Submission
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# Aboriginal Cultural Heritage Bill 2020

# Submission to Department of Planning, Lands and Heritage

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# About CME

The Chamber of Minerals and Energy of Western Australia (CME) is the peak resources sector representative body in Western Australia (WA). CME is funded by member companies responsible for more than 86 per cent of the State's mineral and energy workforce employment.[1]

In 2019-20, the WA's mineral and petroleum industry reported a record value of $172 billion.[2] The value of royalties received from the sector totalled $9.3 billion in 2019-20,[3] accounting for 28.8 per cent of general government revenue.[4] In addition to contributing 40 per cent of the State's total industry Gross Value Added,[5] the sector is a significant contributor to growth of the local, State and Australian economies.

# Introduction and history of reform

CME welcomes the opportunity to comment on the draft *Aboriginal Cultural Heritage Bill 2020* (the draft Bill), as released by the Department of Planning, Lands and Heritage (DPLH, the Department) on 2 September 2020.

This draft Bill has been a long time in the making. The *Aboriginal Heritage Act 1972* (WA) (the current Act) has been in operation for 48 years, with multiple previous reform attempts ultimately unsuccessful.

The current Act was the first of its kind in Australia; legislation focused solely on the recognition and management of Aboriginal heritage. Coming before other seminal pieces of legislation, including the *Racial Discrimination Act 1975* (Cwth) and the *Native Title Act 1993* (Cwth) (NT Act), the current Act created a formal requirement for the consideration of impacts to Aboriginal heritage in development. This was landmark legislation for its day, elevating Aboriginal cultural heritage to a standing within Government approvals and decision-making processes previously unheard of in Australia.

In the decades since, the landscape of land development and Aboriginal heritage recognition and management has evolved. In particular, the introduction of agreement making on land and heritage matters through processes under the NT Act has fundamentally changed the way Aboriginal heritage is both recognised and managed.

The current Act has not maintained pace and currency with these evolving expectations having had no significant amendment since its inception. CME supports the decision made in 2018 by the Minister for Aboriginal Affairs, Hon. Ben Wyatt MLA, to progress a comprehensive reform of Aboriginal heritage legislation in WA. Modernised Aboriginal heritage legislation has the potential to deliver improved outcomes for all stakeholders.

# Modern legislation for the long term

The resources industry in WA has participated fully in this reform process since it began. The sector has worked collaboratively with Government and other key stakeholders with a shared view to delivering improved legislation for WA which reflects expectations, and functions practically for both traditional custodians and industry land users. As part of this engagement, CME provided submissions to both Phase 1 and Phase 2 consultations.

It is critical that WA get this legislation right for the next generation of mining in our State. In engaging with the extensive consultation process run by Minister Wyatt, the resources industry has accepted significant and progressive movements on the principles of how Aboriginal heritage will be recognised and protected moving forward. This is a strong indication of the commitment from the industry to the success of this reform.

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[1] Full-time employees and contractors onsite in 2019-20, excludes non-operating sites. Government of Western Australia, *2019-20 Economic indicators resources data*, Safety Regulation System, Department of Mines, Industry Regulation and Safety, September 2020.

[2] Government of Western Australia, *Latest statistics release: Mineral and petroleum review 2019-20*, Department of Mines, Industry Regulation and Safety, September 2020.

[3] Government of Western Australia, *2019-20 Economic indicators resources data*, Safety Regulation System, Department of Mines, Industry Regulation and Safety, September 2020.

[4] Government of Western Australia, 2019-20 *Annual report on State finances*, Department of Treasury, 25 September 2020.

[5] Duncan, A. and Kiely, D., *BCEC Briefing note: WA Economic update*, Bankwest Curtin Economics Centre, November 2019, p. 4.

### Agreements between traditional custodians and land users are the way forward

The WA resources sector understands the fundamental importance of developing and maintaining respectful relationships with Aboriginal stakeholders to deliver mutually beneficial outcomes from development. The sector pioneered the negotiation of land access agreements to deliver customised approaches to the management of land, cultural heritage and a range of other commitments.

Traditional owners and custodians know their country better than anyone. Formalising agreement making on heritage within legislation empowers local traditional owners, custodians and knowledge holders to make decisions about impact to, and management of, their cultural heritage. CME supports embedding agreement making on heritage into new Aboriginal cultural heritage legislation.

## Functional legislation needed to deliver good outcomes

In making this submission, CME does not seek to alter the high-level principles arising from the Phase 2 consultation which have ultimately shaped the draft Bill. The focus of this submission is on contributing to the delivery of balanced legislation which modernises the Aboriginal cultural heritage legislative regime and provides a workable pathway for consideration of development proposals.

CME's comments on the Bill have been categorised into key themes. Each theme is focused on the interaction of industry stakeholders with Aboriginal cultural heritage, and by extension the practical application of the proposed legislation.

The main concepts outlined in the draft Bill are consistent with the consultation process undertaken to date. However, CME has concerns with the drafting in several sections of the draft Bill. Collectively, these issues have the potential to create real uncertainty for all parties, material delays and difficulty navigating processes.

CME considers that some amendments are required to provide certainty for all stakeholders. Without amendment, processes involved risk resulting in a new system which is difficult to administer and may become easily overloaded. Amendments proposed by CME focus on practical improvements to sections of the Bill which will enable a more functional system with adequate capacity and process whilst supporting the agreed principles resulting from earlier phases of consultation.

It is CME's position that if the priority practical issues within the Bill, as outlined in this submission, are addressed and appropriate resources committed to its implementation, the resources industry would have confidence in the success of this reform.

### Informed consultation

Informed consultation is critical to the success of major legislative reform. Without adequate information, it is difficult for a full assessment of the practical implications of new legislation to be understood. Fundamental elements of the draft Bill, which inform core functions, are deferred to subsidiary regulations and guidance documents, which have not been released for consultation alongside the draft Bill.

Most critically, industry needs to understand the following;

- Timeframes for approval and authorisation pathways – both individual elements of the approval process, and the collective process timeframe are required to understand the potential length of approval processes under new legislation.
- Impact categories –where common activities undertaken by the resources industry, most relevantly for exploration, will fall in the proposed tiered approval system.
- Due diligence process – this informs all interactions of proponents with the draft Bill, along with the key defence available under the draft Bill.

Further information on these key concepts is required as a priority to enable proper assessment of the practical implementation of processes within the draft Bill.

CME strongly recommend the State provide drafts of key guidance documents as a priority.

### Certainty needed for project approvals

The draft Bill sets out an approvals process which appears more uncertain and complicated than the current Act. Even in the absence of draft timeframes, the proposed process creates the potential for protracted approvals processes, which in turn have the potential to contribute to subsequent delays for projects across WA.

CME supports the proposal to undertake adequate due diligence and consultation, and to negotiate agreed outcomes with traditional owners and custodians for the management of cultural heritage wherever possible. This is core to agreement making. However, the introduction of public notification processes for low-impact activities and open-ended 'stop the clock' mechanisms, coupled with the ability to suspend, cancel or issue a stop-order in relation to a validly held approval, gives cause for significant concern. Industry experience with open-ended 'stop the clock' mechanisms in other legislative regimes highlights the fraught nature of such mechanisms and the resultant detrimental impact these can have on projects.

