1	Draft Activity Categories Phase 2		
	Issue	**Discussion**	**Proposed response**
1.1	General comments	The Draft Activity Categories Table (**Table**) must: (a) be legally robust (i.e., consistent with the Act); (b) be consistent (ensure that the same activities do not appear in multiple tiers); (c) definitively identify what "tier" an activity is for the purposes of the Act; and (d) cover the field for all potential land-based activities.	The current approach to the Table is problematic for the reasons outlined below. AMEC submits that the issues identified are best addressed by re-categorising activities based on a definitive, quantifiable and prescribed level of ground disturbance, rather than the current approach of categorisation based on the nature and/or purpose of the activity. This approach would align the categorisation of activities with the potential for harm to Aboriginal cultural heritage consistently across all potential land use activities, consistent with the objectives of the Act. It would also provide a legally robust, objective measure for categorisation of any land-use activity and minimise the potential for legal challenge to authorisations and approvals granted under the Act.
1.2	Marking out activities must be exempt	"Pegging" for prospecting and mining activities (i.e., marking out) is included in the Table as a tier 1 activity. However, it is essential to the mining and exploration industry that marking out be prescribed as an exempt activity. The current marking out process applies only to mining lease and prospecting licence applications under the Act. It involves physically marking the boundary of a mining lease or prospecting licence application by hammering pegs into the ground at the corners of each	Marking out should be prescribed as an exempt activity under section 100(h) of the Act.

		application, and creating small trenches from those corners marking out the direction of the application boundary from each corner post. The process involves the use of hand-held tools only and the level of ground disturbance involved is minimal. The marking out process is fundamental to the concept of application "first in time" inherent in the *Mining Act 1978* (WA) (**Mining Act**). Typically, areas of land become available for marking out at 12am on a specified date, following the expiry, surrender or forfeiture of a previous lease or licence. There is intense competition between exploration and mining companies to acquire available land. The first person/company to correctly mark out the land once it becomes available obtains "priority" for the grant of the application subject to meeting the other application requirements of the Mining Act. In competitive situations, there will be less than 12 hours' notice of land becoming available for marking out as a mining lease or prospecting licence. Potential applicants must act extremely quickly to engage a qualified person to conduct the marking out, travel to site (often remote and involving several hours or more of travel from the nearest regional centre) and conduct the marking out as soon as possible after the land becomes available at 12am and before any competitor. Without marking out, applications for mining leases and prosecting licences would presumably be lodged in the same manner as exploration licence applications. These applications are lodged online from the time land becomes available (usually after 12am) and considered received by the Department of Mines, Industry Regulation and Safety when the Mining Registry opens at 8:30am the following business day. Typically, a number of applications are lodged overnight, and all deemed received at 8:30am on the relevant business day. Competing applications are then subject to a "ballot", where the applicants' names are drawn one at a time by the Warden from a barrel in order to determine application priority. This process causes delay in processing applications, decreases the competitive advantage of the "priority" regime inherent in the Mining Act, and increases the administrative burden of the Wardens Court and to applicants. For those reasons, it is essential that the current marking out process applicable to mining lease and prospecting licence applications remain unchanged. However, because of the very short timeframes involved, it is impractical to require due diligence to be undertaken prior to marking out. The potential for harm to Aboriginal cultural heritage from marking out is minimal due to the very low level of ground disturbance involved in the marking out process.	

		Imposing additional due diligence requirements prior to marking out would have a detrimental effect on the exploration and mining industry, disproportionate to the potential for harm to Aboriginal cultural heritage occasioned by the marking out process.	
1.3	Current draft is non-exhaustive and uncertain	A person is authorised to carry out an activity that may harm Aboriginal cultural heritage if: (a) the activity is an exempt activity and the person complies with s 109 of the Act; (b) the activity is a tier 1 activity and the person complies with s 110 of the Act; (c) the activity is a tier 2 activity and the person complies with s 111 of the Act; or (d) the activity is a tier 3 activity and the person complies with s 112 of the Act. There is no authority under the Act to carry out any activity that is not an exempt, tier 1, tier 2, or tier 3 activity. Exempt activities are limited to those activities listed in s 100 of the Act or prescribed. Tier 1, 2 and 3 activities are limited to activities that are prescribed as tier 1, 2 or 3 activities (Act, s 100). We assume (although it is not clear) that the activities listed in the Table reflect the activities that will be prescribed as exempt, tier 1, tier 2 or tier 3 activities in the Regulations being developed under the Act. The Table is currently non-exhaustive. Because of the scheme of the Act, it is essential that all potential land use activities can be identified as exempt, tier 1, tier 2, or tier 3 with certainty. In the absence of that certainty, the following issues arise: (a) there will be no legal certainty that activities not expressly prescribed in the Regulations/identified in the Table are exempt, tier 1, tier 2, or tier 3 activities that may be authorised under the Act; and (b) the allocation of activities not expressly prescribed in the Regulations/identified in the Table will be subjective and open to legal challenge.	A definitive "catch-all" is required for each activity category. This catch-all should be: (a) objective (i.e., quantitative, independently measurable and verifiable), so as to limit the opportunity for different interpretations and legal challenge; and (b) prescribed in the Regulations for each activity category, to ensure that any potential land use activity (including future unknown activities) is capable of identification as an exempt, tier 1, tier 2 or tier 3 activity. AMEC proposes that the "catch-all" be linked to specified quantities of ground disturbance, for example: (a) tier 1: 1km^2 or less ground disturbance; (b) tier 2: more than 1km^2 and no more than 5km^2 ground disturbance; and (c) tier 3: greater than 5km^2 ground disturbance.

