



**Review of the *Aboriginal Heritage Act*  
1972 Consultation Paper**

**Submission to the Department of Planning, Lands and Heritage**

**Contact**

Lisa Campbell

[L.Campbell@cmewa.com](mailto:L.Campbell@cmewa.com)

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## About CME

The Chamber of Minerals and Energy of Western Australia (CME) is the peak resources sector representative body in Western Australia. CME is funded by its member companies who are responsible for most of the State's mineral and energy production and are major employers of the resources sector workforce in the State.

In 2016-17, the value of Western Australia's mineral and petroleum industry was \$105 billion. Iron ore is currently the State's most valuable commodity, and saw an increase in iron ore sales by almost 31 per cent on the previous financial year to value almost \$64 billion. Petroleum products (including LNG, crude oil and condensate) followed at \$19 billion, with gold third at \$11 billion. These commodities saw an increase in sales of 5 per cent and 7 per cent respectively from the previous financial year.

The resources sector is a major contributor to the State and the Australian economy. The estimated value of royalties the State received from the resources sector reached \$5.78 billion which accounted for around 19 per cent of the State Government's revenue in 2016-17.

## Recommendations

Detailed responses to the questions posed in the consultation paper are provided in appendix one. In addition, CME recommends the phase two consultation paper considers:

- An alternative system which achieves a balance between ensuring Aboriginal people have greater contribution to decisions about their heritage, and ensuring the AH Act paves the way for efficient and effective land use decisions.
- The interaction between the AH Act and the EP Act with a view to streamlining the assessment and approval process for land use which may impact on Aboriginal cultural heritage.
- Proposed transitional arrangements.

## Context

CME welcomes the opportunity to provide comment on the *Review of the Aboriginal Heritage Act 1972 Consultation Paper* (the Paper). The *Aboriginal Heritage Act 1972* (the AH Act) has been in operation since 1972 and CME considers it is time to update the legislation so it remains contemporary. CME supports the review to improve the administration and operation for all stakeholders in the AH Act.

CME's submission forms two parts. Firstly, direct responses to the consultation questions posed in the Paper are provided. These responses are based on industry perspective and functional changes which could be made to improve the operation of the legislation.

Secondly, CME offers a discussion on future directions the legislation and broader management of Aboriginal heritage values and materials could take in Western Australia. This has been informed by observation of positive and negative experiences in other jurisdictions, in addition to the views of CME's member organisations. CME urges the Department to include these recommendations in the phase two consultation paper, to enable a future AH Act to be shaped using an informed understanding of industry's perspective.

## Responses to the Consultation Paper

CME consulted extensively with its members to develop responses to the questions posed in the Paper. Answers to these questions, along with the importance of each issue to the industry, are provided in Appendix One.

## Future directions of the *Aboriginal Heritage Act 1972*

### *Aboriginal people are the custodians of their heritage*

CME and its members supports a system which gives Aboriginal people, as the custodians of their cultural heritage, have a greater role in identifying and maintaining heritage values.

The review provides an opportunity to afford a greater role for Aboriginal people in the management of their cultural heritage in cooperation with the resources industry and other land users, and to improve the efficiency of approval processes for the use of land which may impact upon Aboriginal cultural heritage values.

To achieve this, it will be imperative the new regime identifies the relevant Aboriginal entity to perform the role in each instance. This will enable land users to know who information is to be sought from so information received can be relied upon to comply with the AH Act. Where native title has been determined, CME considers the registered native title body corporate should perform the role for the area within the boundary of the native title determination(s) for which they are registered.

The second phase of consultation should canvass options for how Aboriginal people can have a greater role in identifying and managing their information about cultural heritage. In addition, the second phase consultation paper should engage industry and government in a discussion on how impacts to cultural heritage can be reasonably minimised and mitigated in land use decisions.

### *Land use decisions*

CME favours a 'tiered approach' to land use decisions based on the significance of both the heritage value and the likely impact when using the land for a purpose.

Except with respect to areas of outstanding cultural heritage value which could be afforded special statutory protection (see our separate comments on 'protected areas' in Appendix One, question 7), CME is of the strong view all land use decisions should remain with the Minister or a government department as they are decisions which need to be made in the best interests of the State and all Western Australians. Aboriginal people should have a right to be

heard before decisions are made with respect to land use in an area which may have a significant impact on cultural heritage values.

These approvals should be available to anyone with an interest in or a right to use land, and approvals should be transferrable.