Approvals underpin development and operational certainty. The collective approvals burden for projects and ongoing operations is considerable, yet critical to giving the regulatory assurance necessary for investment surety and safeguarding against risk. Introduction of ongoing uncertainty regarding validly held heritage approvals has the potential to undermine this.

As outlined in the 2020-21 State Budget, WA had resource projects in the pipeline valued at an estimated $129 billion[6] . The scale of this ongoing investment illustrates the need for certainty in approvals for both planned and existing operations to be able to be relied on over the long-term. New legislation must deliver a balanced approach, while remaining cognisant of the impacts any uncertainty around approvals can create.

### Expansion of cultural heritage

The expansion of the definition of Aboriginal cultural heritage was expected by industry. Coupled with the absence of a 'significance assessment', this will result in a large increase in what is protected as 'Aboriginal cultural heritage' under the draft Bill.

Inclusion of aesthetic perspectives within the definition, uncoupled from any other element of heritage, has the potential to be problematic to manage in a practical sense. There is no requirement to link this to broader cultural, spiritual, historical, social or scientific value, and therefore has the potential to be highly subjective in its application.

As a hypothetical example, it could be said that a mining operation and its associated infrastructure could be considered to cause 'harm' to aesthetic elements of heritage by way of existing nearby, without a requirement for physical impact or damage to the cultural or spiritual value of the relevant heritage site.

CME views the inclusion of 'aesthetic' as a standalone element within the definition has the potential to expand the application of the draft Bill beyond its intended purpose and recommends it should be removed from the definition. Any Aboriginal cultural heritage which has assigned cultural, spiritual, social, historical or scientific value will be recognised. Supporting guidance regarding evidentiary standards for Aboriginal cultural heritage will also assist in providing further clarity for all stakeholders under a new system.

By extension, the interaction of a new definition of Aboriginal cultural heritage with that covered under "social surroundings" under the *Environmental Protection Act 1986* (WA) must be considered, with a view to providing regulatory guidance to address this interaction and minimise unnecessary duplication of approvals.

### Offence regime

The collective drafting regarding offences means that there is no clear way to avoid triggering an offence. CME considers multiple amendments are required to deliver an offence regime which functions as intended.

The creation of a new offence in the draft Bill, without a requirement for physical impact, a threshold of materiality, or a scope of what is considered to be 'harm', creates very significant risk from the outset that industry may inadvertently fall foul of the offence regime. This is coupled with a material increase in the penalties for offences under the draft Bill. It is therefore critical that functional defences are available.

CME acknowledges that appropriate penalties should be applied to offences where intent is proven and has supported this throughout consultation. However, CME considers the application of a custodial sentence to a strict liability offence to be both clearly out of step with community expectations regarding the use of strict liability offences, and a departure from the application of such offences in other legislation. CME recommend the strict liability offence be deleted or revised to remove custodial sentences.

Functional defences are critical to a balanced offence regime. As it currently stands, the drafting of the due diligence defence does not deliver a clear defence. Without this operating clearly, a party may be left without a reasonable defence despite adhering fully to processes set out in legislation. CME recommend the due

[6] Government of Western Australia, Industry Activity Indicators, Department of Mines, Industry Regulation and Safety, 2020; https://www.dmp.wa.gov.au/About-Us-Careers/Latest-Resources-Investment-4083.aspx

diligence defence be re-drafted to allow it to be relied upon to provide a functional defence in appropriate circumstances.

### Transition and function of bodies established

The proposed regime relies heavily on the establishment and operation of bodies created in the draft Bill. CME hold concerns that the Aboriginal Cultural Heritage Council (ACH Council), Local Aboriginal Cultural Heritage Services (LACHS), and by extension the Department, may not be adequately resourced to deliver on the range of responsibilities assigned to them.

As currently drafted, the draft Bill does not include a positive obligation on the LACHS to perform the range of functions assigned. As a starting point, CME recommends a positive obligation be imposed on LACHS to discharge their functions, including participation in negotiations and providing information about Aboriginal cultural heritage. In addition, clear governance and accountability standards must be developed, and monitored by the ACH Council, to support LACHS to deliver on their functions. CME recommends that the ongoing resourcing needs of LACHSs remain a key consideration for government as a necessary element of a successful modern regime.

It is clear that approval pathways in the Bill will become more uncertain and likely to be extended in areas where a LACHS is not established. CME acknowledges the establishment of a LACHS may take time in some areas. Further transition provisions, including an extension of the transition period and appropriate resourcing, are required to give proponents a clear way to progress approvals when required. CME propose a two-phased transition period of 36 months would be more appropriate.

A multi-phase transition would allow industry and government operating in areas where a LACHS has been established in the prescribed 12-month transition period to commence any required approvals through the new Act, while preserving the ability to continue to progress approvals through the existing process. A well executed program of transition will be critical to the early success of new legislation. However, it is critical that proponents in all areas have a straightforward and clearly defined process to progress an approval if necessary.

Adequate resourcing of LACHS to perform the functions defined in the draft Bill will be critical to the success of the proposed regime. Resourcing considerations must also be extended to the ACH Council and the Department to ensure adequate capacity to support the LACHS, including through provision of clear governance and operational standards.

### Interactions with environmental and legislation

It is common for environmental values and heritage values to geographically co-exist. Additionally, the *Environmental Protection Act 1986 (EP Act)* includes 'social surroundings' (which incorporates heritage) as part of the environment drawing Aboriginal heritage protection into EP Act approvals. The existing complexity caused by overlaps and duplication between the two regimes are well known and it is hoped that refinement of the draft Bill combined with the amendments to the EP Act through the *Environmental Protection Amendment Bill 2020*, can reduce this complexity under both Acts. Of note, s44 2AA of the *Environmental Protection Amendment Bill 2020* specifically empowers the EPA to consider authorisations from other legislative regimes and hence not regulate the same matter twice. A similar contemplation through the draft Bill would be beneficial.

The EP Act also includes a prohibition on other agencies from progressing approvals or authorisations related to certain projects whilst these projects are under assessment. The interaction of these two regimes must be clarified so that opportunities to enable parallel processing can be implemented.

Additionally, interactions between new Aboriginal cultural heritage legislation and relevant legislation, including the *Mining Act 1978* (WA) must be considered fully, with appropriate regulation developed to limit impacts on existing rights under legislation. This consideration extends to ensuring that all valid tenure types, including State Agreement Act tenure, are captured where relevant in new legislation.

## Summary of high-level recommendations

The below recommendations reflect issues of priority concern. A complete account of proposed amendments to address a range of issues within the draft Bill is contained in the Appendix.

- CME supports embedding agreement making on heritage into new Aboriginal cultural heritage legislation
- CME strongly recommend the State provide drafts of key guidance documents as a priority.

