



**Yamatji Marlpa**  
ABORIGINAL CORPORATION



Our Ref:  
Your Ref:  
Office:  
Date: 28 August 2020

To: Committee Secretariat  
Joint Standing Committee on Northern Australia  
PO Box 6021  
Parliament House  
CANBERRA  
Canberra ACT 2600

Dear Committee

**REF: Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara Region of Western Australia**

Yamatji Marlpa Aboriginal Corporation (YMAC) welcomes the opportunity to make a submission to the Inquiry into the destruction of the caves at Juukan Gorge in the country of the Puutu Kunti Kurrama and Pinikura People (PKKP).

YMAC is the Native Title Representative Body (NTRB) for what are described as the Pilbara and Geraldton regions of Western Australia. YMAC is run by an Aboriginal Board of Directors, representing several native title groups (each of whom have their own language, culture, traditions and protocols). YMAC provides a range of services, including native title claim and future act representation, heritage services, community and economic development assistance, and natural resource management support.

The Pilbara RATSIB region includes the land and waters of the PKKP Native Title Determination Area (PKKP Country). YMAC assisted the PKKP People in their native title claims to achieve recognition of their Native Title by consent in 2015.

YMAC pays its respects to the PKKP People, their Elders past, present and emerging.

This submission is in two parts:

Section One: Submissions to Terms of Reference b), c), and e)

Section Two: Submissions to Terms of Reference a), f), g), h), i), and j)

With respect to ToR (d) - *the loss or damage to the Traditional Owners, Puutu, Kunti Kurrama and Pinikura people, from the destruction of the site* - YMAC acknowledges the PKKP people and their deep connection to Country. It would not be respectful of YMAC to the PKKP for YMAC to comment on loss and damage to the PKKP, as such matters can only come from the PKKP themselves.

YMAC has advocated for several years for legislative reform that will result in a more equitable position for Traditional Owners and a better balance of power in negotiations over protection of Country.

There is a strong need to have more protective measures for areas of significance, and for priority to be given to recognising and protecting Aboriginal cultural heritage in a range of legislations. Not just through the proposed replacement of Western Australia's *Aboriginal Heritage Act 1972 (AHA)* but also, for example, through Federal heritage legislation, the *Native Title Act 1993 (NTA)* and WA's *Mining Act 1978*. YMAC takes this opportunity to elaborate on issues and propose changes.

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YMAC sincerely hopes Traditional Owners across the nation will emerge from this Inquiry in a stronger position to make and influence decisions about the protection of culture, sites and heritage on their Country, both before and after agreements (including existing agreements) have been made.

Thank you again for the opportunity to make this submission. I will be happy to address further questions from the Joint Committee to assist its deliberations.

Yours sincerely,

Simon Hawkins  
**Chief Executive Officer**

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## Section One: Submissions to Terms of Reference (ToR): b), c), and e)

