# To: Department of Planning, Lands and Heritage

# Re: Aboriginal Cultural Heritage Act 2021 Co Design Third Phase

**21 December 2022**

## Introduction

AMEC appreciates the opportunity to provide a submission to the Western Australian Department of Planning, Lands and Heritage in response to the third phase of the *Aboriginal Cultural Heritage Act 2021* 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 consultation, and the first and second phase of the subsequent "codesign process" [1].

## 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 of each is available on AMEC's website, www.amec.org.au

Our commentary in this submission, and all 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

### Regulations

AMEC believed the Government's original intent was to consult on the regulations prior to their gazettal and the implementation of the *Aboriginal Cultural Heritage Act 2021* (the Act) in July 2023. As the gazettal of the regulations is anticipated to occur in February 2023, the timeframe to consult is tight. How the Parliamentary Counsel will translate the current draft of the Activities Table and the Management Code into the regulatory framework is of particular interest to AMEC. As the Act and associated regulations will define Western Australian land access, and given the Government's commitment to codesign, it is not unreasonable that Industry should want to be consulted on the wording prior to its finalisation.

### New concepts and documents introduced in Phase 3

The codesign process has been staged over three phases to refine how the legislative framework will be implemented. It is unsettling that as the final phase concludes new documents and concepts are being identified that will shape the way the Act is delivered in practice.

The Phase 3 documentation proposes several new guidelines that will be developed before implementation in July 2023: investigations guidelines, a survey guideline, and a guideline for the identification of Aboriginal Cultural Heritage (ACH). No timeframe or process around when these documents will be consulted has been specified. Industry needs to be consulted on the wording and framing of this guidance.

New concepts such as a requirement to consult 'local aboriginal groups', exemption of activities that are "like for like or less" and a new "extraordinary circumstances" category when setting fees. The legal robustness of these new concepts are all questioned in the annexure.

### Funding of the LACHS is needed

As AMEC has raised in the first two phases of consultation, and repetitively in separate meetings, the State Government must fund the delivery of Local Aboriginal Cultural Heritage Services (LACHS). The Readiness Grants announced by the Government are a positive step forward, however, the scale and timing of this funding is insufficient to the task.

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, is insufficient to the task ahead.

The scale of funding is disappointing when it 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.

Given the monopolistic powers to land access across 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 current drafting lacks reasonable limitations such as the number of personnel that may be engaged by a LACHS, the circumstances in which they may be engaged, and the maximum reasonable number of hours for the engagement.

The Government should, 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

As raised in earlier consultations, the appropriate resourcing of the Aboriginal Cultural Heritage Council's secretariat is crucial to the functioning of the Council. AMEC is concerned that as the year closes the Government has not moved to set in place the systems and staff necessary to make it happen.

The appointment of the Aboriginal Cultural Heritage Council in September 2022 was welcomed by AMEC. However, the lack of representatives with experience in a range of Industries was a concern for AMEC. 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 (ACHMP).

Ensuring that the Secretariat is sufficiently staffed and the Council has the necessary skills at the table are key. Deliberative investment in the necessary approvals infrastructure must be urgently attended to. Substantial approval delays because of the lack of preparation of the Council and Secretariat are easily foreseeable. As noted previously, the solution to these problems are also within the remit of the Government to solve by sufficiently staffing the Secretariat.

### 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 "education campaign" that was promised materialised.

### Interaction with Environmental Protection Act

Industry continues to voice concern that the duplication between the Environmental Protection Authority (EPA) social surroundings policy and the processes discussed within the Attachment to the Management Code is insufficient to satisfy the WA's Environmental Protection Act 1986 (EP Act). The EP Act provided essentially the same submission in both Phases 1 and 2. While it lists their concerns, it is ultimately the Government that must decide whom will have jurisdiction over ACH matters. AMEC holds it should be the Aboriginal people.

The latest drafting does improve on the previous phase in several regards, but still does not completely alleviate all concerns identified by the EPA. However, it is legally possible for the EPA to accept that the ACH legislation has primacy, which we consider is the policy outcome should be sought by the Government.

### Aboriginal Cultural Heritage Directory (ACH Knowledge Portal)

Established under Part 9 of the Act, the Aboriginal Cultural Heritage Directory, also referred to as the ACH Knowledge Portal, will drive the operation of the Activities Tables and is the lynchpin of the due diligence process under the Aboriginal Cultural Heritage Management Code. Despite this system's importance to the entire operation of the legislative framework there is yet to be consultation or publication of any details. This system's form, content, useability, and technological robustness must be a priority. The platform must be able to sustain the volume of traffic that having it as a threshold for due diligence for Tier 1 activities will bring.

### Unanswered questions regarding form and function: LACHS, ACHMP and Permits

Fundamental questions remain unanswered as to:

- How will a LACHS function?
- Will the Government deliver the promised template/pro-forma Aboriginal Cultural Heritage Management Plan (ACHMP)?
- What is the form and content of an Aboriginal Cultural Heritage Permit?

AMEC raised these questions in earlier phases and would welcome consultation on the Government considerations.

### Documentation

In a marked improvement on earlier phases, the Phase 3 included fully drafted editions of documents. There has been a substantial improvement in several documents with a shift from qualitative language to embracing an objective, quantitative, independently measurable, and verifiable as possible tone.

While this is greatly appreciated, and it has enhanced the feedback AMEC and Industry were able to make, concern remains that the timeframes for further editing and improvement are compressed.

While improvements have been made, AMEC's concern regarding the legal robustness of the guidance remains unaltered following the final phase.