- CME views the inclusion of 'aesthetic' as a standalone element within the definition has the potential to expand the application of the draft Bill beyond its intended purpose and recommends it should be removed from the definition.
- CME considers multiple amendments are required to deliver an offence regime which functions as intended.
- CME recommend the strict liability offence be deleted or revised to remove custodial sentences.
- CME recommend the due diligence defence be re-drafted to allow it to be relied upon to provide a functional defence in appropriate circumstances.
- CME recommends a positive obligation be imposed on LACHS to discharge their functions, including participation in negotiations and providing information about Aboriginal cultural heritage.
- CME recommends that the ongoing resourcing needs of LACHSs remain a key consideration for government as a necessary element of a reliable modern regime.
- Further transitional provisions, including an extension of the transitional period and appropriate resourcing, are required to give proponents a clear way to progress approvals when required. CME propose a two-phased transitional period of 36 months would be more appropriate.

## Conclusion and further consultation

CME welcomes the opportunity to provide comment and proposed amendments as part of the final stage of consultation on the *Aboriginal Cultural Heritage Bill 2020*. Our recommendations for amendments aim to deliver legislation that improves outcomes for all key stakeholders in the recognition and management of Aboriginal cultural heritage in WA through practical amendments.

Further consultation is required to fully deliver on this potential, including consultation on critical elements of the draft Bill which have been deferred to subsidiary documents. CME looks forward to fully and formally consulting on all subsidiary documents once drafted.

If you have any queries regarding this submission, please contact Ms Roannah Wade, Policy Adviser, Land Access and Exploration on 0436 472 667 or r.wade@cmewa.com.

| Authorised by | Position | Date | Signed |
|---|---|---|---|
| Paul Everingham | Chief Executive Officer | 09/10/2020 |  |
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# Appendices

## Appendix I: CME proposed amendments to *Aboriginal Cultural Heritage Bill 2020* to address practical issues

Amendments are sought to resolve material issues with the draft Bill as it currently stands. CME has not sought to include every matter that could be improved, but instead focused on the material issues identified, and included proposed solutions through drafting amendments. Issues are listed in general priority order.

| # | Section | Issue | Discussion | Proposal to resolve issue |
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| 1. | General/ Regulations | ***Crucial details and documents are still to be drafted & provided***<br><br>Fundamental aspects of the draft Bill, which are critical to the overall workability of the regime - are deferred to yet to be released regulations and guidelines.<br><br>These inform core functions of the Bill, which are required to assess its overall workability.<br><br>Provision of priority documents would enable industry to make more informed comment on the draft Bill and its practical implementation. | The matters in the Bill which are deferred to subsidiary documents are fundamental.<br><br>Critical elements to be specified in yet to be released documentation include:<br><br>• The definition of Low Impact Activities and Medium to High Impact Activities.<br><br>• Timelines for approval pathways including; consultation, notification, ACH Council consideration, appeals.<br><br>• ACH Management Code; which is to include critical elements regarding consultation, requirements for CHMP content and due diligence and survey guidance.<br><br>• Various ACH Council guidelines.<br><br>These are critical to the workability of the Bill, and to understanding the proposed approval pathway.<br><br>The definitions of low/medium to high impact categories are core to how proponents will engage with the Act. Without an understanding of how common activities (particularly exploration) are intended to be categorised, it is difficult to see whether proponents will be able to utilise the 'Low impact' ACH permit pathway for low impact, early exploration. Impact categories will also contribute significantly to whether proponents are able to effectively use 'site avoidance' as a valid approach to managing heritage impacts.<br><br>The Department has previously released versions of the impact categories, modelled off the South West Settlement and Yamatji Nation RSHA provisions, although it is unclear whether those definitions will be adopted in the regulations or guidance.<br><br>Proposed timelines have been quoted by the Department in early consultation, without any formal documents being provided.<br><br>. | a) Drafts of these documents are requested to facilitate informed consultation.<br><br>b) As a starting point, the State should provide proposed drafting of the following concepts before the Bill is introduced into parliament:<br><br>i) the impact activity categories;<br><br>ii) all timelines that are to be prescribed and relate to the approval pathway.<br><br>c) Amendment to s104 required to empower CEO to provide a confirmation that an activity is a 'minimal impact activity' or 'low impact activity' instead of just providing advice. |

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| 2. | Various (ss 118(3), 120, 137, 149, 176) | *Approvals process and certainty*<br><br>The timeframe for obtaining an approval is not defined and the approval process appears more complex than the current Act.<br><br>Validly obtained ACH permits and ACH management plans will all be defeasible, including because of 'new information' coming to light.<br><br>This creates significant uncertainty, and a potential for the process for negotiating and implementing agreements between knowledge holders and proponents to be undermined if applied prematurely or without due consideration of negotiated approaches.<br><br>The low threshold for harm and broadened definition of heritage in the draft Bill further compound the risk and uncertainty this creates for proponents. | The process to get an approval under the draft Bill is complex, with many points exposed to potential delay. Without any guidance on timeframes it is difficult to accurately estimate the time required to obtain an approval.<br><br>Currently, section 18 consents (once granted) are indefeasible for the purposes of the Act. It is accepted that in certain circumstances the terms of an approval or authorisation may be required to be reviewed, however this must be balanced, and limited to situations where inadequate processes are in place through an agreement.<br><br>In the draft Bill, ACH permits and ACH management plans will be defeasible. (As will section 18 consents, although CME understand this to be limited to those granted *during* the 12 month transitional period and not those from the current regime that are being grandfathered – clarification on this is required through drafting amendments).<br><br>Further, the ACH Council or the Minister may cancel or suspend the relevant approval (including because new information comes to light about the Aboriginal heritage in question), and the Minister can issue stop activity orders (which may ultimately result in prohibition orders) when new information comes to light.<br><br>Depending on the circumstances, this has the potential to be inconsistent with two fundamental objects of the Bill:<br><br>• to recognise that Aboriginal people have custodianship over Aboriginal cultural heritage and empower them to make decisions about the management of their cultural heritage; and<br><br>• to manage activities so as to achieve clarity, confidence and certainty in providing balanced and beneficial outcomes.<br><br>Industry is therefore concerned that a level of uncertainty exists as to the extent to which an approval or authorisation may be able to be relied upon under the draft Bill.<br><br>This is especially the case for approved ACH management plans which, by prescription in the draft Bill, must contain an *agreed* process between LACHS and the proponent for how to address new information should any come to light. If new information arises and the LACHS and proponent have *already agreed* the implications of that new information, the ACH Council or Minister's ability to override | *Scope of authority*<br><br>a) Only the Minister should have the power to suspend or cancel an approved/authorised CHMP. The ACH Council should not have the power to cancel or suspend CHMPs.<br><br>*Threshold for taking steps to issue stop orders, or to cancel or suspend*<br><br>b) The Minister's ability to issue a stop order, cancel or suspend CHMPs should be limited to situations in which the agreed process for what happens when new information comes to light, set out in the ACH management plan, either (i) is demonstrated not to have been followed, or (ii) did not contemplate what would happen when the 'new information' in question came to light, or (iii) has run its course and further agreement between parties is not able to be reached regarding approach.<br><br>c) Minister should be required to consider the interests of the State in deciding whether to issue a stop order or cancel/suspend an ACH permit and ACH management plan.<br><br>d) Amend s147(1) to clarify that the criteria in s147(2) are the criteria for the Minister to consider in making his/her decision. This then ensures the criteria for cancellation or suspension in s149(2) is clearly linked to s147(2).<br><br>e) The suspension/cancellation and stop order provisions should provide a threshold for materiality of 'new information', or at the least a minimum evidentiary requirement and demonstration of clear potential impact on the heritage value. |