#### *Agreements*

CME considers the second phase consultation paper should canvass options for voluntary agreements between land users and Aboriginal entities or representatives (as identified in the AH Act) to provide for the management of cultural heritage when using land for particular purposes. These agreements could potentially facilitate compliance under the new regime as one method of complying with the AH Act (as an alternative to, but not to replace, statutory consent).

Reforms of this kind have been implemented in South Australia. These agreements are advantageous by allowing Aboriginal people to engage directly with land users about management of their cultural heritage.

#### *Duty of Care and Guidelines*

CME supports consideration of a cultural heritage duty of care, which requires land users to take reasonable and practical steps to ensure a proposed land use does not harm significant Aboriginal cultural heritage protected under the AH Act. Factors relevant in determining duty of care compliance should include:

- the nature of the proposed land use and extent of past land use
- the nature of the heritage values
- the extent and results of consultation with the relevant Aboriginal people
- the nature of enquires undertaken including heritage register searches
- compliance with guidelines (giving them statutory effect)
- whether statutory approval has been granted

This process is focussed on potential harm to significant heritage values and takes into account both the nature of the proposed land use and past land use. It enables the guidelines to recognise low impact land uses not likely to harm significant heritage values.

An approach like this could reduce the need for a determination of whether heritage protected under the AH Act or should be included on a register. Instead, the focus is on enabling land users to efficiently assess and minimise the risk associated with the proposed land use by utilising available information and guidelines with statutory effect.

This approach has potential to reduce the need for the ACMC to determine whether a site is a site protected under the AH Act (reducing the backlog) and encourages culturally appropriate disclosure of information about heritage. It would therefore encourage more efficient and effective use of limited resources.

**CME recommends the phase two consultation paper considers an alternative system which achieves a balance between ensuring Aboriginal people have greater contribution to decisions about their heritage, and ensuring the AH Act paves the way for efficient and effective land use decisions.**

#### *Interaction with the Environmental Protection Act*

The *Environmental Protection Act 1986* (EP Act) was introduced after the AH Act was passed in 1972, but does not deal with the interface with this pre-existing Act. Nor has the AH Act been amended to take account of the newer law.

This has resulted in duplication in assessment and approval processes as impacts on Aboriginal cultural heritage are included under the EP Act social surroundings definition, assessed in the environmental impact assessment (EIA) process and approved in Ministerial Statements. This is problematic because:

- potential impacts of proposed land use on Aboriginal cultural heritage are separately (and inefficiently) assessed and approved using two different and potentially inconsistent processes under the AH Act and the EP Act.
- a different or inconsistent outcome can result from the two processes.
- managing compliance with two different heritage assessment processes and outcomes (including conditions) is inefficient and increases the risk of non-compliance due to the confusion caused by potentially conflicting assessments and approvals generated by the DPLH and the Environmental Protection Authority (EPA).
- dual assessment also creates unnecessary delays and lengthens the overall land use decision making processes for a project.
- there is also an additional impost on Government resources and it is questionable whether the EPA is well placed to assess heritage matters given the knowledge and skills instead housed within DPLH.

**CME recommends the Phase Two consultation paper considers the interaction between the AH Act and the EP Act with a view to streamlining the assessment and approval process for land use which may impact on Aboriginal cultural heritage.**

*Transitional Arrangements*

Any changes to the AH Act should not impact existing approvals for using land for a purpose or decisions about heritage value made under the current AH Act.


**CME recommends the Phase Two consultation paper considers proposed transitional arrangements.**

**Conclusion**

Modernisation of the AH Act and improvements to transparency and certainty in the Aboriginal heritage system are long overdue. CME is focused on amendments which result in an improved, efficient and robust system. It is imperative the reformed legislation provides clarity and certainty for all stakeholders in the Act. Further, to be successful, the reform process must be undertaken using broad, genuine consultation with all stakeholders in the AH Act, including culturally appropriate consultation as appropriate.

CME will continue to engage with its members and the Department over the coming months and looks forward to engaging with the Department throughout phases two and three of the reform program.

