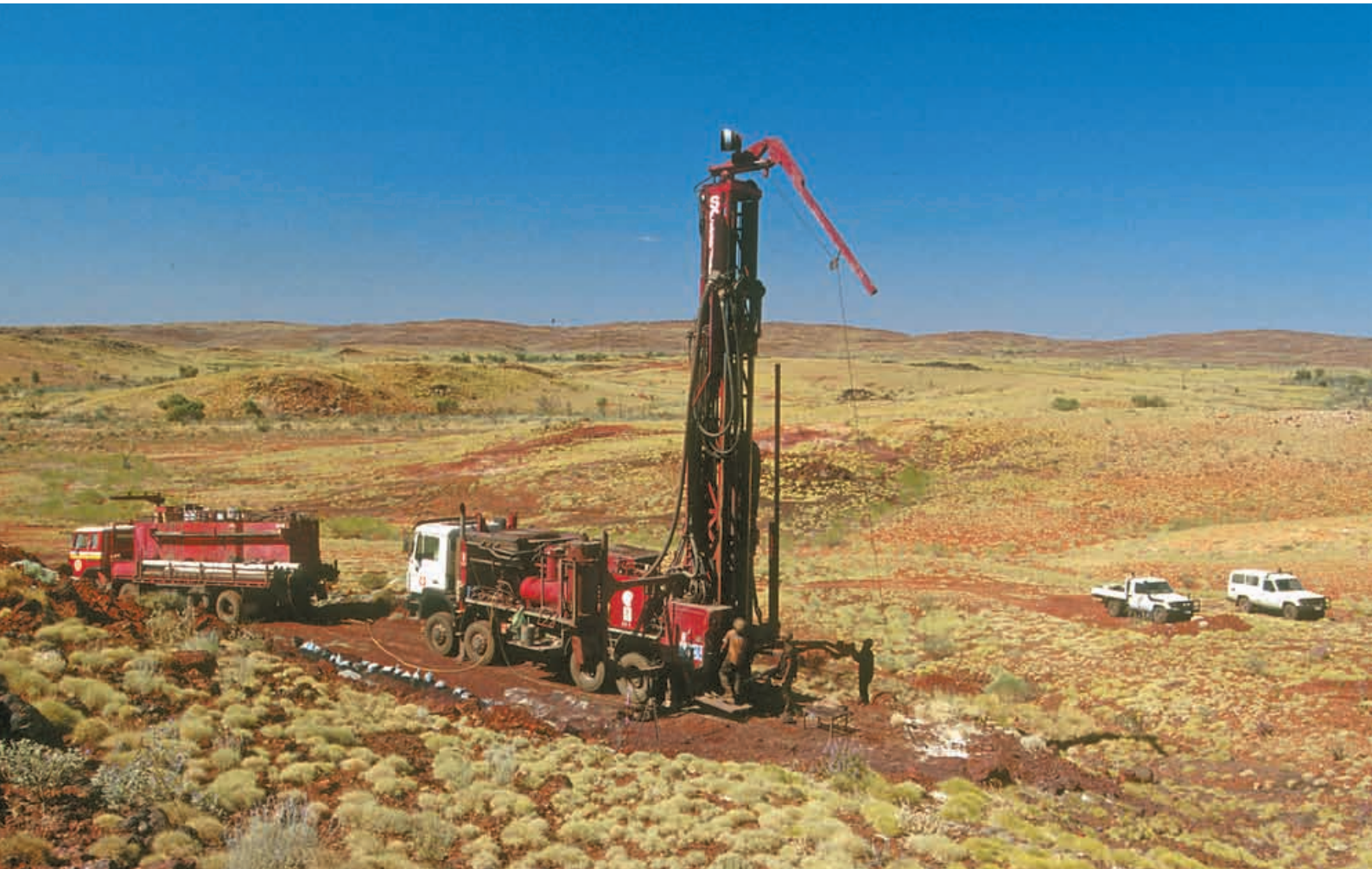




Industry Working Group Report



Review of Approval Processes in Western Australia

Prepared for the
Minister for Mines and Petroleum
April 2009

For more information regarding this report, contact Mr Graham Cobby, Department of Mines and Petroleum, telephone +61 8 9222 3896 or email graham.cobby@dmp.wa.gov.au



INDUSTRY WORKING GROUP

Review of Approval Processes in Western Australia
Chair: Hon. Peter V. Jones AM.