### Interaction with Federal Legislation

There has been no indication as to how the State Government will approach the imminent Commonwealth Government legislative reforms to the management of ACH. How the content that has been codesigned will interact will be answered in 2023. There is concern amongst Industry that there will be substantial duplication and that ultimately this codesign legislative framework will be overridden. The State Government needs a deliberative approach to ensure that the management of ACH is not ceded to the Commonwealth Government.

### Concluding remarks

With less than three months to finalise these documents, and over the traditional Australian holiday period, there is substantial concern this framework will not be ready to be implemented.

Fundamental concerns raised by AMEC throughout this consultation need to be addressed:

- The Government must financially invest in the LACHS;
- The Guidance must be finalised so it is legally robust.
- The yet to be consulted upon Regulations and guidance documents must be shared and consulted with Industry with sufficient time to provide comment.

As we enter the post-Phase 3 consultation, AMEC looks forward to further discussions and asks that the Government consider the publication of further information clarifying how the transitional period will be managed.

The attached annexure provides more detailed feedback to each of the documents in a tabular format and should be read in conjunction with the above commentary.

**For further information contact:**

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AMEC

| 1 | **Activity Tiers and Table** | | |
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| | **Issue** | **Discussion** | **Proposed response** |
| 1.1 | Categorisation of activities by reference to broad activity descriptions remains problematic | The Activity Tiers and Table (**Table**) must:<br><br>(a) be legally robust (ie, consistent with the Act);<br>(b) definitively identify what "tier" an activity is for the purposes of the Act; and<br>(c) cover the field for all potential land-based activities.<br><br>The Table continues to use broad activity descriptions with no clear link to levels of ground disturbance in most cases.<br><br>For example, section 100 of the Act defines a tier 1 activity as "*an activity involving no, or minimal level of ground disturbance that is prescribed for the purpose of this definition".* Section 1.1 of the Table classifies a *"recovery activity which is not an emergency but is necessary to restore essential services"* as a tier 1 activity. There is no reference to the level of ground disturbance associated with such an activity nor rationale as to why such an activity is considered to involve the *"no, or a minimum level of, ground disturbance"*, which is necessary under the Act for classification as a tier 1 activity (see definition of tier 1 activity in s 100 of the Act).<br><br>AMEC notes the inclusion of additional measures it assumes are intended to address such issues, including:<br><br>(a) "catch alls" that have now been included for activities not otherwise specified; and<br>(b) additional commentary on page 4 regarding the application of the Activity Table and prioritisation when categorising specific activities.<br><br>However, these additional measures do not resolve the legal risk associated with prescribing an activity that may involve different levels of ground disturbance as a tier 1, 2 or 3 activity in the regulations, in circumstances where section 100 of the Act clearly defines tier 1, 2 or 3 activities by reference to set levels of ground disturbance.<br><br>AMEC also notes issues in relation to the "catch alls" as outlined further below. | All activities listed in the Table should have a clear reference to the level of ground disturbance associated with that activity that justifies the allocation of the activity to a particular tier.<br><br>For example, if *"recovery activity which is not an emergency but is necessary to restore essential services"* remains in the Table, it should be included in each of tier 1, 2 and 3 and amended to include the underlined words as follows:<br><br>(a) tier 1 – *recovery activity <u>involving no or minimal level of ground disturbance</u> which is not an emergency but is necessary to restore essential services"*;<br>(b) *recovery activity <u>involving a low level of ground disturbance</u> which is not an emergency but is necessary to restore essential services"*; and<br>(c) *recovery activity <u>involving a moderate to high level of ground disturbance</u> which is not an emergency but is necessary to restore essential services"*.<br><br>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 |

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| | | | provide a legally robust basis for categorisation of activities and minimise the potential for legal challenge to authorisations and approvals granted under the Act. |
| 1.2 | Marking out activities must be exempt | "Marking out" for prospecting and mining activities remains 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.<br><br>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 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.<br><br>The marking out process is fundamental to the concept of "first in time" priority for applications 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.<br><br>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.<br><br>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 | Marking out should be prescribed as an exempt activity under section 100(h) of the Act. |

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| | | 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.<br><br>For those reasons, it is essential that the current marking out process applicable to mining lease and prospecting licence applications remains 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.<br><br>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 | "Catch all" categories | A person is authorised to carry out an activity that may harm Aboriginal cultural heritage if:<br><br>(a) the activity is an exempt activity and the person complies with s 109 of the Act;<br>(b) the activity is a tier 1 activity and the person complies with s 110 of the Act;<br>(c) the activity is a tier 2 activity and the person complies with s 111 of the Act; or<br>(d) the activity is a tier 3 activity and the person complies with s 112 of the Act.<br><br>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.<br><br>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).<br><br>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.<br><br>For this reason, AMEC welcomes the inclusion of a "catch all" in the Table that captures activities not otherwise specified in the Table as tier 1, tier 2 or tier 3 activities. | AMEC proposes the following quantities of ground disturbance for the "catch-all" section of the Table:<br><br>(a) tier 1: 100$m^2$ or less ground disturbance;<br>(b) tier 2: more than 100$m^2$ and no more than 300$m^2$ ground disturbance; and<br>(c) tier 3: greater than 300$m^2$ ground disturbance.<br><br>AMEC notes that a definition of "ground disturbance" is included in part 7.2 of the ACH Management Code. |