1. The following section of YMAC's submission seeks to add further background and context regarding the following Terms of Reference:
  - (b) the consultation that Rio Tinto engaged in prior to the destruction of the caves with Indigenous peoples;
  - (c) the sequence of events and decision-making process undertaken by Rio Tinto that led to the destruction; and
  - (e) the heritage and preservation work that has been conducted at the site.
2. In the corporation's capacity as NTRB, YMAC facilitated the negotiations between the PKKP People and Rio Tinto Iron Ore (**RTIO**) culminating in the Binding Initial Agreement dated 28 June 2006; the RTIO and PKKP Claim Wide Participation Agreement dated 18 March 2011 and the RTIO and PKKP People ILUA registered on 24 April 2013 (**PKKP RTIO Agreements**). Additionally, YMAC acted as the PKKP People's Heritage Service Provider until 30 June 2019.
3. The Juukan Gorge lies within the lands covered by the PKKP RTIO Agreements.
4. Negotiations commenced in 2003 and concluded seven years later after an extensive consultation process. YMAC's involvement in the negotiation involved YMAC engaging both internal and external lawyers, as well as heritage, anthropological, financial taxation and economic professionals, to provide advice to the PKKP People throughout the process.
5. The facilitation process also involved various meetings (including with the negotiation team, working group, claim group and applicants' meetings), as well as cultural decision making and regular newsletters to keep people informed. Over 45 meetings were facilitated in connection with the negotiations between 2003 and 2012.
6. Plain English summaries of the BIA were provided to the PKKP People as part of the authorisation process in 2006. Plain English version documents consolidating all the key aspects of the proposed RTIO Claim Wide Participation Agreements were mailed out to all the Traditional Owners negotiating with RTIO represented by YMAC, prior to authorisation meetings in 2010 and available at meetings.
7. At the authorisation meeting in November 2010 a comprehensive slide presentation was made to the PKKP claimants, that went through what the PKKP would get, and what they would give if they authorised the agreement. YMAC CEO also spoke to the group. He advised that even though internal, external and due diligence findings recommended supporting the agreement, as their Land Council YMAC would fully support the group should they decide to not proceed.
8. YMAC engaged in due diligence report preparation and completion, involving independent lawyers to assess the quality and feasibility of the agreements in order to make recommendations to the PKKP Traditional Owners prior to their authorisation of the agreement. This resulted in the Traditional Owners going back to RTIO and insisting on stronger provisions relating to consents and heritage protection over highly significant cultural sites, as well as binding obligations on future parties in the case of assignments and joint venture arrangements.
9. The PKKP Aboriginal Corporation (**PKKPAC**) was registered an Aboriginal Corporation pursuant to CATSI Act on 27 October 2011 and the inaugural board meeting was held on 20 December 2011. PKKPAC assumed the rights and obligations of the "Local Aboriginal Corporation" under the PKKP Claim Wide

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Participation Agreement (**PKKP CWA**) on 18 July 2012. PKKPAC appointed an external law firm as legal advisors to PKKPAC in mid-2012.

10. The role of the Local Aboriginal Corporation (**LAC**) is set out in the PKKP CWA and the ILUA.
11. The PKKP CWA provides for the establishment of a Local Implementation Committee (**LIC**) to, amongst other things, implement and monitor the implementation of the commitment of the parties under the agreement.
12. YMAC assisted with the facilitation of interim LIC meetings prior to the commencement of the PKKP CWA, and with the initial LIC meetings after the commencement of the PKKP CWA. Following the appointment of PKKPAC as the LAC, YMAC understands that the LIC meetings were organised between the parties (PKKP People, PKKPAC and RTIO).
13. YMAC continued to represent the PKKP People in their native title claim until its determination in 2015. Further legal services provided since then have been undertaken through a service agreement arrangement.
14. When announced, these agreements were widely recognised as best practice, offering greater heritage protection, participation in decision-making and economic opportunities than what is afforded under WA's heritage and mining legislation and the NTA. They are now eight years old, and Western Australia is – hopefully – on the brink of introducing stronger heritage legislation for the benefit of Aboriginal culture. Changes to the *Mining Act* and NTA are also required (refer Section Two of this submission).
15. At the time the agreements raised the bar for negotiation outcomes and cultural heritage management in WA beyond what was available by way of legislative protection, by identifying rights reserved areas and excluded areas. Claim groups were then able to identify significant sites and negotiate the inclusion of those sites in the rights reserved and excluded areas, so these could be incorporated in mine site planning by RTIO.
16. Nevertheless, in Western Australia presently, even though agreements like the PKKP RTIO Agreements can and do raise the bar of cultural heritage protection, the fact the legislation itself sets such a low bar makes negotiating more protective regimes by agreement infinitely more difficult than would be the case if the legislation itself offered more protection.
17. YMAC coordinated heritage surveys on behalf of PKKPAC up until 30 June 2019, when PKKPAC took on the responsibility effective 01 July 2019.
18. With respect to the heritage and preservation work that has been conducted on the site, YMAC either conducted and/or coordinated 254 ethnographic and archaeological surveys and monitoring works on PKKP Country, including around Brockman 4 area, between November 2006 and July 2019.
19. YMAC's standard practice undertaken is that archaeologists and/or anthropologists (depending on the scope of the heritage survey) undertake the surveys in collaboration with Traditional Owners. The Traditional Owners' group – in this case PKKP people – establishes their own nomination protocol, to organise for the appropriate PKKP participants for each survey, to provide expertise and local knowledge.
20. The Traditional Owners are nominated based upon their understanding of the area. They consult and collaborate during preparation of the survey; in that they help design the survey strategy, undertake the survey, and provide ethnographic and cultural comment throughout the fieldwork. Recommendations given on the ground are included in reports.