If you have any further queries regarding the above matters, please contact Lisa Campbell, Policy Adviser Land Access and Economic Competitiveness, on (08) 9220 8527 or [L.Campbell@cmewa.com](mailto:L.Campbell@cmewa.com)

Authorised by	Position	Date	Signed
Reg Howard-Smith	Chief Executive	01/06/2018	
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## Appendices

### **Appendix I – Detailed Responses to *Review of the Aboriginal Heritage Act 1972 Consultation Paper* Questions**

Table 1: Responses to Review of the Aboriginal Heritage Act 1972 Consultation Paper Questions

Question	Response
<p>1. Is the long title an adequate description of what the amended Act should set out to do? If not, what changes should be made?</p>	<p>The wording in its present form does not present any particular issues. However, it may be beneficial to add language reflective of terminology used in the protection of Aboriginal heritage, such as “significance”, “place” and “site”. Consideration should be given to the use of the word “object” considering there are no individual objects listed on the register at this point in time.</p> <p>Further, CME considers the long title should reflect the objects of the AH Act as establishing effective and efficient processes to facilitate land use in a way which minimises harm to cultural heritage.</p>
<p>2. What do you think are the best ways to ensure the appropriate people are consulted about what Aboriginal heritage places should be protected, and how a proposal may impact those places?</p>	<p>CME is supportive of Aboriginal people having a greater role in the assessment and appropriate management of cultural heritage values on their country, while at the same time maintaining certainty for land users and efficient processes for decisions about land use.</p> <p>CME considers land use decisions should remain with the Minister or government, as they are decisions which affect all Western Australians. However, CME is supportive of reform which:</p> <ul style="list-style-type: none"> <li>- acknowledges Aboriginal people are custodians of their heritage and gives them a role in the identification and management of information about their heritage and the cultural heritage values which are important to them;</li> <li>- ensures Aboriginal people are given a right to be heard in decisions about land use that may affect significant heritage values;</li> <li>- allows land users and Aboriginal people to enter into voluntary agreements for the management of cultural heritage within an area, as an alternative to obtaining consent (but not replacing the ability to seek consent);</li> <li>- provides a duty to take reasonable care to prevent harm to significant Aboriginal cultural heritage values, with consideration of reasonable consultation with Aboriginal people and supported by guidelines with statutory effect (including as to the nature and extent of consultation, and the nature and extent of the impact to significant heritage value).</li> </ul>
	<p>Rights for Aboriginal people to be heard or consulted should include a clear set of standards, including reasonable timeframes. The resources industry has encountered difficulty at times in identifying who has the right to speak for country. This may occur as a result of multiple vested Aboriginal community interests in a particular area, or as a result of Aboriginal people moving away from their traditional lands. CME strongly considers the regime should identify which Aboriginal entity or representative land users should consult with and rely on for compliance. Where native title has been determined, this should be the registered native title body corporate that holds native title, in respect of all land within the outside boundaries of the relevant native title determination.</p>



	<p>Where native title has not been determined, clarity is required as to who land users and government may speak to and rely on in various other circumstances. In this regard, CME considers the registered native title claimants should be recognised.</p>
<p>3. To what extent has the provision to appoint honorary wardens been effective and how can it be improved?</p>	<p>CME is unaware of any instances where honorary wardens have been appointed under the AH Act. The AH Act in its current form appears to be functioning without the intervention of a warden, and appointing a warden in any future circumstance may result in unnecessary complications and fractious stakeholder relationships.</p> <p>In the absence of use to date, it is difficult to comment on how it can be improved. It may be advisable to re-confirm and clarify the original policy intent behind inclusion of honorary wardens in the AH Act to facilitate proper consideration of its inclusion or otherwise in a reformed AH Act.</p>
<p>4. Are the roles and functions assigned under the Act sufficiently clear and comprehensive to fulfil the objectives of the legislation to preserve Aboriginal heritage places and objects? If not, what changes in roles and functions would you suggest?</p>	<p>As described above in the response to Question 2, CME considers Aboriginal people should have a greater role in identifying and maintaining heritage values, as they are the custodians of their Aboriginal cultural heritage.</p> <p>CME is strongly supportive of the Minister retaining the decision-making role on land use as these are decisions of importance to the State as a whole. CME supports a tiered approach to these decisions (taking into account the nature of the likely impact on significant heritage values) akin to the reforms considered in the Aboriginal Heritage Amendment Bill 2014. However, CME supports Aboriginal people having a right to be heard in these decisions.</p> <p>The Minister should act on expert advice provided by an appropriate representative body. CME considers a review should be undertaken of the role of the Aboriginal Cultural Material Committee (ACMC) to determine whether its composition, the scope of matters it considers, its resourcing and its manner of operating are effective and how it should be modified or replaced.</p> <p>CME is concerned about the sizeable backlog of approvals and heritage assessments awaiting consideration by the ACMC and the impact this is having on the effective operation of the AH Act. The backlog of assessments and approvals is causing delay for the resources sector, which results in time and cost burdens for projects and strained relationships with Aboriginal stakeholders.</p>
<p>5. Does section 5 adequately describe the sorts of places or sites that should be protected under the amended Act? If not, how can it be improved?</p>	<p>The present wording of section 5 is clear in its intent and has been the subject of judicial consideration, so does not warrant significant change. In particular, the definition of what Aboriginal cultural heritage is protected under the AH Act should retain objective criteria, including being of importance and special significance to a community.</p> <p>To provide additional assistance to stakeholders, the Department's intended approach to interpretation and application of section 5 should be elaborated upon in Guidelines developed in consultation with stakeholders.</p> <p>As an administrative change to avoid confusion, the Department should remove, amend or distinguish heritage places from the register which have been the subject of a section 18 approval, and subsequently modified or disturbed.</p>
<p>6. Do section 6 and Part VI adequately describe the sorts of objects that should be protected under the amended Act? If not, how can they be improved?</p>	<p>CME considers the present wording of section 6 is clear in its intent. In particular, the definition of what Aboriginal cultural heritage is protected under the AH Act should retain objective criteria, including being of importance and special significance to a community.</p>