Hon. Norman Moore MLC

Minister for Mines and Petroleum; Fisheries; Electoral Affairs

Dear Minister,

Review of Approval Processes in Western Australia

The resource sector (mining and petroleum) is the key economic driver for the Western Australian and Australian economy. The Premier and his colleagues have made it clear that the State requires an approval system that provides a balance of social, economic and environmental needs which are in the best interests of Western Australia.

A credible, transparent approval system, which has integrity and is readily understood and respected, was an essential element of economic development in Western Australia for many years following the launch of the State's growth in the late "1950s". Western Australia attracted significant capital investment to fund the expansion which saw population grow, new towns and ports established, and new employment opportunities increase as resource development, service industries, and new social infrastructure sprang up across the State.

We can no longer boast of our approval system being the best in Australia. It has deteriorated to where it is criticised for taking too long, being too costly, too bureaucratic, "process driven" rather than being focused on outcomes, and not always representing the objectives of the elected government.

This present situation has developed over the past 25 years. Successive Governments have enacted more legislation, created additional departments and agencies, while additional requirements for licensing, regulatory approvals and compliance, have been approved by Parliament without sufficient review of their effect upon the existing regulatory and licensing arrangements. At the same time, the Commonwealth Government has become more intrusive, enacting requirements for Federal approval and other demands, where it acquired power following its acceptance of United Nations environmental and similar Treaties. This intrusion is mainly evident through the *Environmental Protection and Biodiversity Conservation Act 1999*, native title legislation, and Aboriginal heritage issues.

In the past decade, there has been a series of reports to Government, including recommendations for substantial improvement of the approval process. These include the major review commissioned by the Gallop Government in 2001 and chaired by Dr. Michael Keating. This report was released in April 2002, and apart from implementing some administrative changes, a number of key recommendations were not implemented, and no great improvement to the system resulted. In the following years, there were subsequent reports from the Office of the Auditor General, annual surveys by the Canadian Fraser Institute, and comments from the Parliamentary Public Accounts Committee.

In summary, the acceptance and implementation of the recommendations from all reports has been dismal. The primary reason for this failure has been a lack of leadership by responsible Ministers and senior departmental officers to ensure the recommendations were implemented. Government agencies and departments have been allowed to continue the present undisciplined, uncoordinated and unaccountable system which has existed since 1986. In that year, the then Government brought in the new *Environmental Protection Act 1986*, which in effect, gave legislative and operational primacy to the

Environment Department and to the Environmental Protection Authority. The accountable “one-stop-shop” which had existed up to that time and upon which the significant economic development of Western Australia was based, was gradually eroded, and various processes and requirements were implemented which resulted in time delays, greater expenditure by proponents, and a sense of uncertainty and capital risk gradually emerged.

Given the present economic outlook for Western Australia’s existing industrial base, and the resultant decline in State revenue, it is critical that in supporting the State’s existing industries, together with attracting further investment, the complete approval system be reviewed, and structural as well as administrative changes, be implemented.

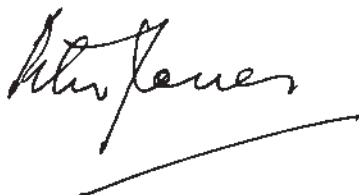
In November 2008, the Minister for Mines and Petroleum announced that he had set up an Industry Working Group to review and advise on ways to improve the State’s exploration and development approval process. The Group was given a series of proposed objectives, including providing a structure for implementing changes.

In discharging its responsibilities and in preparing this report, meetings and discussions have been held with proponents seeking project and investment approvals, Government departments and agencies, departmental officers, and consultants engaged to provide required reports and information. I convey our thanks and appreciation to all those who have spoken with us, and assisted in providing the details and information we needed.