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21. With respect to Juukan Gorge, heritage issues and approvals are addressed at LIC meetings, between RTIO and PKKP representatives.
22. YMAC was not involved in the LIC meetings in 2013 when the proposed Section 18 application for Juukan Gorge was discussed.

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## Section Two: Submissions to ToR: a), f), g), h), i), and j)

23. The remainder of YMAC's submission seeks to highlight the following:
- inadequacies of the *Aboriginal Heritage Act 1972* (WA);
  - interactions between State and Federal laws concerning the protection of Indigenous cultural heritage;
  - why Aboriginal heritage must be considered early in a development process, and continue to be considered as new information comes to light; and
  - the importance of empowering Aboriginal people in negotiations to enable Aboriginal people to protect their heritage.
24. The following pages outline YMAC's submissions addressing the following terms of reference:
- (a) the operation of the *Aboriginal Heritage Act 1972* and approvals provided under the Act;
  - (f) the interaction, of State Indigenous heritage regulations with Commonwealth laws;
  - (g) the effectiveness and adequacy of State and Federal laws in relation to Aboriginal and Torres Strait Islander cultural heritage in each of the Australian jurisdictions;
  - (h) how Aboriginal and Torres Strait Islander cultural heritage laws might be improved to guarantee the protection of culturally and historically significant sites;
  - (i) opportunities to improve indigenous heritage protection through the *Environment Protection and Biodiversity Conservation Act 1999*; and
  - (j) any other related matters.
25. Please note that YMAC responses to these TOR are **not** specific to the events leading up to the destruction of the caves at Juukan Gorge. They are a reflection on YMAC's experience gained and lessons learned through supporting Traditional Owner groups through native title determinations and associated agreement-making and heritage processes at varying levels of complexity, with both the private sector and government.

## *Aboriginal Heritage Act 1972* (WA) (ToR: a), g), h))

26. The AHA was the first legislation in Australia to seek to actively protect Aboriginal peoples' cultural heritage. At the time, the AHA was considered ground breaking, but in the almost 50 years since it was passed, the legislation has been weakened and narrowed, the relationship between Australian governments and Aboriginal peoples has developed, and mining has dramatically expanded and been prioritised as a key economic driver for the State and national economy. Today the AHA is archaic, and ineffective in protecting places of significance to Aboriginal peoples. The primary focus of the administration of the AHA appears to be to enable the legal destruction of Aboriginal places.
27. The AHA ostensibly protects all Aboriginal sites in Western Australia and makes it a crime to destroy or damage an Aboriginal site. However:
- Aboriginal sites are considered the property of the Government or holders of government-granted land titles, not the Aboriginal people. Aboriginal people have no particular standing in relation to protection of their sacred places;
  - the process adopted by the Department of Planning, Lands and Heritage (DPLH) to assess whether a place is a site under AHA results in many places of importance to Aboriginal peoples being found not to be sites under the AHA;
  - the processes to legally permit the destruction of Aboriginal sites (section 18) is widely used with many considering the process to be a "rubber stamp" approving (almost) every application<sup>1</sup>; and

<sup>1</sup> Since June 2017, the Minister has approved 210 s18 consent application. 2 s18 consent applications were denied in that time. Each s18 consent application may cover several blocks of land, or tenements.