<p>7. Is the declaration of a Protected Area under the Act the best way to deal with Aboriginal sites of outstanding importance?</p>	<p>As an administrative change, if an object is removed from a site, and the site's context is no longer an Aboriginal heritage place without the presence of the object, then the place should be removed from the register.</p> <p>Although Protected Areas are likely to contain either places or objects which are protected by sections 5 and 6 of the AH Act (and hence a declaration of a Protected Area may appear unnecessary), the inclusion of Protected Areas in the AH Act highlights the fact some heritage places may be of outstanding significance deserving of particular recognition as such under the AH Act. CME is supportive of this recognition under the AH Act and recommends it be retained.</p> <p>CME is open to considering proposals which give Aboriginal people a decision making role on land use in respect of areas recognised by the Minister as being of outstanding heritage value (i.e.: Protected Areas). However, anyone with rights or interests in or to use those areas should have a right to be heard before a decision is made to confer that status on an area. Existing land rights and interests should not be affected without the interest/right holder's consent.</p> <p>CME recognises the importance of ancestral remains to Aboriginal people. Furthermore, management of remains typically has an interface with other agencies such as the Office of the State Coroner and the Western Australian Police Force. It is logical to provide for specific protection of ancestral remains to ensure its management in a consistent and culturally appropriate manner, and allowing for the interaction with other agencies.</p> <p>CME is supportive of specific provision in the AH Act to manage Aboriginal ancestral remains.</p>
<p>8. Should the Act provide for the management of Aboriginal Ancestral (Skeletal) Remains? If so, what needs to be considered?</p>	<p>Low impact land uses</p> <p>Land users should not require authorisation to use land for a low impact purpose and unlikely to have a significant impact on significant Aboriginal heritage values.</p> <p>CME supports consideration of a cultural heritage duty of care, which requires land users to take reasonable and practical steps to ensure a proposed land use does not harm significant Aboriginal cultural heritage protected under the AH Act. Factors relevant in determining compliance with that duty of care should include the nature of the proposed land use, the nature of the heritage values, the extent and results of consultation with the relevant Aboriginal people, the nature and extent of enquires undertaken, register searches, compliance with guidelines (giving them statutory effect), the nature and extent of past use of the area and whether statutory approval has been granted. Notably, this assessment is focussed on potential harm to significant heritage values and takes into account both the nature of the proposed land use and past land use. It enables the guidelines to recognise low impact land uses not likely to harm significant heritage values.</p> <p>An approach like this could reduce the need for a determination of whether or not an area is heritage protected under the AH Act or should be included on a register. Instead, the focus is on enabling land users to efficiently assess and minimise the risk associated with the proposed land use utilising the available information and with the assistance of guidelines which have statutory effect.</p> <p>This approach has potential to reduce the need for the ACMC to determine whether a site is a site protected under the AH Act (reducing the backlog) and encourages culturally appropriate disclosure of information about heritage.</p>
<p>9. What sort of activities that may affect an Aboriginal site should require consent or authorisation?</p>	<p>Low impact land uses</p> <p>Land users should not require authorisation to use land for a low impact purpose and unlikely to have a significant impact on significant Aboriginal heritage values.</p> <p>CME supports consideration of a cultural heritage duty of care, which requires land users to take reasonable and practical steps to ensure a proposed land use does not harm significant Aboriginal cultural heritage protected under the AH Act. Factors relevant in determining compliance with that duty of care should include the nature of the proposed land use, the nature of the heritage values, the extent and results of consultation with the relevant Aboriginal people, the nature and extent of enquires undertaken, register searches, compliance with guidelines (giving them statutory effect), the nature and extent of past use of the area and whether statutory approval has been granted. Notably, this assessment is focussed on potential harm to significant heritage values and takes into account both the nature of the proposed land use and past land use. It enables the guidelines to recognise low impact land uses not likely to harm significant heritage values.</p> <p>An approach like this could reduce the need for a determination of whether or not an area is heritage protected under the AH Act or should be included on a register. Instead, the focus is on enabling land users to efficiently assess and minimise the risk associated with the proposed land use utilising the available information and with the assistance of guidelines which have statutory effect.</p> <p>This approach has potential to reduce the need for the ACMC to determine whether a site is a site protected under the AH Act (reducing the backlog) and encourages culturally appropriate disclosure of information about heritage.</p>