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| | | | Aboriginal decision-making may be inconsistent with the wishes of the knowledge holders themselves.<br><br>CME maintains that the making of solid agreements which contemplate an *agreed* way to manage such situations is preferred and should be encouraged.<br><br>Suspension of ACH Management Plans for a significant operation would affect the ability of a proponent to continue production. This may have very significant flow-on impacts. Accordingly, this provision should be amended to give confidence that this would only occur in very specific circumstances, where agreed processes have been exhausted, and such a significant step is warranted.<br><br>The broadened definition of heritage to include both contemporary and aesthetic values (which by nature can change), and the requirement to consider all heritage which has any importance to knowledge holders compounds the material risk that these provisions pose. Consent requirements are also open to differing interpretations over time, and must be clearly defined for proponents to adequately demonstrate and defend if required.<br><br>The low threshold for harm prescribed in the draft Bill further compounds the uncertainty for industry, and highlights the range of circumstances in which an ACHMP will be required. | f) Clarification is needed regarding the process of providing new information, i.e. to whom, what is required to prove, how was it found etc.<br><br><u>*Grandfathered approvals and providing certainty for transitional approvals*</u><br><br>g) Clarity required regarding application of cancel/suspend provisions or stop orders to existing s18 consents.<br><br>h) Amend s285(3) to restrict ability to make a decision that a s18 is no longer in force, specific and reasonable reasons should be prescribed for this power to be exercised.<br><br>i) Transitional provisions need to be extended to ensure that all existing lawful activities can continue validly (eg activities undertaken lawfully without approval required (based on due diligence assessment))<br><br>j) 5 year terms for *transitional* section 18 consents deliver no certainty for projects that require approval for a longer term. Include process by which the Minister can extend the 5 year term limitation for such projects.<br><br><u>*Administrative amendments to improve certainty and to ensure regime can operate efficiently*</u><br><br>k) Amend s146(2) to require the ACHMP proposed by parties to be submitted for consideration by the Minister for authorisation alongside any developed by the ACH Council for transparency.<br><br>l) Amend section 35(3)(b) to ensure that adequate information is available to the Minister for decisions to be made. This is necessary (taking into account cultural sensitivities) for due diligence to be satisfied. |

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| | | | | m) Remove overly broad powers in sections 109, 133 and 142 where Council can refuse to consider applications. Applications will have criteria, against which compliance can be considered by AHC Council. |
| 3. | s10 (1)<br>s91 (and ss6, 8) | *Definition and principles*<br>Expansion to the definition of 'Aboriginal cultural heritage' to include social, spiritual, historical, scientific or aesthetic perspectives (including contemporary perspectives).<br>In pursuit of the Bill, particular regard has to be had to certain principles. In s91, those principles go far beyond heritage matters, to matters already regulated by the State under other regimes (for example, environmental values). | The Bill significantly expands the definition of Aboriginal cultural heritage, and in turn, what is protected for the purposes of the Bill.<br>The Bill has departed from the currently understood concept of Aboriginal heritage (heritage of value to Aboriginal people under their traditional law and culture) to the protection of any place that Aboriginal people feel is important to them and should be protected, as part of their *traditional and living cultural heritage*.<br>Alongside the expansion of what is considered to be Aboriginal cultural heritage, there is no significance test for heritage. We recognise that this may be intended to avoid the ACH Council or Minister having a role in assessing all sites for significance. However, without a materiality or evidentiary threshold, there is concern the breadth of application will contribute to a heavy burden on the approval and authorisation processes, and in turn the appeal mechanisms.<br>The inclusion of "aesthetic" perspectives is problematic due to the broad nature of potential application, uncoupled from any social, cultural, spiritual or historical elements. An example could be given of a mining operation which may be considered to be causing 'harm' to the aesthetic elements of nearby Aboriginal cultural heritage, by way of existing in the area.<br>It is also critical to ensure that the draft Bill consider the common co-existence of heritage and environmental values and that existing regulation of land uses and protections within environmental legislation exists in some instances, and hence avoid duplication where possible. Clear guidance from the EPA, DWER and DPLH will be required to avoid uncertainty regarding the scope of assessments under individual legislation and unnecessary duplication.<br>It should be noted that the *Environmental Protection Amendment Bill 2020* specifically contemplates recognition of other legislation to | a) Expressly link the definition of ACH to "Aboriginal tradition" (which is already separately defined).<br>b) Remove reference to "aesthetic" perspectives in s10(1).<br>c) Remove reference to "environmental" and "aesthetic" values in s91(b).<br>d) Clarify that s91(d) does not restrict the operation of the ACH permit or ACH management plan approval regimes.<br>e) Clarify whether s10(1)(a) and (b) are meant to apply to intangible places or only to tangible places.<br>Proposed wording for s10(1)(a): *(a) an area that is composed of or contains: (i) tangible elements of that cultural heritage; or (ii) tangible and intangible elements of that cultural heritage (an Aboriginal place)*<br>f) Stipulate minimum evidentiary requirements for ACH or set requirement that the ACH Council will have to set them, coupled with a requirement for industry consultation.<br>g) Remove references to "individual" values in s91(a).<br>h) Enable recognition of other legislative instruments and protections to minimise |

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| | | | reduce duplication (refer to s44 2AA). A similar approach should be taken in the draft Bill. | duplication and administrative burden for all stakeholders. |
| 4. | General<br><br>Part 4, Division 2 | *Operation of bodies established*<br><br>Concerns regarding the capacity of the State/ACH Council/LACHS to deliver a robust and reliable regime.<br><br>Resourcing of bodies established key to successful function. | The new regime is complex, and sees the ACH Council, DPLH and the Minister responsible for a large number of functions.<br><br>There is serious concern that the process of inviting applications (and considering applications) for the appointment of LACHS will be protracted and possibly the subject of dispute between knowledge holders and native title parties. There are also areas of the State in which it is very unlikely that a LACHS would be established.<br><br>The draft Bill does not currently create an obligation for the LACHS to perform their functions, as defined in s32. Without this, there is serious concern the administration of the Bill may be exposed to significant delay and potential dysfunction. Further, conduct obligations set out in the draft Bill should be mutual, and require both (or all) parties to comply.<br><br>The current use of the terminology "best endeavours" regarding conduct obligations gives rise to concerns this may result in unintended consequences, given the breadth of existing common law on that term, much of which is derived from purely commercial concepts that do not apply comfortably to the regime in the Bill. By way of example, the term 'best endeavours' can in some circumstances impose an obligation on a party to sacrifice their own commercial interests, by way of compromise.<br><br>CME is concerned that both Aboriginal parties and proponents, in various circumstances, will not be in a position to compromise on elements of their respective positions. For example, there may be certain heritage places where Aboriginal parties are simply, for cultural reasons, unable to agree to any CHMP that will facilitate activities that will impact on heritage. There are various other concerns with the language of 'best endeavours' (noting the term is usually used in the context of implementing an agreed obligation, as opposed to the process of engagement with the aim of reaching agreement).<br><br>An alternative may be to incorporate a 'good faith' threshold, however this may give rise to similar concerns. Either way, the State will need to carefully consider the drafting of any relevant threshold or | a) The Bill must include obligation for the LACHS to perform the functions set out in s32.<br><br>To achieve this, amend section 37(3) to read: *(3) a Notice under subsection (2) may be given only if the Minister or the ACH Council: (a) is no longer satisfied that the person meets the requirements to be appointed as a local ACH service as set out in section 34(2); or (b) is satisfied that the person is not properly discharging one or more of the functions set out in section 32.*<br><br>b) Conduct obligations should be mutual – imposed on the proponent and the LACHS, native title party or knowledge holders.<br><br>c) Conduct obligations on either party should not be a pre-condition on the application for authorisation if agreement cannot be reached.<br><br>d) Consider two-phased transition to allow proponents who are ready and willing to follow the new approvals process after 12 months, to do so, while preserving ability for proponents to action a transitional approval if necessary, during this time. Amended transitional timeframe of 36 months proposed.<br><br>*e)* Clarify s34(2)(e) – to ensure requirement of impartiality applies to impartial as between |