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| | | However, AMEC notes the following issues in relation to the "catch alls" included in the Table:<br><br>(a) ground excavation with a depth up to and including 0.5 metres is listed as a tier 1 activity. However, ground excavation with a depth of up to an including 1 metre (with no "floor" of 0.5 metres) is listed as a tier 2 activity. Applying the "working backwards from tier 3" approach outlined on page 4 of the guidance, any ground disturbing activity to a depth of 1 metre or less would need to be classified as tier 2 activity, including ground disturbance of a depth up to and including 0.5 metres. A similar issue applies in relation to ground excavation by reference to square metres and removal of material by reference to kilograms;<br>(b) ground excavation with a surface area greater than 0.25 metres square is classified as a tier 3 activity. This is an extremely small area, equating to approximately two sheets of A3 paper, or four sheets of A4 paper placed side by side. The requirement to obtain an approved or authorised ACH Management Plan (as required for a tier 3 activity) before proceeding with such minor levels of ground disturbance is disproportionate to the potential risk to ACH posed by such small areas of disturbance. The specified amount is also unusual given that clearing of up to and including 100 square metres (a much larger area) is classified as a tier 2 activity, and the Table includes a number of activities involving much greater levels of ground disturbance as tier 2 activities (eg, remediation of areas up to and including 100 square metres or 3 metres in depth); and<br>(c) no definition of "ground excavation" is included, which allows for varying interpretations of what constitutes "excavation". It is unclear why "excavation" has been used instead of "disturbance", given that "disturbance" (but not "excavation") has been defined in the ACH Management Code. | |
| 1.4 | Handheld versus mechanical equipment | There are a number of references to use of handheld versus mechanical equipment in the Table. However, the way in which an activity is conducted (ie, by hand or using mechanised equipment) does not necessarily impact the actual level of ground disturbance associated with the activity. Mechanically-assisted ground disturbance could be minimal, or vice versa. For example:<br><br>(a) survey, mapping, monitoring, measurement and investigations requiring digging of pits or temporary burial of survey equipment is a tier 2 activity (Table, 5.2);<br>(b) however, survey, mapping, monitoring and investigations using handheld mechanical equipment is a tier 1 activity (Table, 5.1). | References to hand-held and mechanical equipment should be removed from the table. All categorisation of activities should be by reference to the associated level of ground disturbance, and not to whether or not mechanised equipment is used to conduct the activity. |

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| | | The level of ground disturbance for the tier 1 activity above may readily exceed the level of ground disturbance for the tier 2 activity. There are numerous similar examples throughout the Table. | |
| 1.5 | Broad activity descriptions | The Table continues to use very broad descriptions of activities that could result in wide range of levels of ground disturbance. For example, all of the following are classified as tier 2 activities, but may in some circumstances only involve no or minimal levels of ground disturbance, or conversely may involve moderate to high levels of ground disturbance, depending on how the "activity" is conducted:<br><br>(a) detailed contaminated site investigation;<br>(b) survey, mapping, monitoring, measurement and investigations requiring digging of pits or temporary burial of survey equipment;<br>(c) planting vegetation or removing invasive or weed vegetation using handheld mechanical equipment.<br><br>Again, there is high variability in the potential for harm to Aboriginal cultural heritage associated with each of the above activities. | The categorisation of activities should be reference to the associated level of ground disturbance involved instead of by reference to broad activity categories with inherently high levels of variability. |
| 1.6 | Statements in commentary do not accurately reflect requirements of the Act re exempt activities | Page 3 states that:<br><br>(a) "*Where there is a risk of harm to ACH from a proposed activity, a proponent is required to follow the authorisation pathway corresponding to the relevant activity tier"*; and<br>(b) *"The [Due Diligence Assessment] (**DDA**) process applies to all activities having regard to their level of ground disturbance"*.<br><br>These statements are inconsistent with sections 103 and 109 of the Act, which provide that a DDA process (ie, to consider risk of harm) is not required for exempt activities and that exempt activities are authorised provided that they are not located in a Protected Area.<br><br>Similarly, the structure of Table 1 (page 3) suggests that a DDA needs to be undertaken before proceeding with an exempt activity to determine if the there is a risk of harm to ACH arising from the activity (eg, second column: "if no risk of harm to ACH"; third column: "authorisation requirements if risk of harm to ACH"). This misrepresents section 103 of the Act, which provides that a DDA is not required for an exempt activity. | Review and amend the commentary in the guidance to ensure all text (including in Table 1) accurately and completely reflects the requirements of the Act. |

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| | | Finally, the "authorisation requirements if risk of harm to ACH" column of Table 3 in relation to exempt activities fails to note that exempt activities are only authorised to proceed as planned if they are not located in a Protected Area. | |
| 1.7 | Inconsistencies and uncertainty | Page 3 states that "*If a specific activity is not listed, a proponent should contact the Department of Planning, Lands and Heritage for advice"*. This is inconsistent with the inclusion of "catch all" categories in the Activity Table.<br><br>Further, the guidance is silent on section 104 of the Act, which allows a proponent to request a letter of confirmation from the CEO of the Department where there is uncertainty regarding the categorisation of a proposed activity. | Further commentary should be included to explain the application of the "catch all" categories and the process for requesting confirmation from the CEO where uncertainty remains. |
| 1.8 | Avoidance or minimisation of harm to ACH wherever possible | Statements are included in table 1 (page 3) regarding undertaking activities "to avoid or minimise harm to ACH wherever possible" (exempt activities) and taking "all reasonable steps possible to avoid or minimise the risk of harm being caused to ACH".<br><br>AMEC welcomes the inclusion of clarification of what steps are required to avoid or minimise risk of harm in the ACH Management Code. | For noting. |
| 1.9 | Undefined terms | Table 1 (page 3) refers to "Protected Areas", "Permits" and "approved or authorised Plans". These terms are not explained or defined elsewhere in the document, which may cause confusion for proponents referring to the guidance without any prior understanding of the requirements of or terminology used in the Act. | Insert definitions for these terms into the guidance that are consistent with the definitions used in the Act. |
| 1.10 | Definition of "new and additional ground disturbance" in Table is incomplete | The definition of "new and additional ground disturbance" used in the Table does not include the full definition included at 7.2 of the ACH Management Code. | The definition in the Table should be updated to match the full definition used in the ACH Management Code. |
| 1.11 | "Like for like or less" activities | AMEC notes the introduction of the "like for like or less" concept in the Table. Further comments regarding "like for like" are included below at paragraph 2.2. | See comments below regarding the introduction of the "like for like" concept. |