Tiered approach

Where using land for a purpose may have a significant impact on significant Aboriginal heritage values, CME supports amendments to the AH Act which create a 'tiered approach' to land use consents based on the significance of the heritage value and the purposes for which the land user proposes to use the land.

For instance, consideration should be given to developing a new type of consent for low impact land uses, akin to those proposed in the 2014 amendments. The resources sector is concerned use of the Aboriginal Heritage Due Diligence Guidelines (2013) in relation to low impact land use does not currently provide enough certainty for a defence under the AH Act. A legislated consent and approval process would provide greater certainty for industry.

Development of this type of consent should be included in regulations and not legislation, and developed in close consultation with industry to ensure it is fit for purpose. Many proponents of low impact land uses are likely to be undertaking activities of a precursory nature. It is important the approval process is not overly burdensome for what may be a simple land use which does not significantly impact upon significant heritage values.

Lower risk land use could be granted consent by the Department, with the Minister otherwise retaining the final decision making authority on other land use decisions.

Agreements

As an alternative to obtaining consent (but not replacing the ability to seek consent), CME is supportive of enabling land users to choose to voluntarily enter into an agreement directly with identified Aboriginal people with respect to the management of cultural heritage as one method of complying with the AH Act. Entering into a voluntary agreement allows Aboriginal people to negotiate and make decisions about their own heritage and promotes a cooperative approach between identified Aboriginal people and land users.

Voluntary, optional agreements of this kind are practical as they can deal with the management of cultural heritage across various proposed land uses, over a period of time, make provision for the steps to be followed in the event a land user's plans change, and allow for the timely resolution of land use proposals.

For this to work, it is important the AH Act identifies which Aboriginal entity land users should be consulted in each area. Where native title has been determined, it should be the registered native title body corporate.

10. What should be the criteria against which to evaluate an activity that may affect a site (e.g. a proposal to use or develop land)?

The Aboriginal Heritage Due Diligence Guidelines (2013) provide criteria for assessing certain types of impact. The scope of these criteria could be broadened in consultation with industry to include clearer definitions of particular land use types. As discussed in the response to Question 9, there is not always sufficient certainty the due diligence guidelines would provide a defence under the AH Act if required.

CME recommends consideration be given to the due diligence approach which involves the establishment of a cultural heritage duty of care and cultural heritage duty of care guidelines which identify reasonable and practicable measures for ensuring land use is managed to avoid or minimise harm to Aboriginal cultural heritage. Land users who comply with the guidelines also comply with the cultural heritage duty of care.