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| | | | obligation and whether guidelines or regulation will be required to clarify the proper operation of that threshold, for the purposes it is used in the new Bill.<br><br>The approval pathways set out in the new Bill will be much less certain if there is no LACHS appointed (or if a LACHS becomes dysfunctional or obstructionist).<br><br>Adequate resourcing for LACHS to be established and perform their functions on an ongoing basis will be key to the success of the proposed regime. Ability for the ACH Council to monitor the performance of the LACHS against their functions and governance standards will allow non-compliance to be picked up early. It is important the ACH Council perform this role, without requiring cancellation or suspension of the LACHS in the first instance.<br><br>While PBCs will have preferential status to become the LACHS for an area, there are large areas of the State where native title determinations have recognised areas of extinguishment (or areas where no native title exists). Legally, there are no PBCs for those areas – which may lead to confusion and dispute regarding a LACHS.<br><br>For consistency, the draft Bill should provide that PBCs can be appointed as a LACHS for areas of extinguishment (as per pending amendments to the NT Act). Similarly, the Bill needs to provide ability for a PBC to be the LACHS for areas in proximity to the claim area where native title has been found not to exist. | knowledge holders (noting there is already inherent partiality within PBCs and native title parties).<br><br>Proposed wording for s34(2)(e): *(e) is impartial as between the knowledge holders for the area for which the local ACH service is appointed.*<br><br>f) Amend s33 and s34 to allow PBC to operate as a LACHS in areas where there has been extinguishment or where NT has been found not to exist (in both cases where area was previously subject of claim that was determined).<br><br>g) AHC Council, and by extension the Minister, should be enabled to suspend or cancel the appointment of LACHS if the LACHS is not adequately performing any of the functions set out in s32. |
| 5. | s89 (b)(2) | *Due diligence defence*<br><br>The "due diligence" defence requires satisfaction of a second limb that appears inconsistent with the application of the due diligence defence itself | This seems to be a drafting error. The two limbs appear inconsistent in application rendering the defence unavailable.<br><br>It is critically important the due diligence defence operates properly. Without this functioning clearly, proponents are left without a reasonable defence in the face of an increased penalty regime.<br><br>Clarification is required as to what 'all reasonable steps' contemplates (particularly in circumstances where the due diligence has determined no heritage exists in the area, what reasonable steps must then be taken to avoid heritage?). This will need to be clarified and provided in the ACH Management Code.<br><br>Site avoidance is used by many where possible to avoid impact on heritage. Both a clearly defined due diligence process, and a | a) Remove the second limb of the due diligence defence.<br><br>b) Alternatively, re-draft the second limb to provide clarification as to what 'all reasonable steps' contemplates, and in particular what is expected of proponents in circumstances where the due diligence has confirmed there is no ACH in the area. |

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| | | | functional due diligence defence are required for proponents to have comfort in using this approach. | |
| 6. | Various (incl ss151, 152)<br><br>s263 | *State significance concept*<br><br>The Bill requires the ACH Council to assess every single site the subject of an ACH permit or ACH management plan application to determine if the site is of State significance (and the ACH Council can issue guidelines in respect of same) | Unlike the existing ACMC, the operation of the ACH Council was proposed to move away from assessing heritage significance. This is contradicted by a requirement for an assessment of State significance to be undertaken regarding all heritage that is the subject of a permit or management plan application before the Council.<br><br>There is no ability to object to the Minister for an ACH Council decision to determine that a place is of State significance.<br><br>CME submit that the Minister is the only appropriate decision maker regarding significance to the State. It is not appropriate for a heritage body to make these decisions. In addition, there are serious concerns that ACH Council business will be delayed, overwhelmed or become backlogged by mandatory State significance assessments on all heritage (an issue faced by the current ACMC in relation to their role in undertaking heritage assessments).<br><br>The Minister should be required to set clear guidance for the ACH Council regarding 'triggers' for an assessment of State significance.<br><br>The obligation to give a landowner notice (before a decision on State significance) does not require notice being sent to the landowner. This should be corrected. | a) Minister should be the only decision maker on heritage of State significance, and by extension should be required to consider the interests of the State in making a decision.<br><br>b) Minister to be required to set clear guidance for ACH Council on State significance assessments, with defined triggers for assessments to limit what is required to undergo an assessment for State significance.<br><br>c) An obligation to give a landholder notice (in addition to public notice) should be created.<br><br>d) Remove requirement for ACH Council to assess *all* heritage for State significance |
| 7. | s110(1), s134, s141 | *Stop the clock provisions*<br><br>'Stop the clocks' can occur when the ACH Council requires "further information". This concept is open-ended. | The ACH Council's ability to seek further information (and in doing so, 'stop the clock') should be limited to those matters required to be addressed in an application for an ACH permit or approval/ authorisation of a ACH management plan as set out in the Bill or regulations.<br><br>Clarity regarding the criteria for an application to the ACH Council is essential. Stop the clock provisions should not be able to be used for information not stipulated as being required.<br><br>Stop the clock provisions can be used to extend timeframes and unreasonably delay the progress of approvals. Any stop the clock provisions in the draft Bill must have a specified, limited timeframe, or include a 'circuit breaker' capacity for either party to refer to the | a) Application information standards (to be detailed in ACH Management Code) to be the only relevant information for which a 'stop the clock' can be triggered<br><br>b) Insert 'circuit breaker' ability for either party to refer application for decision by Minister or ACH Council after a defined period of time, to be specified in the Bill or Regulations. Suggest 21 days (calendar) as reasonable timeframe. |

