

To: Department of Planning, Lands and Heritage

Re: Aboriginal Cultural Heritage Act 2021 Co Design Second Phase

19 August 2022

Introduction

AMEC appreciates the opportunity to provide a submission to the Western Australian Department of Planning, Lands and Heritage in response to the second phase of the Aboriginal Cultural Heritage Act 2021's Co Design.

All of the content discussed is within the preexisting framework of the Aboriginal Cultural Heritage Act 2021, and the context of AMEC's original submission to that consultation¹, and the first phase of the subsequent "codesign process".

About AMEC

The Association of Mining and Exploration Companies (AMEC) is a national industry association representing over 520 member companies across Australia, the majority having project interests in Western Australia. Our members are mineral explorers, emerging miners, producers, and a wide range of businesses working in and for the industry. Collectively, AMEC's member companies account for over \$100 billion of the mineral exploration and mining sector's capital value.

Mineral exploration and mining make a critical contribution to Australia's economy, directly employing over 274,000 people. In 2020/21 Industry generated a record high \$301 billion in mining exports, invested \$3.2 billion in exploration expenditure to discover the mines of the future, and collectively paid over \$39.3 billion in royalties and taxes.

In WA, a record 148,395 people were employed in mining and exploration in 2020/21, and \$2.1 billion was spent on mineral exploration in 2020/21, representing a 21% increase from 2019/20, accounting for 65% of Australia's overall mineral exploration expenditure.

AMEC has a long-standing objective for increased clarity, certainty, efficiency and effectiveness of native title and cultural heritage processes 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.

¹ A copy can be supplied on request.

Our commentary in this submission, and previous submissions, in no ways seeks to diminish respect for indigenous cultural heritage because places which are sacred, ritual, or ceremonial sites of importance to Aboriginal people should be valued and acts or processes that irreversibly damage or destroy these sites are to be avoided or resolved to the satisfaction of relevant parties.

General comments

Funding of the LACHS is needed

The Government is granting a monopoly over the provision of substantial and vital Aboriginal heritage services. It is beholden on the Government to ensure that accessing such monopoly services does not have an excessive cost and that the LACHS are resourced appropriately to undertake their regulated role.

The \$10million committed by the State Government, over four years, appears woefully insufficient to the task ahead. The funding, and the actions of Government, suggest that the Government has decided that Industry will fund the majority of operation of the LACHS. Such a model would, facilitate the potential commercialisation of Aboriginal Cultural Heritage.

The above financial commitment by the Government was announced in the context of the Western Australian State Government having a general government operating surplus for 2021-22 that was estimated by the Treasury at \$5.7 billion. The WA State Government has the financial capacity to invest in the establishment of the LACHS. It has so far, chosen not to. Given the monopolistic powers to land access to the majority of the State being granted to the LACHS, the capacity of LACHS to fulfill their functions has to be a priority. Substantial funding has to be committed now to reduce the impact of the new legislation on the timeliness of approvals and the cost of doing business.

Cost of access

The Government must make a choice as to how much they consider the cost of access should be to undertake economic activities in Western Australia. The Department defers to the Aboriginal Cultural Heritage Committee to set the fee schedule, but there has been limited acknowledgement that the fee schedule is not how much will be charged for land access it will merely be the calculus for it. The process for determining these costs will rely in part on the existing costs. The existing costs can be considerable, for example a company was charged \$785,118.40 for a community meeting to undertake Native Title negotiations. This amount was subsequently revised to \$564,965.50².

Over half a million dollars to begin negotiations (where the finalisation of any agreement might require multiple such meetings over more than a year) is excessive, unreasonable, and unsustainable for the resources industry.

It is now commonplace for mineral exploration companies to be charged between \$15,000 and \$25,000 per day for cultural heritage surveys, with most surveys exceeding \$100,000 in total.

² http://www.nntt.gov.au/SearchRegApps/FutureActs/Pages/FAD_details.aspx?ItemID=4135

The Government can, through its development of the guidance material, cap such costs so that they are reasonable and encourage efficient negotiation processes.