| 2 | Aboriginal Cultural Heritage Management Code (ACH Management Code) | | |
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| | **Issue** | **Discussion** | **Proposed response** |
| 2.1 | Missing documents | The ACH Management Code refers to additional documents yet to be developed or published for comment, including:<br><br>(a) Directory user guidelines;<br>(b) Survey Guidelines;<br>(c) a document to be published by the Department on "identification of ACH"; and<br>(d) ACH Investigations Guidelines.<br><br>Ensuring that the content of these documents (particularly Survey Guidelines and ACH Investigation Guidelines) is fit-for-purpose and consistent with the requirements of the Act will be critical to ensuring the integrity of the ACH assessment and management processes under the new Act.<br><br>AMEC is disappointed that it has not yet been provided with an opportunity to review these documents, particularly given that it raised concerns regarding "documents yet to be drafted" in its phase 2 submissions.<br><br>AMEC's understanding based on current Government commitments is that stakeholders will have no further opportunity to comment on the content of the ACH Management Code or other co-design documents with the benefit of review of the "missing" documents before the finalisation of the co-design documents. | AMEC urges the Government to ensure that appropriate consultation is undertaken with all stakeholders on the "missing" documents and "complete" proposed suite of co-design documents before the documents are finalised. |
| 2.2 | "Like for like or less" concept | There is no basis in the Act for the inclusion of the new concept of "like for like or less". The Act defines tier 1, 2 and 3 activities by reference to level of ground disturbance, not by reference to the purpose or nature of the activity (ie, whether it is "like for like"). It is reasonable and consistent with the Act that an activity be exempt where it results in no new or additional ground disturbance, regardless of whether the activity is in essence "the same type, kind or form" of a previous activity (ie, "like for like").<br><br>AMEC also notes that "harm" (as defined in section 90 of the Act) is limited to harm to tangible heritage, except in Protected Areas where cultural landscapes (including intangible heritage elements) may also be subject to "harm". The Act does not allow activities to be conducted in Protected Areas unless conditions or regulations allow. Given this, any potential harm to intangible heritage from conducting an activity that involves no new additional ground | Ensure a transparent legal foundation for the concept of "like for like or less" either in the Act or the regulations. |

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| | | disturbance but that is *not* like for like, can be separately regulated under conditions or regulations implemented for Protected Areas. | |
| 2.3 | Reasonable steps for avoiding or minimising harm to ACH | Table 4 step 2 requires the proponent to undertake steps where the proponent is aware of "or has been informed of" the presence of ACH in an activity area.<br><br>These steps should take into account that information provided to a proponent regarding the presence of ACH may not always be accurate or reliable. Proponents should have the opportunity to take reasonable steps to verify the accuracy of the information and/or presence of ACH in an area where informed of the ACH by a third party, before the proponent is required to amend the method or location of activities to account for that ACH. | Amend the DDA process for tier 1 activities to address the issue raised. |
| 2.4 | Previous ACH reports | Steps 2 and 3 in table 5 refer to previous ACH reports. In many cases, these reports may be held by the proponent but not included on the Directory due to confidentiality/disclosure restrictions in agreements between proponents and knowledge holders. It should be made clear in this section that the proponent can rely on such reports (subject to the Survey Guidelines).<br><br>There may also be circumstances where the proponent has:<br><br>(a) previously been notified by the knowledge holders for an area that a specific proposed activity is not likely to impact ACH, without a survey being required prior to the commencement of that activity. For example, knowledge holders may have "cleared" an activity proceeding without a survey following receipt of a heritage/activity notice under an applicable heritage agreement; or<br>(b) an applicable heritage agreement with the knowledge holders for an area may authorise the conduct of specified "low impact" activities without further notice or surveys.<br><br>These processes/clearances should be sufficient for the proponent to conclude that there is no risk of harm to ACH, even where a full ACH report does not exist, without requiring further engagement (as currently required under step 6 of table 5). This proposed approach is consistent with section 106 of the Act, which provides that steps taken under related agreements may be used to satisfy due diligence assessment requirements in some circumstances.<br><br>The same comments apply in respect of steps 2 and 3 of table 6 (regarding tier 3 activities). | Review the DDA process for tier 2 and tier 3 activities to address the issues raised.<br><br>Ensure these issues are appropriately addressed in the proposed Survey Guidelines, and that all stakeholders have a reasonable opportunity to consult on the proposed Survey Guidelines before they are finalised. |