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| | | | Minister or ACH Council for a decision once a specified period of time has passed. | c) As an alternative to (b) above, insert ability for Minister to make direction for ACH Council to make a recommendation or decision before the end of a prescribed period.<br><br>d) If a party declines to provide further information following a request of the ACH Council under section 132 or 141, the ACH Council/Minister should not automatically refuse to deal with the application for an approved or authorised CHMP. |
| 8. | s90 | *Impact categories - tenement pegging* | The *Mining Act 1978* requires the physical 'pegging' and 'marking out' of the boundaries of a mining lease or prospecting licence.<br><br>The draft Bill must remain consistent with core elements of the *Mining Act 1978.*<br><br>For the 'first in time' principle and the competitive nature of tenement applications to function, tenement pegging and marking out need to be included in the list of 'exempt activities' in s90. | a) Amend s90 to include pegging and marking out of tenements as per requirements under the *Mining Act 1978* |
| 9. | s63, s65, s74, s75, 76 | *Protected areas - declaration*<br><br>An application for an area to be declared as a "protected area" requires Aboriginal cultural heritage of "outstanding significance".<br><br>The current drafting of what may constitute "outstanding significance" means the threshold is set too low for the intent of this provision. | A (single) knowledge holder can apply for a site of "outstanding significance" to be declared a protected area. The threshold of outstanding significance as currently defined will capture a large range of areas. The cultural heritage need be (emphasis added):<br><br>• of outstanding significance to Aboriginal people including to ***an individual***, community or group; and<br><br>• recognised through social, spiritual, historical, ***scientific or aesthetic perspectives*** (including contemporary perspectives).<br><br>The definition of what is Aboriginal cultural heritage is already much broader (see s10). The definition of outstanding significance seems insufficient given the outcome would render areas of the State protected from future development. At a minimum, ACH of outstanding significance should be required to be more than | a) Link the definition of outstanding significance to 'Aboriginal tradition' to provide a more appropriate threshold.<br><br>b) Remove 'aesthetic' perspectives from s63<br><br>c) In areas where there is a LACHS, require the application for a protected area to be brought by the LACHS.<br><br>d) Require a decision regarding a protected area declaration to be passed by both houses of parliament, based on potential impact of declaration (mirroring the process to repeal in the draft Bill) |

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| | | | 'aesthetic', and have some cultural, social or historical value to elevate it to this status.<br><br>A low threshold for an application for a protected area to be made has the potential create additional administrative burden on the ACH Council to assess, and on landholders to respond. There is no provision to allow the Council to consider the materiality or the interests of the proponent(s), which means it's left to the Minister in every instance to make a balanced assessment.<br><br>It is inconsistent that the process to repeal a Protected Area is not mirrored in the process to declare.<br><br>Consideration should also be had to, for example, the comparative regime for the declaration of Class A Reserves in Western Australia, where a decision of both houses of parliament is required for a comparable impact on landowner and industry. | e) Alternatively, amend s76 to provide for a repeal of a protected area to be a decision of the Minister. |
| 10. | Part 6 | *Protected areas - compensation*<br><br>There is no statutory right of compensation from the State for landholders who are prejudicially affected by a declaration of a protected area (as opposed to the current Act, where compensation is payable see s22). | In the current Act, landholders who are prejudicially affected by a declaration of a protected area are entitled to compensation from the State. This right of compensation has been removed in the draft Bill.<br><br>When coupled with the low threshold for sites of "outstanding significance" (see above) that can be the subject of protected area order applications, there is risk that areas (including granted mining tenure) can result in protected area declarations preventing future development without any right of compensation. | a) Include compensation provision consistent with provisions in the current Act. |
| 11. | s65(2) | *Protected areas – consent requirements*<br><br>Consent of ACH permit and ACH management plan proponents required to make a protected area application. | This section should be expanded to include proponents who have operations or assets in the area already under existing lawful approval or permit, including under other legislation.<br><br>At a minimum, holders of existing land use authorisation under any legislation, in addition to landholders for the purpose of this Act, should be notified at the outset and have the right to make a submission for consideration regarding the proposed protected area. This mirrors the rights to be consulted under State and Commonwealth environmental protection mechanisms. | a) Include additional required consents from such proponents (by expanding the definition of landowner to cover additional valid permits and approvals).<br><br>b) Equivalent rights to notification and consultation must be conferred on existing lawful uses when other protections are considered eg under environmental protection legislation. |

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| 12. | s81 | *Application of new offence*<br><br>The creation of a new offence of carrying out an act that demonstrates disrespect for, or diminishes or otherwise affects the value of, Aboriginal cultural heritage to Aboriginal people. | This offence is much broader and could trigger uncertainty as to how it may be applied. It does not require a physical impact on the Aboriginal cultural heritage itself.<br><br>There is significant risk that industry could inadvertently fall foul of this offence regime. For example, where a proponent avoids physically impacting a site (and therefore requires no ACH permit or ACH management plan for an activity), but broader mining operations in the proximity are considered offensive (or diminish value, eg by restricting access), this may amount to a criminal offence attracting imprisonment penalties of up to 5 years.<br><br>It is also not clear what *value* is meant to be measured in s81(1)(b)(ii). For example, does this contemplate all values, or it is intended to apply only to the cultural value of the Aboriginal cultural heritage?<br><br>Clarification and guidance is required as to the scope of 'harm', in particular as it would apply to 'demonstrating disrespect'.<br><br>There is no comparable offence provision in other State regimes. | a) Include a physical component in the new offence.<br><br>b) Specific reference to 'cultural value' required to restrict to intent of s81(1)(b)(ii). This would also clarify the use of the words "otherwise affects" which would logically only relate to cultural value.<br><br>c) Clear guidance required on scope of 'harm' as defined in the offence. |
| 13. | s84 | *Strict liability offence - commonly accepted concepts misapplied*<br><br>The strict liability harm offence (including 4 year custodial sentence) is coupled with an exclusion of the accident provisions of *The Criminal Code.* | The penalties for offences under the Bill are considerable, including a 4 year prison sentence for the strict liability offence and the exclusion of the accident provisions of the *Criminal Code*.<br><br>The broadened definition of heritage creates considerable risk that an offence, as described in the Bill, may occur without intent.<br><br>The current penalties defined for the strict liability offence are very harsh for an offence requiring no intent, negligence or knowledge to be proven, and having no due diligence or accident defence available.<br><br>By way of comparison with key interstate regimes, the usual criminal defences are maintained in those regimes.<br><br>CME submits that inclusion of a 4 year custodial sentence for a strict liability offence does not align with community expectations, or the application of strict liability offences in other legislation, and should be removed. | a) Maintain financial penalties but remove custodial sentences for s84.<br><br>b) Remove the provision that excludes the accident provisions of the *Criminal Code*.<br><br>c) Remove section 84 from the table in section 246. |