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- the consequences for destroying sites without permission are relatively light, and in any event, appear to be rarely prosecuted (YMAC is only aware of about 6 prosecutions between enactment and 2012, with possibly more since but YMAC has been unable to determine how many due to limited information on the public record).
28. The AHA is administered by the DPLH. The administration of the AHA is relatively opaque, and there is little public information about how effective the protection regime of the AHA is. It appears that the administration of the AHA is under-resourced, which results in places taking many years to be assessed as sites (or not as sites). The DPLH appears to prioritise these limited resources by processing applications seeking consent under section 18 over applications to register sites. Often places are only assessed as to whether they are sites when they become subject to applications for permission for their destruction.
  29. Under the AHA, there is no formal process for the filing of objections against Section 18 applications by Traditional Owners.
  30. Western Australia has proposed replacing the AHA with a more modern heritage act. YMAC welcomes this proposal. It represents a once-in-a-lifetime opportunity to address the fundamental imbalance of power inherent in existing legislation.
  31. YMAC supports replacing the AHA and has participated in the State's current review. YMAC made extensive submissions to both Stage One (2018) and Stage Two (2019) of the State's consultation process, available through the DPLH website.
  32. YMAC intends to provide feedback on the forthcoming Aboriginal Cultural Heritage Bill, which we understand will be released this year. While DPLH's discussion papers in 2018 and 2019 indicated that positive changes will be made, YMAC has adopted a 'wait and see' approach as to how much of the discussion content makes it through to the final Bill.
  33. Further, YMAC notes that interpretation by government of the proposed new Act, how this is resourced, the processes to be undertaken and how the transition from the old Act to the new is approached, will be critical.
  34. **Appendix A: Changes required in Western Australian Aboriginal heritage legislation** outlines what YMAC considers needs to change in the new heritage legislation, at a minimum.
  35. It is important to also note that if the final decision about destruction of a site vests with a Government Minister or Department, there will always remain the risk of a conflict of interest, where the destruction of a site is either at the behest of the government, or will result in significant royalties for the government. This conflict does not exist for the Commonwealth Government.
  36. Further, YMAC strongly advocates that government lead on and **legislate** Aboriginal cultural heritage protection; not rely on agreement-making between proponents and Aboriginal people as the primary protection mechanism (which has too often been the case with WA's current weak heritage legislation).

#### Interaction between State and Federal heritage laws (ToR: f, g, h))

37. YMAC considers it vitally important the Joint Standing Committee recognises that for effective change to occur in Western Australia, replacing the existing AHA with new legislation is just one step towards a better balance and equity for Traditional Owners with regard to protecting their cultural heritage. It cannot happen in isolation. Amendments to other legislation – State and Federal - is also required

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for there to be a significant shift in heritage protection outcomes for Aboriginal people.

### ***Aboriginal and Torres Strait Islander Heritage Protection Act (Cth) (ATSIHPA)***

38. The *Aboriginal and Torres Strait Islander Heritage Protection Act* provides Federal protection to important places where an Indigenous person has requested the Federal Minister intervene, and the Minister so does. While ATSIHPA is theoretically a useful supplement to State heritage protection laws, protective declarations under the ATSIHPA appear to be rare. In addition, the ATSIHPA can only be activated following a request by an Indigenous person, but many native title holders have signed agreements prohibiting them from taking an action to interfere with an agreed act<sup>2</sup>.
39. YMAC takes this opportunity to advocate for the Commonwealth to introduce more comprehensive Commonwealth Indigenous heritage legislation that would ensure that all sites or areas of importance to Indigenous people receive Commonwealth protection. Comprehensive Commonwealth Indigenous heritage legislation would help reduce concerns about conflicts of interest. YMAC continues to support the introduction of such laws.