			AMEC notes that "ground disturbance" will need to be clearly defined for the purposes of the above "catch-alls".
1.4	Use of uncertain language	AMEC notes that the use of the word "could" in the Table (e.g., "this ***could*** include but is not limited to"). This uncertain language leaves the activities included in the lists that follow open to interpretation. For example, where a tier 3 activity "could" include "mining exploration activities consisting of vehicle track creation and drill pads", it is arguable that it is open to conclude that "mining exploration activities consisting of vehicle track creation and drill pads" could fall into a different activity tier in some circumstances. This creates uncertainty regarding classification of activities.	The language used in the activity table should be definitive to allow for certainty in classification of activities.
1.5	Categorisation of activities by purpose	The Table defines some activities by purpose, e.g.: (a) environmental, biological monitoring and conducting tests for water, site contamination or other scientific or conservation purposes; (b) widening access tracks/firebreaks for asset protection outside the existing treated/disturbed area; (c) dredging of natural waterways (e.g., wetlands, rivers, foreshores) to remove sand that has been deposited over time from drainage pipes. The purpose of an activity does not reflect the potential harm that an activity may pose to Aboriginal cultural heritage. For example, the dredging referred to in (c) above could have low potential for harm where only small quantities of sand are being removed, and very high potential for harm where large quantities are being removed. In those cases, there is high variability in the potential harm, despite the activity being for the same purpose. The categorisation of activities by purpose is also arguably inconsistent with the Act, which defines tier 1, tier 2 and tier 3 activities by reference to levels of ground disturbance (s 100).	AMEC submits that the potential for harm is linked to the level of ground disturbance associated with the activity, and not the purpose of the activity itself. Where it is reasonably necessary for specific activities (or activities for specific purposes) to be carried out without the application of the harm mitigation measures specified under the Act, that activity should be prescribed as "exempt". Any other activity should be categorised by reference to the potential for harm. While the Table does seek to categorise some activities by reference to minimal, low or moderate to high ground disturbance (e.g., mining activities),

			these descriptions are highly subjective in the absence of quantifiable definitions of “minimal”, “low”, “moderate” and “high” levels of ground disturbance. AMEC submits that the adoption of the “catch-all” model proposed above at [1.3] (i.e., categorisation by reference to ground disturbance, versus activity purpose) would address these issues identified.
1.6	Broad activity descriptions	The Table includes very broad descriptions of activities. For example: (a) revegetation in degraded areas in mined areas, including fencing areas of vegetation; (b) backfilling historic mine features using imported materials; (c) mining exploration activities consisting of vehicle track creation and drill pads. Again, there is high variability in the potential for harm to Aboriginal cultural heritage associated with each of the above activities, depending on the extent of the revegetation, backfilling or mining exploration activities. For example, the potential for harm associated with fencing areas of vegetation or backfilling depends on the size of the area to be fenced or backfilled (i.e., the level of ground disturbance).	The categorisation of activities should be linked to the potential level of harm to Aboriginal cultural heritage by reference to the level of ground disturbance involved instead of by reference to broad activity categories with inherently high levels of variability. AMEC submits that adoption of the model proposed above at [1.3] would also address these issues. As noted above, where it is reasonably necessary for specific activities (or activities for specific purposes) to be carried out without the application of the harm mitigation measures specified under the Act, that activity should be prescribed as “exempt”.
1.7	Inconsistency	Inconsistencies remain in the classification of activities into the different tiers. For example: (a) vegetation sampling or measuring is a tier 1 activity when considered in relation to natural resource management activities with minimal ground disturbance; (b) however, removing flora samples of up to 20kg and up to a depth of 2m from the nature surface for the purposes of “field mapping and surveys” is a tier 2 activity.	These inconsistencies can be addressed by linking the categorisation of an activity to the level of ground disturbance involved, as outlined above.