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| 14. | **ss252, 253, 254 (and s241(3))** | ***Reversal of the burden of proof***<br><br>This provision reverses the burden of proof in criminal prosecutions, where the fundamental elements of an offence will be taken to be proved such as "that a specified act occurred" | The penalties for offences under the Bill have increased considerably, including a 4 year prison sentence for the strict liability offence, and other penalties increasing to $10,000,000 and 5 years imprisonment.<br><br>The concepts in section 91, together with the low threshold for sites of outstanding significance and other provisions that are issues set out in this table, collectively result in a fundamental shift from what is currently considered Aboriginal cultural heritage to a much broader threshold.<br><br>There does not appear to be any justification to reverse the burden of proof for matters critical to a criminal prosecution. The scope of the matters reversed in this Bill go beyond other similar legislation, and must be removed or revised. | a) Remove these provisions from Bill.<br><br>b) If not removed completely, remove any matters which are material to the prosecution of an offence (particularly items 3 and 5 of s252 which should require proof in the normal way given their fundamental role in the offence regime). |
| 15. | **s130, s131** | ***Informed consent***<br><br>When seeking ACH Council approval of an agreed ACH management plan, the proponent must give evidence of each Aboriginal party having given "informed consent" | This requirement includes providing evidence that "the consent is given voluntarily and without coercion, intimidation or manipulation" (s130(b)).<br><br>It is unclear how this obligation could be achieved with regards to documentation.<br><br>It is also unclear how a proponent would able to provide that confirmation about *internal* decision-making, noting proponents are almost never present or directly involved in traditional owner authorisation meetings and processes.<br><br>There are already authorisation concepts for CATSI Act corporations set out in the CATSI Act. This should be considered for the purposes of the draft Bill. | a) Remove s130(b) and rely on existing CATSI Act concepts that already mandate process for authorisation and decision making etc for PBCs.<br><br>b) If not removed, limit to ensure it applies to proponent's consultations only (so that it does not apply to intra-indigenous matters and deliberations – this can be prescribed by the AHC to the LACHS if required and monitored through governance requirements).<br><br>c) If not removed, guidance required regarding documentation requirements and acceptable forms of evidence to demonstrate informed consent based on proponent consultations.<br><br>d) In cases where LACHS is not a PBC, require AHC to consider this in development of LACHS governance, including decision making and consultation standards and compliance. |

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| 16. | **ss108, 115** | ***ACH permit applications require public notification*** | ACH Council is required to give public notice of an application for an ACH permit (including prescribed period for submissions).<br><br>Public notification for low impact activity permits should not be required. Notification to all relevant knowledge holders (which is the most important notification) is separately provided for through the first notification period.<br><br>If not removed, the requirement for public notification should be shifted so it occurs alongside the notification for all native title parties, PBC's and knowledge holders, avoiding the creation of an additional process with associated time implications. | a) Remove ss108 and 115.<br><br>b) If not removed, shift in process to occur at same time as notification requirement under s105. |
| 17. | **ss135** | ***Council discretion in approving ACH management plans*** | Section 135 provides that the ACH Council "may" approve an ACH management plan if certain requirements have been met. If the ACH Council is satisfied in respect of the matters set out in section 135, the ACH Council should be *required* to approve the ACH management plan. | a) Replace "may" with "shall" in s135. |
| 18. | **ss112, 116** | ***Council discretion in granting (and extending) ACH permits*** | Section 112 provides that the ACH Council "may" grant an ACH permit if certain requirements have been met. If the ACH Council is satisfied in respect of the matters set out in section 112(1), the ACH Council should be *required* to grant the ACH permit – that is, the ACH Council should not have discretion to refuse to grant the ACH permit where the criteria under section 112(1) has been met. This should also apply to extensions of ACH permits under section 116. | a) Replace "may" with "shall" in ss112 and 116. |
| 19. | **s139, s258, s273** | ***Minister decisions (of appeals of ACH Council decisions on CHMPs)*** | The decision of the Minister under section 139, in relation to confirming or changing a decision of the ACH Council (where the ACH Council has refused to approve an agreed CHMP):<br>• should be expressly capable of review by the SAT; and<br>• should not be capable of delegation. | a) Include section 139(5) in the table in section 258.<br><br>b) Include section 139(5) in the table in section 273.<br><br>c) Amend s139(2) to refer to 'a party' being able to object to the Minister, rather than the 'parties' which suggests that all parties must object in relation to a decision of ACH Council to refuse to approve an ACHMP. |

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| 20. | s90 | *Native title agreements*<br>The definitions of "native title agreement" and "previous heritage agreement" are insufficient for the intended purpose. | This seems to be a drafting error or omission.<br>Traditional owners, PBCs and industry often enter into contracts (not ILUAs or s31 deeds) in relation to Aboriginal heritage matters.<br>Even the State (in the South West and Yamatji regions) *requires* that tenement applicants enter into heritage contracts with the traditional owners (that cover issues like consultation, notification, the conduct of heritage surveys, etc).<br>As currently drafted, once the Bill commences the majority of agreements (entered into from that date onwards) containing provisions regarding Aboriginal cultural heritage would not be able to be used in approvals processes before the ACH Council to satisfy requirements for consultation, surveys, etc.<br>Any such agreement would need to be an ILUA for it to play a role in the Bill's approvals process, which is not a sensible outcome.<br>CME suggest that for this provision to deliver on its intent, these definitions must be widened to capture all agreements that contain provisions for the management of heritage, and are endorsed by relevant parties. | a) Change to include all agreements which contain provisions for the management of Aboriginal cultural heritage. |
| 21. | s9 | *Landholder definition*<br>The definition of "landholder" is defined by reference to the *Heritage Act 2018*, which does not include tenure granted under State Agreements, *Mining Act 1904* tenure, or other relevant tenure types in WA. | This seems to be a drafting error.<br>CME happy to assist in provision of tenure types.<br>DMIRS should also be requested to provide a list capturing all types of mining tenure in WA.<br>Consideration should be given to types of tenure used for other purposes relevant to the Act, including for infrastructure. | a) Broaden this definition to capture all forms of tenure and permits.<br>b) DMIRS to provide a list of tenure and permit types relevant to this purpose. |
| 22. | s41 (and s32) | *LACHS fee schedules*<br>The LACHS can charge a fee for services provided in connection with each of the functions set out in s32. | The functions undertaken by a LACHs in s32 are broad, and will allow a LACHs to charge for the exercise of a range of functions well beyond those commonly contemplated through fee for service models, including:<br>• to facilitate consultations;<br>• to facilitate agreement-making;<br>• to "give effect to" Aboriginal heritage agreements; | a) The Bill should confirm that (in addition to LACHs having an obligation to discharge their functions (as discussed above), that the fees can only be charged for services where both parties consult and agree a reasonable budget and scope. |