Aboriginal Cultural Heritage Council Secretariat

The appropriate resourcing of the Aboriginal Cultural Heritage Council's secretariat is crucial to the functioning of the Council. Given the wide-ranging scope of the Act, virtually every single sector of the economy will require assistance, a Permit, or an Aboriginal Cultural Heritage Management Plan. Unless the Government adequately staffs the Secretariat and invests in the necessary approvals infrastructure now it can be reasonably expected that there will be an immediate bottleneck in approvals and delays across the wider economy. This is easily foreseeable and also completely within the powers of the Government to solve by sufficiently staffing the Secretariat.

StreamlineWA

Strong and consistent industry feedback is that the proposed reforms do not align with the Government's stated objectives under StreamlineWA. The Government appears to have accepted that there will be inefficiencies and delays throughout the process to land access for all Industries.

Broader than mining

The *Aboriginal Cultural Heritage Act 2021* applies to all proponents that undertake ground disturbing activities and affect the construction, renovation, or demolition development on residential properties over 1,100m². The language, and examples provided, could mislead a reader to believe that the legislative framework solely considers the interaction of mining and ACH. That is absolutely incorrect. AMEC also notes that the workshops have not enjoyed wide industry representation, nor has the associated media coverage dispelled this misinterpretation.

Hierarchy of documents

As discussed in previous submissions, the guidelines need to be developed in a manner to provide clarity to readers as to how the documents discussed throughout the codesign relate to each other, the legislation, and the regulations.

It is important that the legal standing of these documents is clarified for the reader. For example, if a reader were to follow the steps in these documents would they be fully protected from prosecution? Under Section C of the Aboriginal Cultural Heritage Management Code, the importance of the standing of this document is emphasised: Dot point 4.1.2 suggests "*If the proposed activity is located within an area with known ACH and will not result in new or additional ground disturbance, the activity can proceed without an ACH permit.*" A reader will need to understand how robust the standing of this Code is before relying on it as this contradicts the purpose of the Activities Table.

Other regulators, such as the Western Australian Environmental Protection Authority have undertaken reviews to identify best practice regarding managing the hierarchy of guidelines and addressing similar issues. The need for a clear hierarchy is an outcome detailed at length in the Quinlan

Review³. The Quinlan Review was undertaken following the decision the Chief Justice of the Supreme Court of Western Australia in *Save Beeljar Wetlands (Inc) v Jacob [2015] WASC 482*.

The findings of the Quinlan Review are relevant to the development of these documents, particularly the following⁴:

- Process content reforms should have an emphasis on clarity and simplicity;
- There should be a clear, hierarchical outline of the policy suite, linking policy instruments to statutory functions and powers undertaken by the Department, the LACHS and the Aboriginal Cultural Heritage Council; and
- Identification of which documents, and which parts of documents, are statutory and which are non-statutory (for example the yet to be published template Aboriginal Cultural Heritage Management Plan).

This submission is drafted on the assumption that the wording in the documentation provided matters and will be statutory.

Interaction with Environmental Protection Act

Industry continues to voice concern that the duplication between the EPA social surrounds policy and the processes discussed through these documents will not be resolved through this process. The EPA provided a submission that stepped through their concerns, but ultimately the Government must decide whom will have jurisdiction over Aboriginal Cultural Heritage matters. AMEC holds it should be the Aboriginal people.

The latest drafting does not ameliorate concerns, and the lack of a consultation summary does not answer the implied question in the EPA submission. Namely whether DPLH, or the codesign process, considers that the definition of Aboriginal Cultural Heritage sufficiently considers the environmental impact of a proposal in a manner that fits within the EPA's framework.

Disappointingly it looks likely that despite Western Australia modernising its Aboriginal Cultural Heritage legislation, the outcome will be a duplicative process with the EPA feeling compelled to reach in.