		There appears to be no reasonable basis for the distinction when the natural resource management vegetation sampling has the same potential for disturbance (and therefore the same potential for harm to Aboriginal cultural heritage).	
1.8	Prioritisation	Some activities in the Table may reasonably be classified under two different activity categories. For example: (a) "redevelopment of existing landfill or waste facilities" is deemed a tier 1 activity; (b) "mechanised ground disturbance" is listed as a tier 3 activity. It is reasonable to assume that the redevelopment of existing landfill or waste facilities would require mechanised ground disturbance in most cases. It would appear inconsistent with the purpose of the Act (and with the definitions of tier 1, tier 2 and tier 3 activities in s 100 of the Act) for large-scale redevelopment of an existing landfill or waste facility involving a high level of ground disturbance using mechanised equipment to be capable of assessment as a tier 1 activity.	AMEC submits that adoption of the model proposed above at [1.3] would also address these issues.
1.9	Emergencies	The first row of the Table (page 7) addresses emergency situations. However, s 98(d) of the Act provides that it is a defence to a charge of harm to Aboriginal cultural heritage under Part 5, Division 2 of the Act if the activity generating the harm was carried out in an emergency situation. In any event, emergency situations by their nature require immediate responses. Any requirement to undertake further due diligence and/or obtain an ACH Permit or approved or authorised ACH Management Plan for an emergency situation due to the classification of the emergency response as a tier 1, tier 2 or tier 3 activity would appear unintended.	Emergency activities should be removed from the activity table in their entirety.
1.10	Formatting	The inclusion of numbering for each row would make the Table easier to use. A logical categorisation of activities would improve readability.	AMEC submits that the Table's rows be numbered, and consideration given to a logical categorisation.
2	**Draft ACH Management Code Phase 2 (Draft Code)**		
	Issue	**Discussion**	**Proposed response**
2.1	General comments	The Act requires that a proponent undertake a due diligence assessment for all proposed activities (s 105) except for exempt activities (s 103).	For noting as relevant to the sections that follow.

		The proponent is defined as, relevantly, a person who intends to carry out an activity that may harm Aboriginal cultural heritage. Under Part 5 of the Act (ss 89, 90), "harm" is limited to: (a) Aboriginal places, objects and Aboriginal remains (i.e., tangible cultural heritage); and (b) Aboriginal cultural heritage located in a protected area (i.e., tangible and intangible cultural heritage). The ACH Management Code is a statutory guideline regarding the undertaking of a due diligence assessment (s 294(a)). The purpose of a due diligence assessment is to make a determination, in accordance with the ACH Management Code, regarding: (a) whether the activity is a tier 1, tier 2 or tier 3 activity; (b) the existence of Aboriginal cultural heritage in the area; (c) whether there is a risk Aboriginal cultural heritage may be harmed by the activity; and (d) about the persons to be notified or consulted about the proposed activity. The due diligence assessment is critical in: (a) identifying and avoiding Aboriginal cultural heritage when conducting activities; (b) obtaining appropriate authorisations and approvals for conduct of activities that may harm Aboriginal cultural heritage; and (c) providing a defence in relation to inadvertent harm to Aboriginal cultural heritage where a proponent has otherwise complied with the Act.	
2.2	Statutory guidelines should be limited to their stated purpose under the Act	The purpose of the ACH Management Code is to provide statutory guidance regarding the due diligence assessment requirements of the Act (s 294(a)). The ACH Management Code should be limited to this purpose. The information provided in Part A – Protecting ACH of the Draft Code is beyond the scope of guidance regarding due diligence assessment requirements of the Act and should not be included.	The purpose of the Draft Code is to detail what a due diligence assessment requires, consistent with the due diligence assessment requirements of s 102 of the Act. The Draft Code should be revised to:

		Similarly, the information included in Part B – Due Diligence Assessment Considerations includes broad commentary that exceeds the scope of the ACH Management Code and is arguably inconsistent with the Act at times. For example: (a) s 102 of the Act clearly defines the scope and intended outcomes of a due diligence assessment. The information included in section 1.1 of the Draft Code under the heading "*What does a Due Diligence Assessment achieve*" is broader than the stated outcomes of a due diligence assessment under the Act and conflates matters that are separately dealt with under different sections of the Act (e.g., approval and notification requirements); (b) the "key factors to consider" for a due diligence assessment under section 1.2 of the Draft Code includes "*the existing level of ground disturbance, if any*" – this is not a requirement for due diligence consideration under s 102 of the Act; (c) the Act clearly states that "the proponent" is the person required to undertake a due diligence assessment (s 103). The definition of "proponent" in s 100 of the Act is broader than the description of who needs to undertake a due diligence assessment in section 1.3 of the Draft Code; (d) the definitions of tier 1, tier 2 and tier 3 activities in s 100 of the Act are broader than the definitions included in section 2.1 of the Draft Code.	(a) remove information and commentary that does not directly address the issue of what is required for a due diligence assessment; and (b) ensure that all of the language in the Draft Code is consistent with the Act; and (c) ensure that all information and commentary in the Draft Code is consistent with the Act.
2.3	Unnecessary crossover with other guidelines	Section 2.8 of Part B of the Draft Code sets out the steps for confirming who is required to be notified or consulted in relation to proposed activities. This information is best included in the separate Consultation Guidelines to avoid duplication and potential inconsistency.	Delete this section from the Draft Code and refer readers to the Consultation Guidelines as required.
2.4	References to intangible Aboriginal cultural heritage elements	Part 6 of the Act only requires a due diligence assessment to be undertaken for activities that may harm Aboriginal cultural heritage (**ACH**) (see definitions of "proposed activity" and "proponent"). "Harm" can only occur under the Act to intangible ACH in protected areas (ss 89, 90). As a result, there is no requirement under the Act for proponents to consider intangible ACH where an activity is not located in a protected area. The following statement in Part A, section 3 of the Draft Code is therefore inconsistent with the requirements of the Act:	The inconsistent statement should be deleted from the Draft Code.