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| | | These issues highlight the need for stakeholders to have an opportunity to consult in relation to the proposed Survey Guidelines before they are finalised. | |
| 2.5 | Consultation requirements | Steps 8 of tables 5 and 6 state that a person intending to carry out [a tier 2 or tier 3] activity must notify the interested Aboriginal party and/or knowledge holders. However, the Act only mandates notification/consultation if the proposed activity is assessed as potentially resulting in harm to ACH.<br><br>The same comments apply to sections 9.1 and 9.2 of the ACH Management Code. | Step 8 of tables 5 and 6 should clarify that consultation is not required for a tier 2 or 3 activity if the DDA has concluded that there is no risk of harm to ACH from the proposed activity. |
| 2.6 | Intangible heritage | Section 7.2 refers to "harm" to intangible ACH. However, the concept of "harm" under the Act (as defined in section 90) is only relevant to intangible heritage to the extent that it forms part of a cultural landscape located in a Protected Area. In those circumstances, an activity may only proceed if allowed under conditions or regulations for the Protected Area, and subject to those conditions.<br><br>The reference to harm to intangible heritage in section 7.2 suggests that harm to intangible heritage needs to be considered more broadly in conducting any DDA under the Act, including for activities not located in Protected Areas. This is misleading and does not reflect the requirements of the Act. | All references to cultural landscapes and intangible heritage should be removed from the ACH Management Code.<br><br>Alternatively, it should be clear in the content and structure of the Code that assessment of harm to intangible cultural heritage is encouraged, but not required in relation to the DDA process for tier 1, 2 and 3 activities under Part 6 of the Act. |
| 2.7 | Flowcharts 3, 4 and 5 | The flowcharts do not appear to take into account whether the proposed activity is to be conducted under an existing Plan, or that a Plan (as an alternative to a Permit) may be sought for a tier 2 activity under the Act.<br><br>The references to "like for like" in the flowcharts should also be removed and replaced by the concept of "new or additional ground disturbance" for the reasons discussed above. | Amend flowcharts to address the issues raised. |
| 2.8 | Duplication of processes under EP Act and Act | AMEC remains concerned regarding the duplication of assessment and management of impacts to ACH under Part IV of the *Environmental Protection Act 1986* (WA) and the Act.<br><br>AMEC notes that former Minister for Aboriginal Affairs, Mr Ben Wyatt, committed to the removal of duplication of ACH assessment and management in discussions with AMEC in 2019 when both the ***Environmental Protection Amendment Act 2020*** and the ***Aboriginal Cultural Heritage Act 2021*** appeared likely to progress through parliament together. The intent was to | Review and amend whole-of-Government approach to assessment and management of impacts to ACH to remove duplication and meet historical commitments to industry regarding the same. |

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| | | remove cultural heritage considerations from the *Environmental Protection Act 1986*. However, as the legislative amendments became decoupled this commitment was also delayed. | |
| 2.9 | Reliability of the ACH Directory | AMEC notes the commentary included in section 8.1 of the ACH Management Code regarding the ACH Directory, and in particular, the following commentary included under the heading *"Important information to consider when using the Directory"*:<br><br>*"Due to historical factors, it is possible that some ACH listings may not represent the precise ACH location or associated boundary. Persons accessing the Directory should contact the Department if there exists any doubt as to the accuracy or completeness of information displayed on the Directory.*<br><br>*The best way to be certain of whether ACH is located within a proposed activity area is to discuss with the relevant Aboriginal persons."*<br><br>The DDA process is heavily dependent on the accuracy and reliability of the Directory, particularly in relation to tier 1 activities, which rely primarily on a search of the Directory and a visual inspection of the activity area prior to carrying out an activity. If the Directory is not reliable, there is an increased risk of harm to ACH and non-compliance with the Act.<br><br>It is unreasonable for proponents to assume this risk in relation to a Government Directory, and that the onus of confirming accuracy and completeness of Directory information fall to the proponent, either through contacting the Department or consulting with Aboriginal persons, or both. It is not feasible for proponents to be required to consult regarding the Directory accuracy before conducting a tier 1 activity, particularly where time-critical activities such as marking out are not prescribed exempt activities.<br><br>AMEC considers that any risk of unreliability of the Directory should be assumed by Government. There must be clear statements included in the ACH Management Code to the effect that the information in the Directory can be relied upon for the purposes of the DDA process under the Act unless the proponent is or becomes aware of any additional information that reasonably indicates that the Directory information is inaccurate or unreliable. | Ensure that the information in the Directory is accurate and reliable, including where necessary, allocating appropriate funding for reviewing and amending known historical inaccuracies with Directory information.<br><br>Include a clear statement in the ACH Management Code confirming that that the information in the Directory can be relied upon for the purposes of the DDA process under the Act unless the proponent is or becomes aware of any additional information that reasonably indicates that the Directory information is inaccurate or unreliable. |
| 2.10 | Appendix 1 – About Aboriginal Cultural Heritage | The purpose of Appendix 1 – "about Aboriginal Cultural Heritage" is unclear. The Appendix also does not clarify that the DDA process under the ACH Management Code relates to Part 6 of the Act, which regulates "harm" to ACH. In particular, it is not clear from the information in Appendix | Appendix 1 is not required and should be deleted from the ACH Management Code. Alternatively, if this |

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| | | 1 that "harm" (as defined in section 90 of the Act) relates to tangible heritage elements except in relation to intangible elements of cultural heritage landscapes in Protected Areas. This has the potential to be confusing and misleading for proponents seeking to apply the ACH Management Code.<br><br>Further, the definitions in Appendix 1 do not accurately reflect the definitions used in the Act. For example, "Protected Areas" are defined in Appendix 1 as *"areas that Aboriginal people consider to be of outstanding significance"*. However, in considering whether an activity is proposed to be conducted in a "Protected Area" for the purposes of a DDA, "Protected Areas" only include areas declared as such by order under section 82(1) of the Act. | recommendation is not accepted, Appendix 1 should be reviewed and amended to ensure that it is consistent with the Act and clearly identifies how the information included in the Appendix relates to DDA under the ACH Management Code. |
| **3** | **Consultation Guidelines** | | |
| | **Issue** | **Discussion** | **Proposed response** |
| 3.1 | General comments | The consultation process underpins the process of building relationships, gaining land access and avoiding harm to Aboriginal Cultural Heritage.<br><br>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.<br><br>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.<br><br>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.<br><br>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. | Greater funding is required for LACHS to enable effective consultation. |
| 3.2 | Cost of consultation | The Consultation Guidelines do 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 | A clear statement should be included in the Consultation Guidelines that each party is responsible for its own costs of consultation. |