Interaction with Federal Legislation

The Guidance does not provide any indication of how the Government has balanced the potential impact of the Commonwealth Government legislative framework in this area, both current and proposed. How the content being codesigned will interact with Federal legislation is an open question that will be answered in the next phases of discussion. There is concern amongst in Industry that there will be unintended consequences. We strongly encourage the Government to review each document produced with consideration of how it will interact with existing Commonwealth legislation

³ <https://www.epa.wa.gov.au/legal-and-governance-review>

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<https://www.epa.wa.gov.au/sites/default/files/EPA%20Legal%20and%20Governance%20Review%20-%20Final%20Report%20-%20Quinlan%20et%20al-170516.pdf>

such as the *Native Title Act 1993 (Cth)* and the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.

Public Sector Management Act 1994 & Corporations (Aboriginal and Torres Strait Islander) Act 2006

AMEC notes that the legislation is explicit in S35 that the LACHS are not to be considered as an entity under the Public Sector Management Act 1994. What is a LACHS? Will they exist as the entities under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act)? Will each LACHS need to be a CATSI corporation? This should be clarified. This will determine the governance, taxation, and reporting structures of the organisation. It may also have consequences for pre-existing agreements with the subgroups a LACHS represents, a detail that the State Government needs to consider.

Aboriginal Cultural Heritage Directory

Established under Part 9 of the Act, the Aboriginal Cultural Heritage Directory is a lynch pin of the operation of the Activities Tables and the due diligence process under the Aboriginal Cultural Heritage Management Code. There has been very little codesign or consultation regarding this framework other than brief commentary reiterating that it is progressing from the Department. While beyond the scope of this consultation, the Directory's form, content, useability, and technological robustness remains a priority. It must be built to sustain the volume of traffic that having it as a threshold for due diligence of Tier 1 will bring.

The WA Government's Environment Online digital program that will facilitate environmental approvals has undergone multiple phases of User Testing. AMEC and Industry have participated in workshops and provided feedback on initial designs, flowcharts, and other matters. The ACH Directory should also undergo User Testing prior to launch so that foreseeable technical bugs are resolved.

LACHS

How will a LACHS function? The realities of the governance, reporting, decision-making and expectations of these groups remains utterly opaque. The entire framework, and Western Australian non-indigenous land access, rests on these groups being able to function efficiently. There is currently no information on how these groups will work.

Template Aboriginal Cultural Heritage Management Plan

It is disappointing that the Government has not developed a template/pro-forma Aboriginal Cultural Heritage Management Plan (ACHMP) as was committed earlier in the process. The ACHMP is fundamental to the operation of the Act and the provision of a template by the Government that they consider satisfies the Act would answer several outstanding questions.

What is the form and content of an Aboriginal Cultural Heritage Permit?

It is unclear what the content and form of an ACH Permit will be (S115 (2a)). The legislation is clear that a Permit is needed to authorise Tier 2 activities. However, the Consultation Guidelines are explicitly focused on the process surrounding seeking an Aboriginal Cultural Heritage Management

Plan and provide no explanation of the Permit process. Further detail on how the Permit process, the template etc, defined in S113 of the Act, will operate, and be satisfied would be welcome.

Commentary

It must be noted that AMEC appreciates that in Phase 2, the Department tended documents for consideration rather than raising questions. The written positions taken make comment easier. It is, however, frustrating to be drafting further replies without the consultation summaries of the workshops. The publication of the consultation summaries from both phases' workshops are needed before Phase 3, otherwise the value of the workshops will be lessened. Furthermore, it would aid future submissions if the Government explained why decisions have been taken and certain suggestions ignored. Greater commentary on the policy lens, priorities, and values framework that the Government is using to identify which elements have been 'codesigned' and thus included, and which have not would be helpful.

Concluding remarks

With six months notionally remaining in the process to codesign these documents there is widespread disquiet within industry.

The Government must set the LACHS up for success by investing in them rather than relying on cost recovery. Investing now to ensure systems are in place for streamlined approvals will pay dividends for the WA economy in the future.

Finally, the documentation must be legally robust. Shifting from qualitative language to be as objective, quantitative, independently measurable, and verifiable as possible would be beneficial.

We look forward to the third phase of codesign. The remainder of this submission provides feedback to each of the documents in a tabular format that is attached in the annexure.

For further information contact:

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AMEC