		(a) For tier 3 activities requiring an ACH management plans [sic] that are proposed within cultural landscapes that are not located within protected areas, proponents will still need to consider ACH and potential impacts in a cultural landscape context (p 9).	
2.5	Due diligence assessment for exempt activities	The Act does not require due diligence assessment for exempt activities (s 103). However, the Draft Code includes a due diligence process to be followed for exempt activities. Similarly, section 4 of Part A of the Draft Code (p 4) includes broad statements regarding when a proponent is required to undertake a due diligence assessment, that do not address that no due diligence assessment is required for exempt activities and could be misleading.	The inclusion of due diligence requirements for exempt activities is inconsistent with the requirements of the Act and should be deleted from the Draft Code.
2.6	Due diligence assessment minimum requirements not met for tier 1 activities	By definition (s 102), a due diligence assessment requires a proponent to consider (among other things) whether ACH is located in the area of a proposed activity, and if there is a risk of harm to that ACH as a result of the proposed activity. The due diligence requirements for tier 1 activities in the Draft Code currently only require the proponent to consider the ACH Directory to determine whether the proposed activity is located in a protected area. If it is not, the proponent may proceed provided that all reasonable steps are taken to avoid or minimise harm to ACH by the activity. Arguably, this is inconsistent with s 102 of the Act, which requires further consideration of whether: (a) ACH is located in the activity area; and (b) there is a risk of harm being caused to ACH by the proposed activity. This inconsistency increases risk of legal challenge and the robustness of the due diligence defence provided under s 98 of the Act. A proponent may proceed with an activity having complied with the steps outlined in the ACH Management Code, but otherwise have failed to comply with the due diligence assessment requirements in s 102 of the Act.	Reconsider the due diligence process for tier 1 activities to ensure consistency with the requirements of s 102 of the Act. For tier 1 activities, the proponent should be able rely on a search of the ACH Directory. The proponent should be deemed to comply with the Act (and to be able to rely on the due diligence defence in s 98 of the Act) if: (a) the ACH Directory shows that the proposed activity is not in a protected area; and (b) the ACH Directory does not show any ACH in the area of the proposed activity; or (c) any ACH identified in the area of the proposed activity is avoided or all reasonable steps are taken to minimise harm to that ACH.

2.7	All reasonable steps to avoid or minimise harm to ACH	The Draft Code provides that tier 1 activities may proceed without an ACH permit or approved or authorised ACH Management Plan provided that a due diligence assessment determines that: (a) the activity is not located within a protected area; and (b) all reasonable steps are taken to avoid or minimise harm to ACH by the activity. The requirement to take all reasonable steps reflects the requirements of s 110(d) of the Act. "Reasonable steps" is not defined in the Act. Section 2.1 of the Draft Code suggest the following will be reasonable steps for tier 1 activities: (a) undertaking a search of the ACH Directory; (b) undertaking a visual inspection prior to carrying out the activity; and (c) actively considering whether there is an alternative way to carrying out the activity that reduces the risk of harm and implementing that alternative if viable. However, this guidance is inconsistent with the due diligence requirements for tier 1 activities outlined in paragraph [2.5] above (which do not require searches of the ACH Directory beyond checking if the proposed activity is in a protected area), and it remains unclear if these steps will satisfy the legal test required under the Act – i.e., are these "all reasonable steps that could be taken to avoid or minimise harm" to ACH by the activity? Clearer guidance is required regarding what "all reasonable steps" entails. For example, if there are Aboriginal places or objects located in the activity area identified on the ACH Directory, could it be considered reasonable to proceed to harm that ACH if the cost of altering the activity is prohibitive?	More detailed guidance should be provided regarding what "all reasonable steps" entails in specific circumstances that may arise under the Act.
2.8	Due diligence consultation requirements	Section 113 of the Act requires a proponent who intends to carry out a tier 2 activity in an area that may harm Aboriginal cultural heritage to notify certain persons about the proposed activity. The Draft Code provides that, if a proposed tier 2 activity is located within an area with known ACH but will not result in new or additional ground disturbance, it can proceed without an ACH Permit.	The due diligence assessment process outlined in the Draft Code should clearly identify when consultation is required. Those consultation requirements should be reviewed to ensure that they are consistent with the requirements of the Act.