Previous reports and recommendations have also been reviewed, and contact has been maintained with those currently engaged in the approvals process. This latter contact has already resulted in changes and improvements in some areas where improvements could be implemented through administrative decision. This movement reflects a growing acceptance that significant re-assessment of the existing processes and requirements is overdue, and needs to be implemented if Western Australia is to regain its previous status as a safe and welcoming destination to invest and conduct business. This is even more important at the present time in view of the current economic downturn.

The Industry Working Group is very mindful to ensure that proper understanding and consideration of environmental issues is in no way diminished by the report recommendations. In fact, the Industry Working Group believes consideration of these matters will be fairer and more comprehensive if the recommendations are implemented.

In submitting this report, I advise that the contents reflect a challenging task for Government, which the Group has diligently discharged, knowing its critical social and economic importance to the future welfare of all Western Australians. To the extent that the recommendations in this report are accepted by Government, it will be critical to their successful implementation that the Government demonstrate clear, firm and ongoing leadership.



Hon. Peter V. Jones AM.

Chairman,
Industry Working Group

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1. Executive summary and key recommendations

Executive Summary

In discharging its responsibilities, the Industry Working Group and those involved in reviewing the approval processes and preparing this report, have held discussions and meetings with Government departments and agencies, departmental officers, project proponents and consultants engaged to provide the required reports and information to assist in the assessment processes. Previous reports and recommendations were also reviewed, especially with regard to the fate of each report's recommendations.

The approval processes in Western Australia have become more detailed, more costly, and in many cases, increasingly removed from the precise assessment and approval requirements of the proponent. This has led to a complex system which cannot be easily understood, and at times, cannot be justified. This review is a re-assessment of a system which has brought Western Australia from having what was considered the best understood and effective approval system in Australia, to the present low level of credibility, coupled with a high level of criticism.

It is a sobering thought to realise that several of those projects which have driven the Western Australian economy and provided social and economic benefits for more than a generation, would today experience great difficulty in gaining acceptance from the present approvals system.

Successive Governments have realised this, and commissioned various reports and enquiries. Unfortunately, these examinations were followed by less than adequate support given by governments for change and improvement, and have not resulted in an improved, less costly and less complex system.

Since the great mineral and energy developments of the 1960s and 1970s, political attitudes about environmental matters and indigenous issues have powerfully evolved. They have had major impacts on approval processes, but on a piecemeal basis. Little, if any, serious thought appears to have been given at the level of government policy, to the cumulative effects of these impacts.

The insertion of these considerations into the process has vastly increased cost, delay and uncertainty. This disruption has not only been a great frustration to very large international enterprises, which have the geographical spread of projects, the cash flow and expertise, to cope, but has had a most serious effect on small and medium size companies, which lack the financial resources, (and thus the time), to endure labyrinthine procedures and delays which can continue for years. It should also be noted that the nimbleness and urgency of these companies and individual prospectors, constitutes the 'engine room' of exploration.



In reviewing the existing approvals processes, it became apparent that each involved department and agency was possessive and at times opaque, regarding its processes, functions and what it saw as its key approvals issues. There would appear to be a different emphasis in each area, with what each one saw as important to it being the key aspect to be developed and protected. While this can be understood to some degree, it has meant that:

- most key recommendations from previous reports have not been addressed or properly implemented;
- the suitability of processes within departments and agencies have not been regularly re-assessed to ensure appropriate outcomes are being achieved;
- the necessary “whole of Government” outcome from the approval process has not been achieved;
- there is a lack of “materiality” amongst officers making critical decisions and placing costly, and at times, unnecessary, demands upon project proponents; and
- too often, the departmental view is advanced and implemented, despite it differing from government policy and the positions of other departments and agencies involved in the same approval processes.

There has also been merging of departments and agencies which has not helped the overall approvals system and the policies involved. This has led to different views being expressed within government agencies and policies pursued within areas of government, which has not been helpful to the overall outcome required.

This appears to have been most notable in relation to environmental approvals. The great power of Western Australia’s *Environmental Protection Act 1986* has had unintended and unforeseen consequences, coupled with an apparent lack of materiality and failure to focus on outcomes. The delays encountered in navigating through the environmental requirements, have led to other departments and agencies losing focus on their own tasks as they wait for the environmental clearance. Getting through the process, in whatever shape, has come to take precedence over getting the best outcomes. This may lead to unbalanced or incomplete information going forward to the decision-making levels of government.