### ***Native Title Act 1993 (Cth)***

40. Strong heritage protection laws are essential for the efficient operation of the *Native Title Act 1993 (NTA)*. Western Australia seeks the grant of mining exploration tenure through the NTA's "expedited procedure", which is a faster process for the grant of some tenements. Among other things, to be able to be granted through the expedited procedure, the act must not be likely to interfere with areas or sites of particular significance to the native title holders. Increasingly, in assessing whether an act is likely to interfere with areas or sites of particular significance, the National Native Title Tribunal (NNTT) is finding that the AHA does not effectively protect these places, and thus the expedited procedure cannot apply<sup>3</sup>. More effective heritage protection would enable more mining tenements to be granted through the expedited procedure, while also ensuring Aboriginal heritage is protected.
41. In Western Australia, mining tenements are generally granted as acts that pass the freehold test: NTA s24MB(1). S24MB(1)(c) requires that there be a law that makes provision for the preservation or protection of areas and places of significance in the area. It is unclear if the AHA is sufficient to satisfy this requirement, but if so, it makes a mockery of the requirement. YMAC supports amending s24MB(1)(c) to ensure that for an act to pass the freehold test, there be a law that ensures **effective** protection of areas and places of significance. Commonwealth legislation should set out minimum standards for such legislation, so that reference can be made to those standards.

### **Aboriginal peoples' heritage must be considered from the start of processes (ToR: h, j))**

42. Decisions about Aboriginal heritage should always be considered at the planning stage of projects to ensure that, to the greatest extent possible, projects are developed to avoid any negative impact upon or destruction of Aboriginal heritage. Further, legislation should require that heritage should continue to be considered throughout the life cycle of a project and managed appropriately as new information becomes available. Unfortunately, Aboriginal heritage matters are often ignored by proponents and

<sup>2</sup> For example 8.10(b)(v) of the ILUA attached to the NNTT submission to this inquiry.

<sup>3</sup> *Marputu Aboriginal Corporation RNTBC (INC 8085) v Peter Romeo Gianni* [2019] NNTTA 18, *Bunuba Dawangarri Aboriginal Corporation RNTBC v Oladipo Minerals Pty Ltd and Another* [2019] NNTTA





government until *after* the main planning has concluded. By this point, taking the steps to avoid destruction of Aboriginal heritage may be more time consuming and/or costly than obtaining Section 18 consents under the AHA.

43. No key planning or resource laws in Western Australia currently specifically refer to, let alone require the protection of, Aboriginal heritage. While in some legislation Aboriginal heritage protections may be implied, more specific reference is recommended, for example through the *Mining Act 1978* (WA). Requiring developers and companies to design projects that from the outset at the pre-planning stage properly accommodate and protect Aboriginal heritage, will result in fewer projects dependent upon the destruction of Aboriginal heritage.
44. As an example, in Western Australia before being able to conduct mining operations, a prospective miner must lodge a mining proposal with the Department of Mines, Industry Regulation and Safety (DMIRS). Among other things, the mining proposal (appropriately) requires extensive environmental approvals, and a mine closure plan. In contrast, the mining proposal does not require any engagement with the Traditional Owners, or Aboriginal heritage surveys to be conducted.
45. Suggested possible inclusions in the *Mining Act* to address this imbalance are outlined in **Appendix B: Proposed revisions to the *Mining Act 1978*.**
46. This issue is by no means limited to resource companies. There is similarly no requirement to engage with Traditional Owners or Aboriginal heritage in:
  - *Local Government Act 1995* (24 Section 18s approved for local governments since June 2017)
  - *Main Roads Act 1930* (46 Section 18s approved for Main Roads since June 2017)
  - *Planning and Development Act 2005*.
47. Changing these laws to require Traditional Owner engagement and Aboriginal heritage to be considered in the early stages of project planning will result in projects being developed with an understanding of the Aboriginal heritage implications, and result in fewer Aboriginal sites being affected.

