Executive Officer

AMEC response to the WA Aboriginal Heritage Act Review Consultation Paper - March 2019		
Proposal Number	DPLH Proposal contained in March 2019 Consultation Paper	AMEC comments
1	<p>Repeal the Aboriginal Heritage Act 1972 and deliver new, modernised Aboriginal heritage legislation</p>	<p>AMEC has previously suggested that a number of administrative reforms should be undertaken within DPLH processes and systems, including the release of updated guidance material for all stakeholders.</p> <p>Clarity should be provided on what business improvement initiatives the Department is pursuing in advance of progression of this reform agenda and the passage of a new Act in this Term of Government.</p> <p>Included within such a business improvement initiative it is critically important that the integrity and trustworthiness of the Sites Register must be restored as a matter of urgency. We understand that there are no immediate plans or resource allocations to start work on such a fundamentally important project. The Sites Register should be given priority attention to improve the access and storage of accurate and contemporary cultural heritage information.</p>
2	<p>Update definitions and scope of new Aboriginal heritage legislation to include ancestral remains, places based heritage and intangible cultural landscapes.</p>	<p>Members are concerned that updated definitions and scope of the new Act may result in all existing survey reports / clearances / Heritage Agreements becoming redundant or invalid, the outcome of which could necessitate new surveys to be conducted and Agreements being re-negotiated. This would be unacceptable to industry as it would create significant uncertainty for all land use developers, unnecessary costs and delays.</p> <p>The Consultation Paper indicates that there is no statutory process for dealing with Aboriginal ancestral remains. Clarity should be provided on how this statement intersects with the WA Criminal Code which states that it is a criminal offence to interfere with human skeletal remains, and with s20 of Aboriginal and Torres Strait Heritage Protection Act. This would appear to be creating unnecessary duplicative processes and potential project delays.</p>
3A	<p>Local Aboriginal Heritage Services</p>	<p>Some members have expressed significant concerns that the Local Aboriginal Heritage Service (LAHS) concept will provide the accredited party with significant influence and leverage as gatekeepers over the overall heritage process which will lead to project delays and increasing costs.</p> <p>Members consider that this is a crucial issue which must be addressed in any new framework. Information available from Department of Mines, Industry Regulation and Safety Form 5 annual reports indicates that around \$17 million was conservatively paid by mineral exploration and mining companies to Native Title representatives in the 2018 year for heritage surveys.</p> <p>We further understand from the Consultation Paper that DPLH does not wish to be involved in any fees and charges capping or benchmarking exercise. This will continue to be a flaw in the existing process and needs to be addressed.</p> <p>Industry has received examples where knowledge holders do not wish to go through their Native Title Representative Body / Prescribed Corporate Body (as a single body), and in some cases are inherently factional. Consideration will need to be given by DPLH on how this issue will be dealt with at a practical and local level noting also that in some areas Aboriginal people themselves cannot agree on who the right people are to speak for country.</p> <p>As the <i>Native Title Act</i> provides PCBs with a range of functions (section 52 of the Act and the <i>Native Title (prescribed Bodies Corporate) Regulations</i>), clarity should be provided on how these functions and powers will co-exist when the PBC is operating as a LAHS.</p> <p>As sections 203B and 203BK of the NTA also provide NTRBs and the National Native Title Tribunal statutory dispute resolution functions and powers an explanation should be provided in guidance material on how they will interact with the proposed Local Aboriginal Heritage Service and Aboriginal Heritage Council functions, noting that the State legislation will be subservient.</p>