Responsible resource development has had, and will continue to have a negligible impact on Western Australia’s environment. Clearly, there are particular sensitive environments that should be rigorously protected. The environment is an important consideration, but it is not always, or even often, the only one. A weak economy is a far greater threat to the environment than is responsible development.

As the elected Government is the maker of policy, it also has the responsibility to ensure that its stated policy vision and details are clearly understood, acknowledged and carried out by the departments and agencies entrusted with the consideration and management of approvals applications. Currently, this is not necessarily happening within the approvals system.

In the document titled “Strategic Review of the Banded Iron Formation Ranges of the Midwest and Goldfields”, released in October 2007 by the Departments of Environment and Conservation and the then Department of Industry and Resources, policies attributed to the former Government relating to intended creation of reserves, exploration and development restrictions and other intentions were indicated, which still appear to be pursued by the Department of Environment and Conservation. This has led to difficulties between departments and agencies, as well as with proponents seeking to pursue the advancement of exploration and projects. Where such issues arise, the departments involved have

a responsibility to seek Government clarification of any such policy differences. Above all, Government should also ensure that its policy in such circumstances is clearly understood by the departments and agencies responsible for handling the approval processes.

It is considered that currently, Government is not fully aware, or has not approved, all of what some of its agencies are requiring of proponents, and the policies that are being pursued. The Environmental Protection Authority is the main adviser to Government on environmental policy, and related matters. Increasingly however, it, and other statutory bodies would seem to have developed policies, processes and requirements, which they have pursued and enforced without the current Government's endorsement.

The primary reason for this situation has been a lack of initiative by responsible Ministers and senior departmental officers in ensuring that Government policies, together with the recommendations of previous approval reports, were implemented. For that reason, we are recommending that a Parliamentary Secretary, a senior officer, or an external person with the appropriate knowledge and experience to champion the recommended reforms.

As mentioned above, previous reports and recommendations have been largely ignored, or not addressed as their authors saw necessary.

This report provides a two phased approach to improving approval processes in Western Australia. Phase one recommendations are essentially administrative and can be addressed without legislative change. Phase two recommendations require legislative change. The Industry Working Group and all those involved in the preparation of this report are very definite in one key aspect – **the need to address and change the present flawed and complex approvals system is critical, and the time for implementing phase one recommendations is NOW.**

The phase one recommendations are a first step in that direction, but will not of themselves be sufficient to deliver the best understood and effective approval system in Australia.

The Industry Working Group is also recommending (phase two) that Government investigate the benefits of establishing a single decision making authority. Such a model would greatly increase the efficiency and credibility of the approval processes, and could apply across Government to areas such as planning, local Government, etc., as well as this current study relating to the mining and petroleum industries. As mentioned within this report, the elected Government is the final arbiter of policy and as such, needs to be fully aware what its agencies are doing and imposing, and to have considered and approved what is being implemented by its agencies. Realistically, a significant change of this order would take longer to investigate and implement.

If Western Australia is to recapture an approvals system which is easily understood, has integrity, credibility and is accountable, then a different and less complex approach needs to be implemented, and a greater focus on outcomes developed. The efficient and immediate implementation of phase one recommendations would support this objective and is strongly endorsed.



Key recommendations – phase one

Phase one recommendations relate to policy and administrative matters and can be implemented without the need for legislative change. The Industry Working Group (IWG) provides the following phase one recommendations:

Recommendation 1 – Define the Western Australian resource development policy

It is recommended that the Government clearly define its vision and policy for economic and social development, with special reference to developing the State’s mineral and petroleum resources. It is recommended the Government publish a resource development policy to support the vision.

This publicly available policy will provide a clear direction for departments and agencies, industry and the community. The policy will assist project proposal approval decision making. The policy should make clear approval objectives and indicative timelines for all State mineral and petroleum exploration and development proposals.

Recommendation 2 – Establish a natural resources agency

Despite the merger of the Department of Conservation and Land Management and the Department of Environment, significant cultural, philosophical and policy differences continue to create impediments to the efficiency and effectiveness of the State’s approvals processes.