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| | | 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.<br><br>AMEC notes that the Guidelines now also require a proponent to *"consider reasonable requests for assistance to participate in the consultation process".* AMEC strongly objects to the inclusion of this requirement, which suggests an obligation on proponents to fund consultation costs where requested to do so. AMEC considers it the responsibility of Government to appropriately fund LACHS and other Aboriginal persons required to be consulted to ensure that those organisations/persons can meet their consultation and other obligations under the Act. | LACHS and other Aboriginal persons must receive sufficient funding from Government to meet their consultation and other obligations under the Act. |
| 3.3 | Reciprocal obligations | Successful consultation relies on all parties actively participating in the consultation process. This necessitates that obligations around consultation participation also be imposed on the persons who are required to be consulted (ie, Aboriginal parties). Currently, the Consultation Guideline impose minimal obligations on Aboriginal parties that must be consulted to "make genuine efforts" to respond to consultation attempts.<br><br>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) as well as proponents. | Amend the Consultation Guidelines to outline clear consultation obligations for both proponents and Aboriginal parties in relation to consultation on Aboriginal Cultural Heritage Management Plans (**Plans**). |
| 3.4 | Genuine attempts to contact and consult, in a timely manner, each Aboriginal person (which includes an organisation) | The Consultation Guidelines now state that a LACHS should publicly state its preferred method of consultation and contact. However, there is no further statement regarding where this information should be stated, meaning that proponents may need to "search" for the information in multiple locations. | The ACH Directory should identify contact information for Aboriginal parties, including their preferred method of consultation. |
| 3.5 | Consultation carried out under a related agreement | Section 1 of the Consultation Guidelines states that consultation carried out under a related agreement that is "in line" with the requirements of the Guidelines is considered sufficient for the purposes of a Plan. | Develop appropriate guidance around consultation under related agreements. |

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| | | "In line" is highly subjective and imprecise language. Further guidance is needed to assist industry to determine when a related agreement can be relied upon for consultation purposes. | |
| 3.6 | Attempts for initial contact | The Consultation Guidelines require proponents, as a minimum standard, to follow up initial contact with persons to be consulted for a minimum of 12 weeks as follows:<br><br>(a) fortnightly for six (6) weeks;<br>(b) weekly for four (4) weeks; and<br>(c) daily for two (2) weeks.<br><br>Firstly, the timeframes require a minimum of 24 attempts at contact, including daily attempts for a period of fourteen (14) consecutive days. This is excessive and borders on harassment of the persons to be consulted.<br><br>Secondly, it is unclear what is meant by "daily" contact. Is this restricted to business days, or does it also include weekends and/or public holidays? AMEC considers contact on weekends and public holidays improper, and the daily contact requirement excessive (even where restricted to business days).<br><br>Thirdly, the twelve (12) week period is stated to be inclusive of allowances for cultural conventions and commitments. However, there is no apparent change to the contact attempts that must be made during the 12 week period in the event of cultural commitments. AMEC considers it highly inappropriate and disrespectful to the persons to be consulted that a proponent be required to make daily contact for 14 consecutive days with an Aboriginal person where the proponent is aware that the person is unavailable due to engagement in funeral or other cultural commitments.<br><br>Fourthly, the minimum contact period for contacting LACHS is stated to be one (1) month. It is unclear how the minimum contact requirements outlined for the twelve (12) week period apply when attempting to contact a LACHS.<br><br>Fifthly, other sections of the Consultation Guidelines note the need for proponents to be flexible and to consult in a culturally appropriate and consistent manner. It is unclear how these requirements align with the specific twelve (12) week initial consultation requirements. | Reconsider the minimum consultation requirements and revise the Consultation Guidelines to ensure that they are fit-for-purpose, reasonable, respectful and culturally appropriate.<br><br>Impose positive obligations on LACHS and other Aboriginal persons to be consulted to respond to consultation attempts.<br><br>Provide further guidance and clarification regarding consultation obligations and the role of the Department if no response is received by the end of the initial consultation period. |

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| | | Sixthly, where it is not possible to make contact, the proponent must *"take reasonable steps to identify and use alternative methods of contact…"*. This suggests an obligation on the proponent to continue to make contact, even if there is no response after twenty-four (24) separate contact attempts over a twelve (12) week period. This is inconsistent with other statements in the Consultation Guidelines that *"a maximum of 12 weeks is required"* for initial consultation attempts.<br><br>Finally, where no response is received over a twelve (12) week period, the proponent may seek advice from the Department, who will consider whether a proponent has *"undertaken consultation consistent with the requirements of the Act and these guidelines on a case-by-case basis".* This statement raises a number of questions, including:<br><br>(a) what process will be implemented by the Department to ensure that procedural fairness is afforded, that the Department's consideration is otherwise conducted appropriately, and that the requirements of the Act are met;<br>(b) what will be the consequences and process should the Department determine that consultation has not met the requirements of the Act and the Consultation Guidelines;<br>(c) what options will be available to proponents where the Department's decision is disputed; and<br>(d) how will this process be managed (and what timeframes will be imposed) to ensure that the process does not result in additional unnecessary delay to proponents who have made genuine attempts at consultation to no avail? | |
| 3.7 | On Country meeting requirements | The Consultation Guidelines provide that, where practicable and unless otherwise preferred by the persons to be consulted, at least one consultation should happen on Country and should include visiting the area of the proposed activity.<br><br>This presents a number of logistical challenges, including but not limited to costs of attending on Country meetings and site visits. It would not be unusual for costs of a site visit in a remote area over a period of 1-3 days (including travel time) to exceed $30,000. | Amend the Consultation Guidelines to provide clarity on when it may be considered "practicable" to attend on Country meetings, noting the associated costs and logistical challenges.<br><br>Provide clarity around consultation costs as outlined in paragraph 7.2 above. |
| 3.8 | Use of social media | Section 4.1 of the Consultation Guidelines requires proponents to seek to contact persons to be consulted by social media. This is highly unprofessional and gives rise to a number of concerns regarding appropriate boundaries between professional and personal roles of persons to be consulted, and the confidentiality of information to be shared. | Remove requirements for consultation by social media. |