A range of criteria should be relevant, including the nature of the information available about heritage value, previous disturbance, whether surface disturbance is proposed and whether the proposed land use is likely to cause additional harm

	<p>to significant heritage values. Examples of low impact land uses may also be drawn from the existing due diligence guidelines and common low impact land uses identified in heritage agreements in WA like the Noongar standard heritage agreements.</p>
<p>11. How can 'impact' arising from proposals for land use on sacred sites that do not have physical cultural heritage elements be assessed?</p>	<p>Heritage which is entirely intangible, but yet may be impacted by a physical land use, presents a challenge. The resources industry recognises heritage values may exist in a place without evidence of human occupation or modification. However, in determining the existence and impact of such areas it is critical evidence is gathered to validate the shared nature of the regard with which the place is held, and the collective view of the impact on heritage values arising from use of the area. As for other land use decisions, the Minister (acting on expert advice) is the appropriate person to determine whether and how land use should proceed in light of intangible heritage values.</p> <p>Any intangible heritage should exist in some physical form in order for it to be impacted by a physical land use. If there is no physical manifestation of the heritage value, then it is difficult for a physical land use to impact it.</p> <p>For example, a story is intangible and it may be linked to a landscape. Impacting the landscape may impact on the story, therefore protection of the landscape from a particular land use may be needed to protect the intangible heritage values associated with the landscape. Intangible heritage values associated with physical places/objects/sites may be protected by the current definitions offered under section 5 through the protection of those physical places/object/sites to which the intangible heritage value is linked.</p> <p>If intangible heritage values which exist in complete isolation of any physical element are to be contemplated under the AH Act, CME considers the potential for physical impact to these values must be conclusively ruled out.</p> <p>Any inclusion of intangible heritage in the AH Act should be separate from section 5 in order to avoid ambiguity. Application of intellectual property rights may be a useful consideration in identifying a way to protect intangible heritage such as songs and stories.</p>
<p>12. Who should provide consent or authorisation for proposals that will affect Aboriginal sites?</p>	<p>Aboriginal people should have a role in identifying and managing information about their cultural heritage, and should have a right to be heard in assessments relating to heritage values and land use which may affect those values.</p> <p>However, the final decision as to whether and how a land use should proceed which may significantly impact significant Aboriginal heritage values, needs to remain with the Minister. Ultimately, land use decisions are a matter of State importance, and should be decided by the State.</p> <p>For lower impact land uses, CME supports a tiered approach to decision making which enables a simpler consent process, and decisions made by the Department.</p> <p>CME is open to Aboriginal people having a decision making role in respect of areas the Minister has determined are of outstanding heritage value. However, anyone with rights or interests in those areas should have a right to be heard before such a decision is made. Existing rights and interests should continue, unless the relevant interest or rights holder gives their consent.</p> <p>CME supports an approach allowing land users and identified Aboriginal people to voluntarily enter into an agreement for the management of cultural heritage, as an alternative to obtaining (but not replacing/eliminating the ability to obtain) a statutory land use decision.</p>



<p>13. To what extent is the current section 18 application process effective and how can it be improved?</p>	<p>There are several administrative problems with the section 18 consent approval process:</p> <ul style="list-style-type: none"> <li>• The ACMC, as a relatively small committee which meets infrequently, does not have the capacity to review and approve the volume of applications received. This is evidenced by the substantial backlog of matters awaiting ACMC review.</li> <li>• It would be helpful to receive more certainty from the Department about what information needs to be lodged with the section 18 application. Subsequent requests by the Department for supporting information, which could have been supplied in the first instance had there been improved certainty, results in lengthy approval time delays.</li> <li>• Once section 18 applications are submitted, the applicant should be able to view the progress of the application using a tracking mechanism. An online system for this would be ideal.</li> <li>• The process is not transparent.</li> <li>• In the event a right in or to use land (including a mining tenement) is transferred, the section 18 approval should be transferrable to the transferee of the right in or to use the land.</li> <li>• Section 18 applications should be able to be lodged by anyone wanting to use the land, not just the landowner.</li> </ul> <p>CME recommends the following be progressed in phase two of the consultation, as a means of addressing these issues:</p> <ul style="list-style-type: none"> <li>• ‘Tiered approach’ to consents based on the ‘significance’ of the heritage value and of the significance of the impact likely to arise when using the land for a purpose. This approach could adopt the reforms proposed in the Aboriginal Heritage Amendment Bill 2014<sup>1</sup> and facilitate or fast track the issue of permits or consents in respect of low impact land uses.</li> <li>• Giving Aboriginal people a greater role in identifying and managing information about Aboriginal heritage values. This information will then guide the Minister or government to make land use decisions and to assist proponents to meet their duty of care.</li> <li>• Reviewing the role of the ACMC.</li> <li>• Giving Aboriginal people the right to be heard in land use decisions.</li> <li>• Allowing land users and Aboriginal people to voluntarily enter into an agreement for the management of cultural heritage, as an alternative to obtaining (and not replacing the ability to obtain) a statutory land use decision.</li> </ul>
<p>14. What provisions could be included in an amended Act to ensure the long-term protection of Aboriginal sites where alternative statutory arrangements do not apply?</p>	<p>The wording in the question “where alternative statutory arrangements do not apply” is ambiguous. The AH Act is the prime legislation for protecting Aboriginal heritage values in Western Australia, so long as the heritage meets the definition provided in section 5 of the AH Act.</p>

<sup>1</sup> See Aboriginal Heritage Amendment Bill 2014 (WA) cl 9.