To address this, and other impediments, it is recommended that government, through the Economic Audit Committee, consider structural change to establish a natural resources agency.

A proposed Department of Natural Resources would better support the delivery of efficient and effective environmental management services and approvals, and provide an increased focus on conservation and land management to existing and future National Parks and Reserves.

Recommendation 3 – Establish a “stand alone” role for the EPA

The Environmental Protection Authority (EPA) is the primary environmental policy advisor to Government. No change to this advisory role is proposed. Similarly, no change to the authority of the Minister for Environment is proposed.

Currently the EPA does not control its own resources. Resources are provided by the Department of Environment and Conservation (DEC).

It is strongly recommended that the Environmental Protection Authority (EPA), its service unit and its advisory role be a “stand alone” responsibility. It is proposed that the EPA retains its independent environmental impact assessment advisory role for prescribed or high risk environmental proposals and that the EPA be directly resourced and held accountable for its resources and outputs.

It is recommended that the EPA take responsibility for the functions of Part V (excluding works approvals and licences required for activities on mining tenements and petroleum permits, leases or licences) of the *Environmental Protection Act 1986*, contaminated sites and associated compliance monitoring functions to remove duplication and overlap within the environment portfolio.

To reduce duplication and streamline approvals, it is recommended that the requirements for works approvals and licences under Part V of the *Environmental Protection Act 1986* for mining and petroleum activities be incorporated into mining and petroleum approval processes.

Recommendation 4 – Establish an independent “Approvals Reform Office”

It is recommended that government establish an independent approvals reform office to assist relevant Ministers drive approvals reform. The office would be responsible for overseeing the implementation of Government endorsed reform recommendations.

It is recommended that a Parliamentary Secretary, senior officer or an external person with the appropriate knowledge, who has direct access to the Director General of the Department of Premier and Cabinet, and to the Premier, be appointed to assist relevant Ministers deliver approvals reform.

Recommendation 5 – Reform Native title and Aboriginal heritage processes

Uncertainty, complexity and the resultant delays associated with native title and Aboriginal heritage have a disproportionate adverse impact on mineral and petroleum tenure and activity approval timelines. In particular, the original objectives of the *Aboriginal Heritage Act 1972* (AHA) are not being fully achieved to the detriment of economic development in the Western Australian resource sector. There are opportunities for improving the administration of Aboriginal heritage policy, procedures and guidelines which, if implemented, would help achieve the objectives of the AHA and provide more certainty for the development of projects in the regions of Western Australia.

The effective and efficient administration of the processes contemplated by the *Native Title Act 1993* (Cth) (NTA) is critical for the development of projects in remote and regional Western Australia. The State has a significant role in the successful outcomes of these processes including:

- The Office of Native Title (ONT) administers the Government’s native title policy generally, and ONT has a central role in the resolution of native title claims
- The Department of Mines and Petroleum (DMP) represents the State as a party in many ‘future act’ arbitral proceedings in the National Native Title Tribunal; and
- The Department of Indigenous Affairs (DIA) administers the AHA and provides advice to Government on Aboriginal heritage policy. The DIA’s role is relevant because the contentious point in many ‘future act’ processes under the NTA is Aboriginal heritage protection. This is especially the case where the relevant ‘future act’ is the grant of an exploration title (such as a prospecting licence or exploration licence under the *Mining Act 1978* (WA)). For such exploration titles, the NTA’s ‘future act’ process is referred to as the ‘expedited procedure’.

The former Government attempted to facilitate the grant of exploration titles through the ‘expedited procedure’ future act process by agreeing a series of ‘Regional Standard Heritage Agreements’ (RSHA’s) in and around 2002/03. This was initially partially successful, but the use of RSHA’s has fallen away mainly due to the unwillingness of Aboriginal groups to work within the present unregulated RSHA framework.

It is recommended that there be a renewed focus on resolving native title claims. This includes using the Federal Courts where satisfactory progress in claim resolution through mediation is not being achieved within reasonable timeframes.

It is recommended that native title “future act” processes be initiated by the State expeditiously and in parallel with other non-native title processes wherever practicable.

Additional resourcing of Warden’s Courts is recommended to ensure that objections lodged by native title claimants are actively prosecuted and progressed to avoid delays to other statutory approval processes.