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| | | | • to make submissions to the Council;<br>• to consult with other LACHs and knowledge holders about heritage that extends beyond their boundary;<br>• to undertake, either directly or indirectly, on-ground identification, maintenance and conservation of Aboriginal cultural heritage in the area.<br>While the eligibility requirements for LACHS requires them to have a "reasonable" schedule of fees for services provided in connection with the functions set out in s32, the breadth of s32 may result in considerable sums being demanded by LACHs for their services – with insufficient capacity for regulatory oversight, monitoring or reasonable scope.<br>This introduces considerable uncertainty for proponents, and risks creating a barrier to early on-ground development and activities.<br>For this to function sustainably, LACHS and proponents must be required, through the ACH Management Code consultation guidelines, to have discussions regarding costs, and agree on a reasonable scope of works. | b) Include process where proponent can request Council-supported mediation on budgets and fee-setting in cases where this is not possible.<br>c) Mediation by Council on fee-setting to be able to be extended to determination of reasonable scope of costs in situations where no agreement can be reached. |
| 23. | s102(d) | *Low impact activity authorisation contradiction*<br>The authority to carry out minimal or low impact activities that harm heritage is coupled with an obligation to take all reasonable steps to avoid or minimise risk of harm, even in circumstances where the harm is authorised by an approved or authorised ACH management plan or permit | This seems to be a drafting error. The two concepts are inconsistent.<br>At a minimum, a re-draft of this section is required for clarity.<br>In Victoria, for example, ACH permits may also be issued to carry out an activity that will or is likely to harm ACH, and may be issued subject to conditions regarding the doing of the activity. However, there is no equivalent statutory requirement for a permit holder to take all reasonable steps to avoid or minimise risk of harm. | a) Remove s102(d).<br>b) Alternatively, provide that s102(d) does not apply to activities undertaken in accordance with an approved or authorised ACH management plan. |
| 24. | s62 | *Non – disclosure penalty*<br>The Bill imposes a financial penalty for non-disclosure of Aboriginal places, Aboriginal | The current Act does not impose financial penalties for non-disclosure. The draft Bill imposes a penalty of $20,000 for individuals, or $100,000 for corporations. | a) Amend s62 to provide exception for person or corporation where they are not required to disclose information if requested by |

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| | | objects and Aboriginal ancestral remains. | While there is an exception for an Aboriginal person acting in accordance with their rights, interests and responsibilities in accordance with Aboriginal tradition, the reality is that industry participants, representative bodies, archaeologists and anthropologists (and many others) often do not report heritage finds because they are requested not to by traditional owners or custodians.<br><br>There should be an additional and express exception for an individual or a corporation acting on the instruction or request of an Aboriginal person, who are themselves acting in accordance with their own rights, interests and responsibilities in accordance with Aboriginal tradition.<br><br>Regarding the application of the penalty for non-disclosure, further certainty is required on the time in which a proponent must comply with the reporting obligation. | Aboriginal person already captured by existing exemption.<br><br>b) Alternatively, remove obligation to notify heritage finds. Heritage information relevant to an approval is required to be provided with the application for an ACH Permit or CHMP. Disclosure of information not relevant to an approval should be at the discretion of the Aboriginal persons to notify if they choose to. |
| 25. | Part 11 - Division 2, 3, 4, 5 | *Inspectors*<br><br>The powers of inspectors are significant and could be considered unjustified for the purpose of heritage compliance monitoring. | The powers of inspectors may be inconsistent with obligations and regimes imposed by safety legislation such as the *Mines Safety and Inspection Act* and *Regulations*.<br><br>Accept the establishment of inspector function for compliance purposes. Reasonable limitations should exist on power of inspectors, with regard to the purpose they serve.<br><br>For example, s233 contemplates the use of force which is inappropriate in the circumstances, and should be the role of the WA Police if required.<br><br>The Vic Act does not contemplate the use of force by authorised officers, neither does the NSW NPW Act.<br><br>Inspectors appointed must be required to adhere to a Code of Conduct and be directly accountable to the Department for compliance.<br><br>It must be an offence to impersonate an Aboriginal inspector. | a) Reframe Division 3 to obligate a landholder to permit a person to have reasonable access to a place with prior notice, noting considerations and requirements regarding safety of mine site personnel.<br><br>b) Where entry without notice is necessary in specific circumstances, an entry warrant should be obtained under Part 11 Division 4.<br><br>c) Remove s233 – Use of force by appointed inspectors is not appropriate where there are provisions for entry, and the ability to request assistance from WA Police to carry out duties. |
| 26. | s117 | *Transfer of ACH permit* | Period needs to be set for when notice of a transfer of an ACHMP must be given. | a) Amend s117 to require notice to be given by one party only. |

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| | | | Simplification can occur by requiring the notification to be made by one party, consistent with the transfer of ACHMP's under s156 (which require notification by the transferee only) | b) Set period for notice of transfer |
| 27. | s245 | *Liability*<br>This provision sees employers liable for offences committed by employees, even when the employee was not acting with the employer's authority or contrary to the employer's orders or instructions | This seems to be a drafting/conceptual error.<br>There is a defence if the employer took all reasonable steps to prevent the commission of an offence.<br>And the Bill requires there be regard given to: (a) what the employer knew, or ought to have known, about the contravention, (b) whether the employer could have prevented the contravention, and (c) any other relevant matter.<br>However, where an employee is acting independently and contrary to the employer's orders or instructions, there seems to be no justification to extend the liability to the employer in this way. | a) In section 245, replace "whether or not" with "unless". |
| 28. | s179, s181 | *Prohibition orders* | The threshold for a recommendation to the Minister for a prohibition order in s179(1) is not proportionate to impact of a grant of a prohibition order.<br>Minister should be required to consider evidence as to whether the ACH in question still requires protection, after consulting with and considering the evidence provided regarding interests and potential impact to all relevant parties, and the interests of the State. | a) Amend s181(2) to require the Minister to consider the submissions and evidence provided by relevant parties. |
| 29. | Part 10, Division 4 | *Remediation orders* | Threshold for recommendation to the Minister for a remediation order should be increased.<br>Evidence should be required to be provided by the Council that ACH has been harmed, following consultation with all relevant parties.<br>Current drafting in s187 means that landowners or occupiers may be held responsible for harm caused by a third party or trespasser. This should be amended to require it to be directed to the person responsible for the authorised harm, unless that person can't be located. In this case, the person with control over the activity in question should be liable, or the landowner if they authorised the activity. | a) Amend s187(2) to provide more clarity regarding the issuing and liability for remediation orders. |

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| 30. | Part 9 | *ACH Directory* | Guidance in regulations required to establish the level of evidence and information required for the purpose of the Directory.<br><br>The ACH Council should be required to provide a base level of non-confidential information about Aboriginal cultural heritage for the ACH Directory (consistent with the obligation to report heritage)<br><br>Access to the information on the ACH Directory should be expanded from "to the extent that the information and documents relate to the activity" to include "the area where the activity is proposed to be conducted, or affected by the proposed activity" or similar to make it functional for use as part of a due diligence assessment process required under the draft Bill.<br><br>Knowledge holders, or in instances where they exist, LACHS, should be identified clearly on the ACH Directory. This will contribute to more certainty for proponents where there is no LACHS and enable consistency of process.<br><br>Process to remove information from the ACH Directory should be clear, and require consultation with other affected parties. Parties should be able to apply to the ACH Council to have the ACH Directory corrected where inaccuracies are identified, and able to be substantiated with evidence (for which criteria needs to be provided). | a) Amend s170 to require provision of relevant documents to any proponent proposing to conduct activity in the "the area where the activity is proposed to be conducted, or affected by the proposed activity" to assist in use of the ACH Directory as a planning tool.<br><br>b) ACH Directory to record knowledge holders, native title parties and, where they exist, LACHS, for consistency. |
| 31. | s113 | *Limited permit duration* | ACH permits are in force for 2 years, unless the permit is earlier cancelled or extended.<br><br>This will not be sufficient for permits which may be used to authorise the installation of long term or permanent infrastructure, where ground disturbance is not required. | a) Provide for discretion of Minister to extend the grant of an ACH permit for installation of low-impact infrastructure. |