	<p>There is nothing in the AH Act which suggests the intent of the legislation is not to provide long term protection of heritage. The AH Act currently provides protection for Aboriginal heritage values in perpetuity unless consent to use the land in a manner which may impact heritage value is granted under section 16 or 18.</p>
<p>15. Are the enforcement provisions under the Act adequate to protect sites? If not, how can they be improved?</p>	<p>CME considers the Department should retain responsibility for enforcement of the AH Act. Improved Departmental oversight of section 18 approvals and post-approval reporting could assist the Department in its enforcement of the AH Act. CME considers the AH Act should retain a time limit on enforcement action. A three year period would allow sufficient time for enforcement of the AH Act without creating an open-ended liability.</p>
<p>16. Are the current penalties under the Act adequate? If not, how can they be improved?</p>	<p>This is the first major revision of AH Act since its inception in 1972. It would appear warranted to review the magnitude of penalties given inflation and evolving community expectations since the legislation was introduced.</p>
<p>17. Should a defence continue to be provided where the disclosure of information (section 15) is against customary laws/protocols?</p>	<p>The resources industry recognises in certain cases, disclosure of information is counter to customary laws and protocols. This can often cause issues of transparency and accuracy with respect to the information stored on the Register. CME is open to Aboriginal people having a greater role in identifying and managing their cultural heritage information, in a manner which enables information to be made available in a culturally sensitive manner, to guide land users (e.g. to meet their duty of care / establish a defence) and the Minister/government (as land use decision makers).</p>
<p>18. Are the criteria for assessing the significance of sites under section 39 (2) and (3) adequate to evaluate whether a site should be added to the Register? If not, what should the criteria be to assess the significance of a site?</p>	<p>Legislated definitions of significance have the potential to be too restrictive in the long term and difficult to amend via the legislative process. Rigid legislated definitions of significance do not account for the dynamic and changing nature of heritage interpretation and attachment of different heritage values across communities. CME considers the criteria in ss 5, 6 and 39 are adequate for assessing significance. Importantly, they provide objective criteria for assessing importance and significance of heritage values to a community. This should be retained.</p>
<p>19. What should be the steps to report, nominate, assess, enter, amend or remove an entry from the Register?</p>	<p>The current process for reporting heritage information to the Department operates relatively well. Although clearer definitions of the required information (file type, maps, reports, forms, supporting information) could be further clarified by the Department to ensure accuracy and avoid future delays, this does not need amendment to the AH Act and can be progressed independently. The ACMC, as a relatively small committee meets infrequently, does not have the capacity to review and approve the volume of information received on an on-going basis, nor address the existing backlog. CME recommends a review of the ACMC should be undertaken to assess whether it should be modified or replaced, or whether its functions require changing to ensure an efficient use of resources. For instance, nominations, assessments, entries, amendments or removal of an entry from the Register in the first instance could be handled by the Department and referred to the ACMC for review only in the case of particular complexity or high significance. Staffing, resources and professional heritage knowledge of staff would need to be commensurate with the volume and nature of information received by the Department.</p>

	<p>CME is supportive of Aboriginal people having a greater role in identifying and managing their cultural heritage information, in a manner which enables information to be made available in a culturally sensitive manner, to guide land users (e.g. to meet their duty of care / establish a defence) and the Minister/government (as land use decision makers).</p>
<p>20. What do you think is missing from the Act?</p>	<p>CME has provided a number of suggestions throughout this submission for new additions to the AH Act. In particular, the matters highlighted in the first section of this submission (separate to the responses to specific questions should be considered. CME supports an approach underpinned by effective regulations, administration and resourcing from the Department, including to manage transitional issues.</p>
<p>21. What sections, if any, do you think should be removed from the amended Act, and why?</p>	<p>Refer to question 3 for the need to review the role of Honorary Wardens.</p>