### **Protect Aboriginal heritage by empowering Aboriginal people to negotiate strong agreements (ToR: j)**

48. The best people to make decisions about Indigenous heritage, are the Indigenous people whose heritage is being considered.
49. Through the NTA, mining companies have had to negotiate with native title holders before the grant of mining leases. Almost universally, those agreements address how heritage is to be managed.
50. These negotiations do not happen in a vacuum. Native title holders face the 'ticking clock' of the mining company bringing an NTA future act determination application, which generally results in the grant of the mining lease without benefits or protections for the native title holders, and the "right" of mining companies to bring an application under section 18 of the AHA for a consent to damage or destroy Aboriginal sites.
51. Consequently, native title holders are often given the unenviable choice of entering into an agreement with inadequate heritage protections or rejecting the agreement and having the mining lease granted with no heritage protection beyond the insufficient protections offered by the AHA. YMAC draws the Committee's attention to pages 10 and 11 of the National Native Title Council submission to this enquiry for further discussion on "right to negotiate" and related provisions in the NTA.

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52. YMAC submits that strengthening native title holders' rights **in legislation** will in turn empower native title holders to negotiate stronger agreements that enable them to decide how their heritage will be managed.

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**APPENDIX A: Changes required in Western Australian Aboriginal heritage legislation**

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In this Appendix YMAC outlines specifically how Western Australian heritage legislation could be improved to better guarantee the protection of culturally and historically significant sites.

YMAC has made two extensive submissions to the current review of the AHA being coordinated by DPLH, as well as attended numerous meetings, and have proposed these improvements to the legislation. This is a summary only; that is, it does not encompass the entirety of YMAC's previous submissions improvements to heritage legislation. The areas outlined below are therefore minimum changes sought through the coming *Aboriginal Cultural Heritage Bill*.

Key areas where the legislation could be improved to ensure better heritage protection outcomes for Traditional Owners include, but are not limited to the following:

- (a) The legislation should be for the protection of Aboriginal cultural heritage for the benefit of Aboriginal people first and foremost, and then the broader community.
- (b) The legislation should be brought into alignment with the NTA and the *Mining Act 1978* (WA).
- (c) While the legislation must address land use this should be a secondary function and not its primary purpose. The legislation cannot be a 'conveyor belt' for approvals. A new heritage act should make it clear to developers that they should redesign projects where possible, to avoid impact on Aboriginal heritage.
- (d) The legislation should clearly articulate minimum standards for consultation and enshrine avoidance as a key principal of heritage protection.
- (e) Aboriginal people who are the right people to speak for the Aboriginal sites in question must be given key decision-making roles throughout the whole process.
- (f) At minimum the principle of free and prior informed consent must apply, as enshrined in the United Nations' Declaration on the Rights of Indigenous People, must apply and prevail over any inconsistent requirements. The imbalance of power between the parties is enormous and the legislation should operate to help mitigate this.
- (g) The definition of Aboriginal cultural heritage should be broader. Western scientific inquiry seeks to classify places and put discrete boundaries around them. This is especially relevant when it comes to managing Aboriginal sites, establishing discrete boundaries makes it easier to manage heritage from a land user's perspective but does not reflect Aboriginal perceptions of sites and Country. Cultural heritage cannot be fenced off, as if it's somehow separate from obligations to care for and protect surrounding Country.
- (h) The legislation should also recognise place-bound intangible heritage as well as intangible heritage in the form of language, song, story, dance, art, etc. This would recognise the breadth of Aboriginal cultural heritage and ideally lead to resources being made available to protect and manage these forms of intangible heritage. It would also align with recent advocacy surrounding Constitutional reform recognising Aboriginal heritage as a contemporary and living thing, not just ancient places.
- (i) Cultural landscapes should be recognised in the legislation. Often the significance of an Aboriginal site isn't in the site itself but in its relationship to other sites and activities within the landscape. For example, small artefact scatters, representing family camps in proximity to a ceremonial ground. Taken individually and removed from the landscape context the significance is greatly diminished.
- (j) Consultation should begin early and continue throughout the lifecycle of a project.