The original objectives of the AHA appear to have been misinterpreted by some parties to the detriment of the protection of Aboriginal heritage and development in Western Australia. Information provided to the Industry Working Group indicates that a heritage survey “industry” has developed over the last 5 years that has contributed to unacceptable work practices, unnecessary heritage surveys, inaccurate data recordings and unnecessary expense for the mining and petroleum exploration industry and the public of Western Australia.

It is strongly recommended that the efficiency of the administration of the AHA be improved through administrative reform. It is not recommended that the AHA be reviewed and legislatively changed at this time. A series of administrative and regulatory reforms are required to establish clear guidelines and fee structures for the conduct and registration of aboriginal heritage surveys, together with section 18 procedural transparency through strategic reform and establishment of appropriate conditions. A review of the register of sites and record keeping practises is required. It is recommended that appropriate training is provided to DIA staff.

It is recommended that new Aboriginal heritage guidelines being developed by the Department of Indigenous Affairs (DIA) are reviewed by the mining and petroleum industry prior to final endorsement by the Minister for Indigenous Affairs. The impact of these guidelines on existing work practices, approval timelines and heritage survey costs should be measured over a 12 month period. It is recommended that DIA and the resource industry jointly develop appropriate impact measures. A report on the impact of the new guidelines using these measures should be provided to the Minister for Indigenous Affairs and published on the DIA website by 1 July 2010.

Recommendation 6 – Reform the *Environmental Protection Act 1986* appeals process

There have been serious procedural questions about the manner in which appeals under Part VII (Appeals) of the *Environmental Protection Act 1986* are conducted. Concern has also been expressed about the appointment of ex-DEC and former agency staff as appeal convenors.

It is recommended that the appeal process be reformed to address the issues of procedural weakness and concern about the manner in which appeals are conducted. It is recommended that the fundamental principles of administrative law are adopted in the relevant current legislation and that those administering the system are properly trained in administrative law. It is recommended this occur through immediate administrative reform.

It is recommended that appropriately qualified people should be appointed as appeal convenors.

To address the areas of concern associated with the present appeals process, and to bring procedural integrity and transparent accountability it is recommended that the responsibility for the appeal process be transferred to the State Administrative Tribunal.

Pending this transfer, it is recommended that a retired magistrate be appointed to hear appeals, and to implement appropriate hearing procedures.

Recommendation 7 – Reduce the objections backlog at the Warden’s Court

During the financial year 2007/08 there were 885 objections under the *Mining Act 1978* referred to the Warden’s Court. An application for a new mining title cannot be progressed until an objection has been resolved. Currently, this process can take between 6 – 12 months or longer to resolve. The *Mining Act 1978* provides for any person to object to grant of new title within 35 days of lodgement. However, the 2006 amendments to the Warden’s Court procedural requirements under the Mining Regulations 1981 have failed to deliver in terms of expedited outcomes for objections.

There are currently five magistrates appointed as Wardens under the *Mining Act 1978*. They are not full time Wardens. It is estimated that between 10 - 50% of their time is spent on mining matters. The number of Warden’s Court hearing dates is limited by the number of Wardens available and their workload. For example, there are only 8 hearing dates scheduled in the 2009 calendar year for the Karratha area.

It is recommended that Government consider the appointment of a full time Mining Warden and increase the number of hearing dates. It is recommended that Government consider appointing retired magistrates as additional Mining Wardens to address the backlog of objections referred to the Warden’s Court.

It is estimated that 95% of all objections are resolved between parties just prior to hearing dates. If this is accurate, government assisted pre court conference meetings coupled with an increase in the number of hearing dates would assist in the resolution of objections.

It is recommended that government consider appointing suitable fit and proper persons to be Wardens of Mines as per Sections 13 and 14 of the *Mining Act 1978* to facilitate pre court conference meetings and reduce the number of registered objections.

Recommendation 8 – Reform the administration of environmental offsets

Having regard to the additional inconvenience, financial costs and uncertainty, it is recommended that all offset arrangements be transparent, be finalised in the original scoping of the approval process, and be subject to Ministerial approval and Cabinet endorsement.