		There is no consultation requirement included in the Draft Code for these circumstances, despite the requirements of s 113. The due diligence process is also inconsistent with the statement in section 2.5 of the ACH Management Code (p 18) that "*undertaking of a DDA will require engagement with the Aboriginal party and/or knowledge holders in relation to tier 2 and tier 3 activities, particularly where there is uncertainty whether an activity is likely to harm ACH"*.	Inconsistent statements should be deleted from the Draft Code or revised to ensure consistency across the Draft Code.
2.9	New or additional ground disturbance	The concept of "new or additional ground disturbance" is not included in the Act. It is described in the Draft Code as "*any disturbance that is not consistent with the existing level of surface or subsurface disturbance at the time the activity is proposed to take place"*. The Act refers to the level of ground disturbance associated with particular activities, not to whether it is new, existing or additional disturbance. The Act does not consider the level of disturbance that has already occurred or is already occurring. The assessment of new or additional disturbance is highly subjective. If a proponent determines that there will be no new or additional disturbance and proceeds with an activity without consultation and without an ACH Permit, there is a high risk of non-compliance with the Act. While Industry is supportive in theory of this concept, to ensure it is legally robust the Draft Code must clearly identify how the concept is consistent with the due diligence assessment considerations in s 102 of the Act.	Further guidance is required regarding assessment of whether a particular activity constitutes "new or additional ground disturbance". Ideally, objective, quantifiable measures of what constitutes "new or additional" disturbance should be included in the guidance.
2.10	Confirming that ACH is not present	Part B, section 2.3 of the Draft Code states that "*if it is confirmed that ACH is not located in the activity area, the activity may proceed without further assessment*". Industry has observed the legal and practical difficulties with knowing a negative. The subsequent table refers to "*a reasonable possibility that ACH is present*'', "*a reasonable view*" and a document has "*confirmed that ACH is not present*". Each of these phrases is subtly different and give rise to potential inconsistency.	AMEC submits that the standard of assessment that should be adopted here is "*reasonably considers that ACH is absent*".
2.11	Impacts to ACH	Part B, section 2 of the Draft Code refers to "*Impacts to ACH*". This language is inconsistent with the Act, which is based on the concept of "harm", and not "impacts". "Impact" and "harm" are not synonymous.	References to "impacts" to ACH should be amended to "harm" to ACH throughout the Draft Code.

2.12	Guidance re different types of ACH	The Draft Code states that the "*Department will develop guidance documents to assist proponents undertaking a DDA to recognise different types of ACH*". What are the timeframes and content of these documents? Will they be considered universally consistent across the State? What will be assumed level of understanding by the general public once they have been published?	Further information is required regarding the proposed guidance. The proposed guidance should also be published in draft with an opportunity for public review prior to the finalisation of the Co-Design process and full implementation of the Act. The legal status of the guidance should also be confirmed (i.e., will it form a subset of the statutory guidelines developed under s 294 of the Act?).
2.13	Related Agreements	The Act provides that steps taken under related agreements may be used to satisfy the requirements of the due diligence process (s 106). However, Part B, section 2.7 of the Draft Code states that related agreements may be used to satisfy <u>*some*</u> due diligence requirements (i.e., a subset of the entire due diligence process may be satisfied, rather than the whole). The distinction in language is important, as there must be greater clarity provided that some related agreements can satisfy the expectations of the due diligence process and thus be considered valid. The Draft Code is otherwise silent on the role of related agreements. A key step in the due diligence assessment process should include consideration of any existing agreements that may include steps relevant to the due diligence assessment.	The Draft Code should be amended to: (a) reflect the Act (i.e., steps taken under related agreements may satisfy the requirements of the due diligence process); and (b) consider any existing agreements at an early stage of the due diligence assessment process.
2.14	Reliability of the ACH Directory	Part A, section 4.2 of the Draft Code acknowledges that the ACH Directory may not represent the precise location or boundary of ACH. However, the due diligence assessment process is reliant on searches of the ACH Directory. A proponent must be able to rely on searches of the ACH Directory in the due diligence assessment process, otherwise it is arguable that further steps are required to ensure that "all reasonable steps" have been taken to avoid or minimise harm to ACH.	It is critical that: (a) the ACH Directory is reliable; and (b) reliance on the ACH Directory for the purposes of due diligence assessment be deemed to satisfy the requirements of the Act.

			A clear statement should be included in the Draft Code that searches of the ACH Directory undertaken in accordance with the due diligence assessment outlined in the Draft Code can be relied upon by proponents for the purposes of determining whether ACH is present in the area of a proposed activity.
2.15	Existing Survey Reports (ACH investigations)	The table on pages 16-17 of the Draft Code refers to: (a) existing reports or studies that allow a determination that ACH is not present or that there is not a reasonable possibility that ACH is present; (b) reports of past ACH investigations, conducted with the Aboriginal parties and/or knowledge holders that did not locate any ACH nor identify the reasonable possibility of ACH being present; and (c) consultation undertaken with Aboriginal parties and/or knowledge holders in accordance with the Draft Code identifies that ACH is not present nor that there is a reasonable possibility of ACH being present. It is unclear whether a proponent can rely on a historical survey report/ACH investigation without consultation with the Aboriginal parties/knowledge holders or where the Aboriginal parties/knowledge holders suggest that the report/investigation is unreliable. Survey reports are also not always comprehensive. For example: (a) a survey and subsequent report may have only considered the conduct of very specific activities in specific areas; (b) an ethnographic survey may have been completed over an area, but not an archaeological survey. These factors may give rise to reasonable doubt regarding whether such survey reports can be relied upon for different activities in the same area.	Clear guidance should be included regarding when a historical survey report can be relied upon by a proponent in assessing the possibility of ACH being located in a proposed activity area. Clear timeframes should be included in that guidance. Industry suggests that historical surveys that meet the following requirements should be clearly stated in the Draft Code to be considered reliable for the purposes of due diligence assessment under the Act: (a) survey completed within the previous ten years; (b) survey conducted with the involvement of the appropriate knowledge holders (as identified in the Knowledge Holder Guidelines); and (c) survey considers the area of the new proposed activity; and (d) survey assessment is relevant to the new proposed activity (i.e., considers either the same or