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- (k) Minimum standards of investigation should be mandated for the various stages of projects. Ideally, beginning with low level avoidance surveys to establish what is in the landscape so that the proponent can plan to avoid them.
- (l) Heritage surveys should occur before any ground disturbance activities take place. These should include, at a minimum, six representatives from the Native Title group.
- (m) Currently the significance of Aboriginal sites is evaluated by the Aboriginal Cultural Materials Committee (**ACMC**) and Minister. There are no current requirements for the ACMC membership to include Aboriginal people, which is breathtakingly inadequate. The legislation should ensure that the only people responsible for deciding if a place is an Aboriginal site and determining the level of significance to ascribe to it should be the Aboriginal people who speak for that site.
- (n) Aboriginal people should have a right of veto over sites that they consider to be of exceptional significance.
- (o) Any approvals should have a right of review if new information comes to light that changes the significance of a place.
- (p) The time limit to commence prosecutions should be extended to a minimum of five years. Traditional Owner groups should have the right to inspect proponent's projects to ensure compliance with heritage legislation and NTA agreements. As an additional benefit this could provide fee for service work opportunities Aboriginal rangers or site inspection teams.
- (q) Penalties must be made significant enough to encourage compliance. This could include a public register of breaches that could impact on the social licence to operate, as well as substantially higher fines and imprisonment terms.
- (r) The legislation should also contain provisions concerning the protection and management of Aboriginal ancestral remains.
- (s) All stakeholders should have a right to appeal any decisions at an independent tribunal such as the State Administrative Tribunal in Western Australia.
- (t) Provision needs to be made to help fund Prescribed Bodies Corporates (**PBCs**) and Aboriginal Corporations to manage their heritage. Many PBCs have no permanent staff and no income streams. If they are to take a key role in the management and protection of their heritage they will require funding and resourcing to do so.
- (u) Qualified heritage professionals provide an important role in helping to *support* Traditional Owners. Archaeology and anthropology for example are two additional tools to help Traditional Owners to record their past. New legislation should not seek to remove these experts from the process, as, for example, a site of archaeological significance can come to have very high cultural significance as archaeological results are processed and interpreted.
- (v) The recognition of more indigenous protected areas and provisions to engage Traditional Owners in the management / co-management of these places.

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**APPENDIX B: Proposed revisions to the *Mining Act 1978* (WA)**

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As noted in YMAC's submission, decisions about Aboriginal heritage should be considered at the pre-planning stage of projects, as opposed to the 'last box to be ticked' stage, to ensure that, to the greatest extent possible, projects are designed and developed from the very outset to avoid damage to Aboriginal heritage. In terms of mining projects in Western Australia, that can be achieved by:

1. mandating that Aboriginal heritage issues are addressed *as part of* the mining proposal application process; and
2. DMIRS notifying companies at the time of lodging an exploration tenement application of the Mining proposal statutory guidelines concerning Traditional Owner Engagement during the exploration phase.

The following proposed amendments (underlined) to the *Mining Act 1978* (WA) will provide a strong incentive for companies to engage in a positive way with Traditional Owners at the exploration phase as failure to do so must then result in delays in completing the requirements for any future mining proposal. In WA a mining proposal needs to be prepared in accordance with the DMIRS guidelines.

As noted on the DMIRS website the *Mining Act* refers to the "guidelines" as the mechanism for mandating the form and information required in mining proposals and mine closure plans. The guidelines are prepared by DMIRS and endorsed by the Director General as the guidelines under section 70O(1) of the *Mining Act*, and as such form part of the statutory requirements.

A Mining proposal therefore can only be a valid application if it meets the requirements as identified in those guidelines.<sup>4</sup>

The proposed amendments (underlined) to the Statutory Guidelines for mining proposals are as follows:

**PURPOSE**

*This document is the guideline approved by the Director General, Department of Mines, Industry Regulation and Safety on 31 January 2020 under section 70O of the Mining Act 1978 identifying the form and content of information required in a mining proposal. This Guideline takes effect from 3 March 2020, and supersedes the Guidelines for Mining proposals in Western Australia published Guideline takes effect from 3 March 2020...*

*6. Environmental Legislative Framework The mining proposal must include a list of environmental approvals, other than under the Mining Act 1978, that have been sought or are required before the proposal may be implemented and any specific statutory requirements that will affect the environmental management of the site.*