It is recommended that there should be no ad hoc offset arrangements and that rules and guidelines for such arrangements be prepared together with industry, and forwarded for Ministerial consideration and Cabinet endorsement. Such arrangements, where appropriate, must be factored into the process at the start.

Recommendation 9 – Review Government policy

Information made available to the Industry Working Group strongly suggests that decision making within some agencies is still being made on the basis of previous Government policy.

It is recommended that Government immediately review the policies of the former Government that impact on the approvals processes to ensure that they reflect the current policies of the present government. This would include the document titled “Strategic Review of the Banded Iron Formation Ranges of the Midwest and Goldfields”, the associated “Draft North Yilgarn Management Plan”, and all other relevant mining and petroleum, environmental, native title and heritage policies.



Recommendation 10 – Encourage agency use of external resources

As previously recommended by Government, and repeated in the Auditor General's Report Number 5 October 2008 titled "Improving Resource Project Approvals", it is recommended that agencies use accredited consultants, certified assessors and establish expert panels to assist agencies in the approval process.

There are examples of industry funded expert panels that have greatly facilitated the approval process without compromising the integrity of the outcome.

Recommendation 11 – Improve cross agency access to technical information

The Auditor General's Report Number 8, dated September 2007, titled "Management of Native Vegetation Clearing" drew attention to the failure of the DEC to provide proper access to its technical data base. There is restricted access to some of DEC technical databases which are important for assessing applications for clearing native vegetation associated with mineral and petroleum proposals. In particular, Declared Rare Flora and Priority Flora, Threatened Fauna, and Threatened Ecological Community databases are not made fully available.

It is recommended that this information is provided to the EPA database and other relevant agencies to assist government approval decision making.

Recommendation 12 – Review of internal approval processes and timelines

It is recommended that the Ministers having responsibility for key approval agencies, such as the Department of Planning and Infrastructure, Department of Indigenous Affairs, Department of Mines and Petroleum and the Department of Environment and Conservation, appoint suitable panels to review agency key approval processes and provide a report to the Premier, via their Ministers, by end of September 2009.

A key element of this review should be to rectify the general lack of approval target timelines and transparency in decision making within government.

It is recommended all government departments involved in approvals are required to publish key approval timeline targets and performance measures on departmental websites on a quarterly basis.

Key recommendations – phase two

The implementation of phase two recommendations would require either significant change or legislative amendment.

Recommendation 13 – Establish a single decision making authority (DMA)

It is recommended that Government establish a single decision making authority for all mining and petroleum proposals. The single decision making authority would have in place an integrated assessment process to ensure key social, economic and environmental issues are considered.

A single decision making authority for all mining and petroleum proposals represents a significant change to the current multi-agency approvals system and warrants careful and detailed investigation.

Recommendation 14 – Amend Section 41 and Schedule 6 of the *Environmental Protection Act 1986*

Section 41 of the *Environmental Protection Act 1986* has been interpreted by certain decision makers as preventing them from continuing the normal proposal assessment process. That was never the intent of section 41.

For clarification, it is recommended that section 41 be amended so that:

- 1. Statutory project approvals and tenure can be granted prior to the environmental impact assessment (EIA) approval being granted; and**
- 2. Works cannot commence under those project approvals or the title until the EIA approval has been granted by the Minister for the Environment and all other statutory approvals are in place.**

There is duplication and overlap of native vegetation clearing assessment processes between the *Environmental Protection Act 1986* and the *Mining Act 1978*, State Petroleum Acts and relevant State Agreement Acts. For many mining or petroleum proposals, native vegetation clearing is assessed twice, once under Part V of the *Environmental Protection Act 1986* and secondly under the mining and petroleum approval requirements.

To reduce duplication and deliver better environmental outcomes, it is recommended that all native vegetation clearing associated with proposed mineral and petroleum activities be assessed under the authority of the *Mining Act 1978*, State Petroleum Acts and relevant State Agreement Acts.

To ensure there is no change to the standard of native vegetation assessment applied, it is recommended that the clearing principles of the *Environmental Protection Act 1986* (Schedule 5) are integrated into the mining and petroleum proposal assessment processes. This would require amendment of Schedule 6 of the *Environmental Protection Act 1986* and administrative changes to the mining and petroleum proposal assessment processes.