		It is critical that industry be able to rely upon historical survey reports in appropriate circumstances without risk of challenge. Industry has previously invested significant resources in conducting historical surveys that clearly identify ACH in areas of the State. If there is not clear guidance supporting the veracity of these historical surveys in appropriate circumstances, this will undermine the reliability of these surveys in due diligence assessment under the Act and increase risk of legal challenge.	analogous activities, or considers the existence of ACH in the survey area more broadly).
3	**Attachment 1 – Draft DDA Flowchart**		
	Issue	**Discussion**	**Proposed response**
3.1	General comments	The issues identified in section 2 above are relevant to the flowcharts. The flowcharts are otherwise a useful tool for industry.	The flowcharts should be updated to address any amendments to the due diligence assessment process in response to the comments in section 2 above.
4	**Draft ACH Management Plan Overview Phase 2 (Draft Plan)**		
	Issue	**Discussion**	**Proposed response**
4.2	Positive Consent	Section 5.4 of the Draft Plan states that "*as part of demonstrating informed consent from the Aboriginal party, the ACH management plan will also need to demonstrate that harm to ACH proposed under the ACH management plan has been authorised by the Aboriginal party*". This is inconsistent with the requirements of s 146 of the Act, which require consent to the ACH Management Plan (**ACHMP**), and not consent to "harm". There is a key distinction between providing positive consent to harm and not opposing an activity. The informed consent requirements of the Act require the Aboriginal party to be fully and properly informed about the proposed activity the subject of the ACHMP, including the information required by s 146(2) of the Act, which concern potential harm and mitigation methods. The consent to the ACHMP is better characterised as a consent to the proposed activity, noting the potential for harm to ACH and the mitigation methods to be employed, and not a consent to the harm itself.	The identified statement should be removed from the Draft Plan.

5	Draft Knowledge Holder Guidelines (Draft Guidelines)		
	Issue	**Discussion**	**Proposed response**
5.1	General Comments	The purpose of the Knowledge Holder Guidelines is clearly stated in s294 of the Act to be for "*the identification of persons who are knowledge holders for an area*". The following statement in the Draft Guidelines is fundamentally inconsistent with this purpose: *"It is important to note that these guidelines are not about determining who is or isn't a knowledge holder, but rather outlining the practical steps that are to be followed to be able to get in contact with knowledge holders and notify and consult as required under the Act."* The Draft Guidelines will not meet the requirements of the Act in the absence of guidelines regarding identification of knowledge holders (i.e., determining who is or isn't a knowledge holder). Defining who speaks for country is a difficult question to answer, but crucial for the entire legislation to work. Clear guidelines are needed to ensure that a proponent can rely on the authorisations and defences in the Act if it has consulted where required under the Act with knowledge holders. The responsibility for identifying knowledge holders should lie with LACHS or, in the absence of a LACHS, with Government. Knowledge Holders for each area of the State should be recorded on the ACH Directory. The purpose of the Draft Guidelines should be to outline the processes/considerations for LACHS (or Government, where required) in identifying knowledge holders.	The Draft Guidelines should be redrafted to outline the processes/considerations for LACHS and/or Government in identifying knowledge holders.
6	**Draft Timeframes**		
	Issue	**Discussion**	**Proposed response**
6.1	General comments	The identification of timeframes by the Government is appreciated. However, it is unclear how the Government has decided that these timeframes are appropriate or what resourcing will ensure that these timeframes are met. Greater detail on why these timeframes were chosen is sought in future codesign documents.	