*7. Stakeholder Engagement The mining proposal must include information on the engagement that has been undertaken with stakeholders, a record of the engagement undertaken to date and include a strategy for ongoing engagement.*

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<sup>4</sup> DMIRS Information for Consultation – Public Release of Draft Statutory Mining Proposal and Mine Closure Plan Guidelines and Guidance Notes For Comment





Traditional Owner Engagement. The mining proposal must include information on the engagement that has been undertaken with Traditional Owners in relation to the protection of Aboriginal heritage and environmental values before, during and after the exploration phase. Where Traditional Owners deliver their own Cultural Awareness Training, the proponent is required to make arrangements for its relevant personnel to attend such training if that has not occurred during the exploration phase.

The mining proposal shall include:

- Details of the Cultural Awareness Training attended
- Details of the engagement with Traditional Owners during the exploration phase including a description of the groups' cultural heritage values, lessons learned etc
- Identification of Exclusion Zones to protect Aboriginal Sites of Significance from mining activity
- A Cultural Heritage Management Plan/Heritage Agreement with Traditional Owners
- A Certificate of Consultation signed by the Traditional Owners confirming that the proponent has followed appropriate cultural heritage protocols during the exploration phase and had undertaken genuine consultation regarding its mining proposal

8. Baseline Environmental and Aboriginal Heritage Data. The mining proposal must describe the existing environment in which the site is located, including any natural (biological/ physical) and Aboriginal heritage values and sensitivities that may be affected by the activities.

This section must include a description of the baseline data covering the below environmental and Aboriginal heritage aspects as well as analysis and interpretation of the baseline data. This section must cover the following environmental and Aboriginal heritage aspects:

- climate
- landscape
- materials characterisation
- soils
- geochemical and physical characteristics of subsurface materials and mining waste
- biodiversity
- hydrology (including surface water and groundwater)
- Aboriginal heritage values as described by Traditional Owners
- environmental threats
- Aboriginal heritage threats.

Where environmental analysis or cultural heritage surveys have been undertaken the findings must be summarised in the mining proposal and all relevant technical and other reports must be attached as appendices.

#### 9. Environmental and Aboriginal Heritage Risk Assessment

The mining proposal must include an environmental and Aboriginal heritage risk assessment that:

- identifies all the environmental and Aboriginal heritage risk pathways affecting DMIRS Environmental Factors across all phases of the mine life and that may arise from unexpected or emergency conditions;

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- *includes an analysis of these risks to derive an inherent risk rating, prior to the application of treatments;*
- *identifies appropriate risk treatments including in relation Aboriginal cultural heritage, the identification of Exclusion Zones to protect Aboriginal Sites of Significance from mining activity;*
- *includes an evaluation of the risk pathways to derive a residual risk rating; and*
- *demonstrates that all residual risks are as low as reasonably practicable (ALARP). The mining proposal must provide information on the processes and methodologies undertaken to identify the environmental and Aboriginal cultural heritage risk pathways and their potential impacts, including a description of the risk assessment criteria and risk evaluation techniques.*

YMAC considers there will be a range of benefits for both Traditional Owners as well as for mining companies if the Statutory Guidelines are amended as proposed and DMIRS notifies companies of these requirements at the time of lodging an exploration tenement application.

For example it will potentially diffuse the adversarial approach that is often taken in mining negotiations under the right to negotiate provisions of the NTA if cultural heritage issues are addressed in a collaborative way during the exploration phase and as part of the mining proposal process.

As a result of this early engagement and promoting cultural awareness and understanding between the parties, rather than viewing the protection of Aboriginal heritage as an obstacle to be overcome during the mining approval process, it can be seen as an opportunity for collaboration and relationship building.

Moreover, early collaboration with Traditional Owners on Aboriginal heritage matters at the front end of the mining application process can be seen as a vital part of a mining company's social licence to operate. As recent bitter experience has shown, the importance of the acquisition and maintenance of a mining company's social licence to operate should never be underestimated and once lost can be difficult if not almost impossible to recover.

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