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| | | There are also a number of platforms that could reasonably be considered "social media" that AMEC considers inappropriate for communication of this nature (eg, Snapchat, TikTok). | |
| 3.9 | "Any and all alternatives" to activity methods | The Consultation Guidelines require proponents to explain and document *"any and all alternatives to the method the proponent intends to use to carry out [an] activity".* This requires clarification to impose reasonable limits on the alternatives that must be explained and documented. | AMEC proposes that the requirement be limited to "any reasonable and practicable alternatives". |
| 3.10 | Uncertain and potentially significant timeframes | Section 4.1 of the Consultation Guidelines states that "*the length of time to agree to a timeframe and framework for consultation should not exceed three months*."<br><br>When combined with an initial consultation period of up to twelve (12 weeks), this results in a potential timeframe of six (6) months before a framework is agreed and consultation commences. Consultation must then be completed "*within a reasonable timeframe"* under section 139(2) of the Act before a proponent can provide "official" notice of its intention to carry out the proposed activity under section 142(1) of the Act (see section 142(3)).<br><br>A timeframe of 100 business days is currently proposed to be prescribed for proponents and Aboriginal parties to reach agreement on a Plan under the Prescribed Timeframes co-design document. This equates to a further period of approximately 5 months.<br><br>If a proponent and Aboriginal parties do not reach agreement, a further period of 60 business days (approximately 3 months) is proposed under the Prescribed Timeframes for the ACH Council to make a recommendation to the Minister regarding whether a Plan should be approved. There is no prescribed timeframe in which the Minister must make their decision.<br><br>When taken together, this equates to a potential timeframe of approximately fourteen (14) months before a Plan that cannot be agreed is referred to the Minister for determination. This timeframe has potential to result in significant delay. | Revise the proposed timeframes in the Consultation Guidelines to ensure that, when read together with the proposed Prescribed Timeframes under the Act, the Consultation Guidelines timeframes do not result in excessive delays to project/activity timeframes. |
| 3.11 | Related agreements | Consultation carried out in accordance with a related agreement may be used to satisfy the consultation requirements under section 139 of the Act (see section 140 of the Act). Some related agreements may have timeframes and/or processes agreed between proponents and Aboriginal parties that differ to the timeframes included in the Consultation Guidelines. In such cases, it should be clear that the timeframes and/or processes in the related agreement prevail. | Include a clear statement in the Consultation Guideline to confirm that timeframes and/or processes in related agreements prevail to the extent of any inconsistency with the timeframes |

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| | | | and/or processes set out in the Consultation Guidelines. |
| **4** | **Knowledge Holder Guidelines** | | |
| | **Issue** | **Discussion** | **Proposed response** |
| 4.1 | General Comments | The purpose of the Knowledge Holder Guidelines is clearly stated in section 294 of the Act to be for "*the identification of persons who are knowledge holders for an area*".<br><br>The following statement in the Knowledge Holder Guidelines is fundamentally inconsistent with this purpose:<br><br>*"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."*<br><br>The Draft Guidelines will not meet the requirements of the Act in the absence of guidelines regarding identification of knowledge holders (ie, determining who is or isn't a knowledge holder).<br><br>Defining who speaks for country is a difficult question to answer, but crucial for the entire legislation to work.<br><br>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 LACH, with Government. Knowledge Holders for each area of the State should be recorded on the ACH Directory.<br><br>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. |
| 4.2 | ACH knowledge system | Section 3.2 of the Knowledge Holder Guidelines refers to publication of notices on the Department's ACH knowledge system. This is a new concept/system that has not previously been referenced in the consultation process and it is unclear who will have access to this system or what information will be included on the system. | Amend reference to be to Directory. |

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| | | AMEC considers it preferable that all information/notices relevant to the Act be via the Directory, which AMEC understands is intended to act as a single repository of publicly-available State Aboriginal cultural heritage information. | |
| 4.3 | "Unknown" knowledge holders | Section 4.2 of the Knowledge Holder Guidelines states *"if a search of the Directory and contact with the relevant native title group(s) is unsuccessful at identifying any or all of the relevant knowledge holders…".*<br><br>It is unclear how a proponent will be able to confirm whether knowledge holders identified by searches of the Directory and native title groups include "all relevant knowledge holders". This presents a number of issues, including:<br><br>(a) if a statement is made by a LACHS or native title group claiming that all relevant knowledge holders have been identified, can the proponent rely on this;<br>(b) when will a proponent be required to undertake further investigations regarding potential additional knowledge holders;<br>(c) will a proponent need to consider and consult with local Aboriginal groups and/or the Department to confirm identification of all relevant knowledge holders in all circumstances;<br>(d) when can a proponent comfortably conclude that all relevant knowledge holders have been identified for the purposes of the Act; and<br>(e) what additional steps can/will be undertaken by the Department to confirm that all relevant knowledge holders have been identified when contacted by a proponent? | Further guidance is required for proponents to be able to ensure that all relevant knowledge holders have been identified for the purposes of the Act. |
| 4.4 | Local Aboriginal groups | The concept of "local Aboriginal groups" is highly ambiguous and raises similar issues to those identified at paragraph 4.3 above. In essence, at what point can a proponent comfortably conclude that it has completed sufficient consultation and identified all relevant knowledge holders for the purposes of the Act? | As above, further clarity and guidance is required from Government regarding identification of "all relevant knowledge holders". |
| **5** | **ACH Management Plan Template and Guiding Notes** | | |
| | **Issue** | **Discussion** | **Proposed response** |
| 5.1 | ACHknowledge portal | The Template and Guiding Notes refers to the "ACHknowledge portal" (**Portal**), which is currently being designed and built. It appears that the Portal will form an integral part of the implementation of the new legislation. However, there is very little known about this system. | Further information and transparency is required around the development and intended operation of the Portal, including an opportunity to consult on key aspects of the Portal, given its |