6.2	Appropriate resourcing is critical	The current realities of existing cultural heritage management see engagement with groups that are under-resourced, regularly fail to meet commercial timeframes and struggle to manage the often differing views in their groups. With that context in mind, a 20 working day turn-around for ACH Permits in particular is welcomed by Industry. It is anticipated that there will be a very high volume of ACH Permit applications for tier 2 activities. Appropriate Government training and resourcing will be needed to support the reality of these timeframes.	
6.3	Timeframe for ACH Council recommendation where ACHMP not agreed	A timeframe of 120 working days is proposed for s 162(2) of the Act (period for ACH Council to make a recommendation to the Minister about an ACH management plan where there has been no agreement between the proponent and the interested Aboriginal party). This is the equivalent of 24 working weeks or approximately 6 months. There is a timeframe of 80 working days (approximately 16 working weeks, or 4 months) of negotiation between the proponent and Aboriginal party under s 143(2) of the Act prior to an application to the ACH Council for such a recommendation. There is no timeframe specified in the Act for when the Minister must make a decision. The above timeframes may extend where "stop the clock" provisions are enacted. Realistically, it is likely that the time from commencement of negotiations with the relevant Aboriginal parties to a decision of the Minister will exceed 12, and potentially 18 months. This is likely to result in significant delays to the implementation of projects.	AMEC submits that the prescribed timeframe for s 162(2) of the Act should be reduced from 120 working days to 60 working days. This will still allow approximately 3 months for consideration by the ACH Council before a recommendation is made to the Minister.
7	**Draft Consultation Guidelines (Draft Guidelines)**		
	Issue	**Discussion**	**Proposed response**
7.1	General comments	The consultation process underpins the process of building relationships, gaining land access and avoiding harm to Aboriginal Cultural Heritage. Effective consultation is reliant on the Local Aboriginal Cultural Heritage Services (**LACHS**) established under the Act being sufficiently resourced, guidelines being clear and comprehensive, and the identity of knowledge holders known and undisputed.	Greater funding is required for LACHS to enable effective consultation.

		The Government funding provided for LACHS to date is insufficient for these organisations to engage the staff necessary to meet governance requirements and the expectations this legislative framework will place on them. Consultation is not simple. The Government should invest in ensuring the staff of the LACHS have the appropriate skill sets to meet the administrative requirements prescribed in the legislative framework. So far, the Government has committed $10million to finance the creation of LACHS. If the Government were to appropriately resource the Department of Planning, Lands and Heritage they would have to expend many orders of magnitude more than $10million.	
7.2	Language used is inconsistent with the requirements of the Act	The Guidelines focus on the application s 101 of the Act to consultation required under s 139(1) of the Act. Section 139(1) of the Act requires a proponent who intends to carry out an activity under an ACH management plan to consult with each of the persons to be consulted about the proposed activity. The Draft Guidelines state (p 5) that "*a proponent who intends to carry out an activity that <u>will require</u> an ACH management plan must consult…*" (emphasis added). This is inconsistent with the language of s 139(1) of the Act, which refers to activities intended to be carried out <u>*under*</u> an ACHMP.	The language in the Draft Guideline should be amended to be consistent with the language in the Act.
7.3	Cost of consultation	The draft does not address who is responsible for the costs of the consultation. This must be made clear. For example, what is the Government's consideration of the proponent's position if the Aboriginal party refuses to engage in consultation unless their costs are fully met (which is common in relation to native title and Aboriginal heritage consultations under the *Native Title Act 1993* (Cth) and the *Aboriginal Heritage Act 1972* (WA)? Section 101 of the Act does not require a proponent to fund the consultation costs of the consultees.	A clear statement should be included in the Draft Guideline that each party is responsible for its own costs of consultation.
7.4	Reciprocal obligations	We note that the Draft Guideline is limited to the consultation that must be carried out by a proponent under s 139(1) of the Act. Accordingly, the Draft Guideline focusses extensively of the expectations of the proponent in that consultation process. However, the capacity for the proponent to successfully consult will be reliant upon the persons to be consulted participating equally in the consultation process. This necessitates that	Statutory guidelines should also be made outlining consultation obligations for Aboriginal parties in relation to consultation on ACHMPs.

		obligations around consultation participation also be imposed on the persons who are required to be consulted (i.e., Aboriginal parties). Section 294(b) of the Act provides that Guidelines may be made about "*the carrying out of consultation for the purposes of this Act"*. This allows for statutory guidelines to be made in relation to the obligations of Aboriginal parties (including but not limited to LACHS).	
7.5	Communication Protocol	In negotiations under the Aboriginal Cultural Heritage Act 1972, some groups issue a 'communication protocol' as a first step before any further consultation. These protocols restrict access to Traditional Owners and binds proponents to only speak through certain parties and in certain forms. Such protocols narrow the channel of communication. Such practices do not satisfy S 101 (a) and (e).	A clear statement should be included in the Draft Guideline on communication protocols.
7.6	Genuine attempts to contact and consult, in a timely manner, each Aboriginal person (which includes an organisation)	The Draft Guideline requires that a proponent seek advice from a person to be consulted on their preferred method of consultation. However, it would be more streamlined if this onus was reversed so that LACHS and other Aboriginal parties to be contacted are identified on the ACH Directory, together with their preferred method of consultation. This will assist in reducing the administrative burden on LACHS and other Aboriginal parties. The Draft Guideline also encourages proponents to consider delays in consultation arising from cultural conventions and commitments. This is a reasonable and well understood reality of working on country that is understood and accepted across most of Industry. However, it can be difficult to ascertain if an Aboriginal group is uncontactable due to a cultural commitment or because they have decided to not answer the correspondence. This misunderstanding can be easily overcome if the onus is placed on LACHS to make it clear when they are not available due to cultural commitments.	The ACH Directory should identify contact information for Aboriginal parties, including their preferred method of consultation. The consultation guidelines to be developed for Aboriginal parties (see above at paragraph [7.4]) should require those parties to advise unavailability due to cultural commitments.
8	**Draft Fee for Services Guidelines (Draft Guidelines)**		
	Issue	**Discussion**	**Proposed response**
8.1	General Comments	AMEC is fundamentally opposed to differential pricing and cross subsidisation. The fees across Western Australia should be standardised across all industries and government agencies. All tiers of Government should be expected to pay the same rate as Industry.	For noting.
8.2	Indirect costs	Identifying the precise quantum of fees for the LACHS is difficult due to the lack of information provided as to their cost structures. No information has been provided.	Ensure LACHS are properly funded to carry out their functions under the Act.