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3B	<p>DPLH Proposal contained in March 2019 Consultation Paper</p> <p>Aboriginal Heritage Council</p> <p>Desired Outcome - per Consultation Paper</p> <p>Strategic oversight of the system by a panel of skilled people experienced in Aboriginal heritage management. Equitable agreements between land users and Aboriginal people are encouraged, best practice recognised, and reliance on the Minister as the sole decision maker is reduced</p> <p>Noting the significant and critical role that the Aboriginal Heritage Council (AHC) will play in the proposed framework it is crucially important that people with relevant skills, experience and capacity are appointed to the AHC. In this regard, AMEC notes the apparent difficulty in appointing people to the existing Aboriginal Cultural Materials Committee.</p> <p>In view of the forecast heavy workload that the AHC will encounter, particularly in the transition and implementation phases, it must be appropriately resourced to meet day to day operational demands of land users, including out of session advice or decision making in special circumstances.</p> <p>Noting that the AHC will be required to develop standards (including timeframes and performance reporting) and guidance material, it must be done in close liaison with all stakeholders (including AMEC).</p> <p>We understand that the AHC will be a central point of advice and fill a dispute resolution role, for example, in such circumstances where parties may not have reached a mutual agreement in relation to terms and conditions with a proposed Heritage clearance and Agreement. Members welcome this concept as this is often the point where unnecessary costly delays occur due to unreasonable demands or expectations.</p> <p>Although the role of the AHC will be focussed on Aboriginal heritage in its decision making, it is unclear what consideration will be given to economic, employment and social benefits in that process and finding the right balance.</p> <p>In the public interest, and despite Confidentiality Clauses, Heritage Agreements submitted to the AHC for endorsement should be recorded on the public Register with any commercial-in-confidence data redacted, where appropriate, to reduce duplicative surveys and costs being incurred.</p> <p>Industry is concerned that the AHC will be ratifying Heritage Agreements to ensure that they meet their designated Standards on yet to be defined standards. This will add an unnecessary additional layer of approval and result in further delays.</p> <p>In order to reduce costly delays and potential conflict in the Agreement making process there would be significant benefit for consistency and reduced administrative purposes if the AHC provided a Model Template Heritage Agreement in liaison with stakeholders.</p> <p>We understand that the AHC will also have an education function. AMEC would be pleased to assist in developing an education and awareness campaign in relation to the different features and activities undertaken by mineral exploration and mining companies.</p> <p>Noting that the Minister will assess proposals of State Significance or have a major impact on Aboriginal heritage, appropriate guidance material should be made available on this process.</p> <p>Such guidance material should ensure that the role of the Department of Jobs, Tourism, Science and Innovation (JTSI) does not duplicate processes performed by the Department of Planning, Lands and Heritage (DPLH).</p> <p>The guidance material should provide clarity around how the Minister will use the capacity to issue a stop work order where heritage is deemed to be threatened, or in cases of unauthorised land use.</p> <p>Members are concerned that DPLH has been focussing resources on reformatting reports from heritage consultants, and that no action has been taken to rectify this inefficiency by issuing clear guidance material / report template on what is required. This action should be undertaken immediately.</p> <p>It would appear that DPLH resources and expertise will be under pressure in the new framework, and therefore should be appropriately addressed through an increased allocation from the Consolidated Account.</p> <p>In addition to the AHC playing a dispute resolution role we support the concept of DPLH facilitating problem / issues management.</p> <p>Relevant guidance material should articulate how the 'stop the clock' process will be applied.</p> <p>Noting that the 'heritage professional' must be independent of the LAHS, the AHC or the DPLH, clarification should be provided in circumstances where the 'heritage professional' is an employee or has a direct business relationship with one of those parties. Avoidance of perceived or actual conflict of interest will be pivotal to the integrity of the proposed LAHS process.</p>
3C	<p>The Minister's role</p> <p>The Minister can focus on the effective and efficient running of the system. Ministerial intervention to be reserved for contentious matters or projects of State Significance/major impact. Stakeholders are confident in the system that is fair, efficient and effective and DPLH supports Minister and the AHC in the oversight and operation of the system, policy development, maintenance of the Register.</p>
3D	<p>The role of DPLH</p> <p>Improved outcomes, elimination of substandard consultants, and no regulatory burden.</p>
3E	<p>Heritage professionals - selection with appropriate qualifications and experience and improving standards.</p> <p>Improve the accuracy of records and information on Aboriginal Heritage on the State's database</p>
4	<p>Retain the current form and function of the register of Aboriginal places and objects</p> <p>As detailed in AMEC's previous submissions, the Register is vitally important in building trust and confidence in the current and future administration of the Act. Immediate priority attention should be given to improving accuracy and integrity.</p>

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5	Introduce a referral mechanism to facilitate tiered assessments of proposed land uses.	<p>Encourage the co-existing of land use proposals and Aboriginal heritage places, by streamlining low impact activities.</p> <p>Early referrals and advice intended to lead to reduced cost</p> <p>Providing Aboriginal people to determine better outcomes for their heritage through agreements focusing on avoiding and minimising impact.</p> <p>Better heritage outcomes based on respectful and positive agreement making.</p> <p>New and existing agreements concerning heritage outcomes can be used to expedite land use assessments if they meet certain requirements.</p>
6	Encourage and recognise agreement making	<p>Members support the concept of a risk based approach. However, in order for that to be successfully implemented guidance material on the risk assessment and due diligence processes, including the definition of 'low impact' must be clearly articulated.</p> <p>As referrals may be made to the AHC, members are concerned that a pre-emptive referral could be made before that land user is ready for such a referral.</p> <p>As detailed in previous submissions AMEC fully supports the concept of Consents running with the land to avoid duplicative processes which creates costly delays.</p> <p>Agreement making is a fundamentally important component of the whole process, and is the source of disagreement in terms and conditions, including costs. The proposed framework does not appear to address this critical issue.</p> <p>Members require clarity on the status of existing Agreements, particularly noting that some definitions will be changing and standards will be reviewed and updated. This may result in demands from the DPLH, AHC and / or the LAHS for existing Agreements to be re-written, and re-negotiated. This will be at an unacceptable cost and create significant uncertainty within the mineral exploration and mining sector.</p> <p>Guidance material should be made available describing the ratification process for existing and future Agreements.</p> <p>Consideration should be given to developing a procedure whereby Agreements which include compensation provisions will constitute a satisfaction of all "Timber Creek" compensation matters.</p>
7	Transparency and Appeals.	<p>Guidance material should be available on the proposed standards of procedural fairness.</p> <p>As Planning Law in WA is structured in such a way that the only person with a right of appeal over a decision in relation to a development application on land is the developer. Consideration will need to be given to the resultant precedent created by this proposal. This further notes that other holders of interests in land may be heard during a planning process, but they may not appeal a decision of the Western Australian Planning Commission, Joint Development Advisory Panel or Minister.</p> <p>An explanation should be provided on whether stakeholders can appeal decisions to the AHC and the Minister, as well as to the SAT.</p> <p>Industry takes the duty of care responsibility extremely seriously and strongly adheres to the principle.</p>
8	A modernised enforcement	Guidance material should be drafted on the mechanism whereby sections of a Protected Area may be undeclared, for example, for the purposes of constructing a railway line or pipeline.
9	Protected Areas	Guidance material should be drafted on the mechanism whereby sections of a Protected Area may be undeclared, for example, for the purposes of constructing a railway line or pipeline.