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| | | | fundamental importance to the implementation of the Act. |
| 5.2 | Positive Consent | Section 3.4 states that the letter of informed consent provided by Aboriginal parties must acknowledge *"that harm to ACH proposed under the Plan has been authorised by the Aboriginal party"*.<br><br>This is inconsistent with the requirements of s 146 of the Act, which require consent to the Plan, not consent to "harm".<br><br>AMEC submits that there is a key distinction for Aboriginal parties between providing positive consent to harm ACH and authorising or consenting to a (broader) Plan which includes additional considerations, such as mitigation and/or compensation measures.<br><br>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 Plan, including the information required by s 146(2) of the Act concerning potential harm and mitigation methods.<br><br>The consent to the Plan 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. | Statements regarding authorisations and consents from Aboriginal parties to be reframed to address the identified issues. |
| **6** | **Prescribed 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. | Ensure appropriate resourcing to ensure that the prescribed timeframes can be achieved by all stakeholders. |
| 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.<br><br>With that context in mind, specified timeframes are welcomed by Industry. However, 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. | Ensure appropriate Government resourcing and training to ensure that prescribed timeframes can be achieved and there is sufficient capacity to address anticipated application volumes. |

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| **7** | **Local ACH Service (Fees) Guidelines** | | |
| | **Issue** | **Discussion** | **Proposed response** |
| 8.1 | LACHS must be properly funded by Government 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 recognises that the funding provided to PBCs is inadequate for the regulated expectations, this payment does set a precedent that the State Government should consider.<br><br>If the State Government wants the LACHS to succeed AMEC considers that State Government should fund the establishment and continued operation of their administrative activities. | Ensure LACHS are properly funded to carry out their functions under the Act. |
| 8.2 | Extraordinary circumstances | AMEC notes the introduction of the concept of higher fees than those set out in the Guidelines for "extraordinary circumstances" and the call for feedback regarding what may constitute extraordinary circumstances and an appropriate fee structure for such circumstances.<br><br>AMEC opposes the introduction of this concept in its entirety, on the basis that the current structure and content already provides sufficient scope and flexibility to account for such circumstances. In any event, section 50 of the Act allows for the ACH Council to approve variations to fee structures on application by a LACHS where the ACH Council considers that the variation is reasonable and complies with the Guidelines. | The concept of higher fees for extraordinary circumstances should be removed from the Guidelines. |
| 8.3 | Wide scope for unreasonable fees to be charged | In the absence of reasonable limitations such as the number of personnel that may be engaged by a LACHS, the circumstances in which they may be engaged, and the maximum reasonable number of hours for the engagement, there is still significant scope for the fees charged by LACHS to be unreasonable and disproportionate to the nature of the specific engagement.<br><br>Where proponents are liable for payment of fees to LACHS, there should be clear measures implemented to ensure the protection of proponent interests. Such measures could include, for example:<br><br>(a) a requirement for LACHS to provide costs estimates to be agreed with proponents in advance of activities;<br>(b) clear guidance regarding the need for costs charged and the level of service provided to be proportionate to the requested or required service; | Further development of the Guidelines is required to address the issues identified. |

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| | | (c) limitations on the engagement of experts to circumstances where reasonably required (to be assessed on an objective basis);<br>(d) a limitation on the number of personnel that may be engaged for specified standard services and the number of hours/days that they may be engaged for;<br>(e) independent and objective criteria for determination of seniority or expertise when higher fees may be charged for senior and/or expert roles;<br>(f) review and audit processes for ensuring that the objectives of the Guidelines are achieved;<br>(g) inclusion of clear statements in the Guidelines that fees should be limited to those necessary to cover reasonable costs of service provision and are not intended to generate profit and/or fund activities of LACHS beyond the requirements of the Act or otherwise not directly connected to the service for which the fees are charged; and<br>(h) establishment of an independent body for determination of costs disputes and/or complaints. | |
| **9** | **Protected Area Order Guidelines** | | |
| | **Issue** | **Discussion** | **Proposed response** |
| 9.1 | General comments | The purpose of these Guidelines is stated to be to set out the factors that will need to be considered when determining whether ACH is of outstanding significance for the purposes of the Act. However, the scope of the Guidelines is then limited to the information to be provided by knowledge holders when making an application for a protected area order.<br><br>There are a number of matters that must be included in an application for a protected area order set out in section 72 of the Act. The matters that must be considered by the ACH Council in its preliminary assessment of an application are set out in section 76 of the Act.<br><br>The Guidelines in their current form are significantly underdeveloped and do not address the requirements of the Act. | Further development and consultation is needed on the Protected Area Order Guidelines before they are finalised to ensure that the Guidelines are fit-for-purpose and address the requirements of the Act. |
| **10** | **State Significance Guidelines** | | |
| | **Issue** | **Discussion** | **Proposed response** |
| 10.1 | General comments | No comments. | |
| **11** | **Determining 'Substantially Commenced'** | | |
| | **Issue** | **Discussion** | **Proposed response** |
| 11.1 | General comments | No comments. | |