		The Government is obligated to finance the establishment of the LACHS and contribute to their ongoing operations. The Commonwealth Government funds the Prescribed Bodies Corporates (PBCs) created under the *Native Title Act 1993* (Cth) to perform the functions required by that legislation. While AMEC holds that the funding provided to PBCs is woefully small for the regulated expectations, this payment does set a precedent that the State Government should consider. If the State Government wants the LACHS to succeed they should fund the establishment and continued operation of their administrative activities.	
8.3	Functions LACHS can charge for	The Draft Guidelines state (at section 5.1) that *"a LACHS can charge fees in relation to the delivery of the services associated with the development and negotiation of an ACH Management Plan".* However, under s 49 of the Act, a LACH may charge a fee for services that it provides in connection with any local ACH service functions that it provides in its designated area. There may be circumstances where a proponent will seek to engage with a LACHS for the purpose of a due diligence assessment (e.g., when considering whether an ACH Permit is required for a tier 2 activity).	The Draft Guideline should be amended to acknowledge that LACHS will be bound by an endorsed fee schedule for any fee for services charged in connection with any LACH service provided.
8.3	WA Treasury's Costing and Pricing Government Service Guideline	The framing of fees is not done in a void as it is a common regulatory practice. There is a substantial volume of Government literature that outlines how fees are set. The Western Australian Treasury published the seventh edition of the *Costing and Pricing Government Service* guideline in May 2020, and that provides a useful starting point for considerations by the Department of Planning, Lands and Heritage. The Costing and Pricing Government Service guideline starts by exploring a range of questions that are useful to fully understand before attempting to detail a cost: (a) what is the context within which the service is delivered (i.e., relevant policy issues, government goals, directives, standards or principles of operation)? (b) What government desired outcome does the service address? (c) Is the service measurable in a verifiable and consistent manner? (d) What are the processes associated with delivering the service and where do they begin and end? (e) Does the service cover an entire function?	For noting.

		(f) Who has responsibility for delivery of the service? All of these questions are relevant to the provision of services in LACHS. Noting that while LACHS explicitly are not subject to the Public Sector Act, they will regulate the access and economic activities of many industries. These rights while not a veto could be structured to be one in all but name.	
8.4	What is a reasonable fee?	This section is of particular interest to Industry. Fees should relate solely to the service provided, not the development, impact or proponent, unless those factors directly make the service provided more costly. LACHS fees will need to be paid by a wide range of members of the general public when complying with the ACH Act. For example, families residing on blocks greater than 1100m2, non-profit associations (local football clubs) and small hobby farming retirees. The fees should accordingly not exceed the minimum cost if the service were provided by an independent efficient service provider. The LACHS cannot be compared generally to any other "organisation or individual providing a service". Each LACHS will be a monopoly provider for its area as per s 36(3) of the Act. Generally, the pricing and efficiency of service providers is determined by market forces. If a service provider is overpriced or too inefficient, then there will not be demand for services from that provider and ultimately the providers business will fail. LACHS will not be subject to those market forces and accordingly there will be no incentive or compulsion for efficiency. Nothing requires a LACHS to operate in an efficient manner. The Act only regulates "timeliness" in s 48(2) of the Bill. It is questioned what value the recent historical fees and charges levied by "former incarnations" will be. Most fees, charges, percentages of expenditure and royalties are commercially confidential. The recent historical fees and charges levied were based on a different cost structure under different legal obligations. Without some incentive or compulsion to operate efficiently, then basic economic theory suggests it is likely that the fee charge by a LACHS will be greater than that which would	For noting.

		otherwise be provided by a competitive market. There is nothing in the Guideline to stop the LACHS from always providing a "premium" service with a "premium fee".	
9	**Draft Outstanding Significance Guidelines**		
	Issue	**Discussion**	**Proposed response**
9.1	General comments	No comments.	
10	**Draft State Significance Guidelines Phase 2**		
	Issue	**Discussion**	**Proposed response**
10.1	General comments	No comments.	
11	**Draft Determining Substantially Commenced Phase 2**		
	Issue	**Discussion**	**Proposed response**
11.1	General comments	No comments.	