Recommendation 15 – Amend the *Mining Act 1978* to allow for railways in miscellaneous licences

The development of railways to service iron ore projects has in the past been accomplished under State Agreement Acts, and this has to date only applied to the Pilbara region. There is demand from both large and small iron ore producers in the Pilbara for railway transport. A *Mining Act 1978* miscellaneous licence is an easement title capable of crossing other mining tenements and other land titles. Importantly, it does not extinguish native title. Title for rail under the *Land Administration Act 1997* requires a resumption of native title and this can lead to delays and increased compensation costs. The lack of a viable title process can delay the commencement of new iron ore projects.

To streamline approvals, it is recommended that the *Mining Act 1978* be amended to allow for a miscellaneous licence that includes the development and use of railways.



2. Introduction

2.1 Review objectives

The objective of the Industry Working Group was to provide strategic advice to the Minister for Mines and Petroleum and the Government about how best to improve the credibility and efficiency of Western Australia's mining and petroleum exploration and development approvals processes.

The group was requested to review all approvals associated with exploration, development and production phases of mining and petroleum activity. It therefore was particularly concerned with the approvals required under the Western Australian *Mining Act 1978* and State Petroleum Acts, as well as specific issues raised associated with mining, and petroleum activity under other legislation.

The objectives of the review included reviewing existing approval processes (environmental, tenure, planning, native title and Aboriginal heritage) necessary for mining and petroleum activity to occur in WA including consideration of:

- timelines associated with these processes;
- impediments, overlap and duplication by State and Commonwealth agencies;
- mechanisms for review of decisions;
- benchmark against selected jurisdictions in Australia and elsewhere;
- identifying which impediments can be addressed through changes to government policies and administrative processes, and those which will require legislative change;
- developing a framework to ensure better co-ordination across agencies to achieve more timely approvals – including provisions to ensure decision-making within specified timeframes;
- providing a programme for implementation of administrative changes – which should happen quickly;
- legislative changes which could be contained in an omnibus Bill and be given priority in the parliamentary legislative program;
- a mechanism for ongoing review of implementation, based on milestones with input from industry; and
- identification and analysis of the key issues that stakeholders have with the approvals processes, and actions that can be taken to improve Western Australia's reputation as a place to do business in the mineral and petroleum industries.

2.2 Industry Working Group

The Industry Working Group was established by the Minister for Mines and Petroleum in November 2008. The first Industry Working Group meeting was held Friday 21 November 2008. Subsequent meetings were held 12 December 2008, 12 February 2009, 6 March 2009, 3 April 2009 and the 23 April 2009.

The group was tasked to provide a final report for the Minister for Mines and Petroleum by April 2009.

The Industry Working Group comprised of the following members:

Hon. Peter Jones, Chairman.

Former Minister for Resources Development, Mines, Fuel and Energy.

Mr John Bowler, MLA, Deputy Chairman.

Member for Kalgoorlie. Former Minister for Resources.

Mr Chris Clegg, Consultant, Mineral Tenement Management Services.

Mr David Parker, Government and Public Affairs Manager, Apache Energy.

Mr Derek Carew Hopkins, Advisor, Office of the Minister for Regional Development. Former Acting Director General, Department of Environment.

Mr Doug Koontz, Principal Environmental Consultant, Aquaterra

Mr Ian Fletcher, BHP Billiton's Vice-President Government Affairs.

Mr Ian Wight-Pickin, Chief of Staff, Office of Deputy Premier,

Minister for Indigenous Affairs.

Mr Mark Gregory, Partner MinterEllison Lawyers, Native Title Resources Law.

Mr Noel Ashcroft, Chief Executive, Government Relations, The Griffin Group.

Mr Richard Ellis, Director (WA).

Australian Petroleum Production and Exploration Association.

Mr Tim Shanahan, Director, Energy and Minerals Initiative.

University of Western Australia.

Mr Tony van Merwyk, Partner, Freehills Lawyers, Environmental Law.

Secretariat support to the Industry Working Group was provided by the Department of Industry and Resources until 31 December 2008 and the Department of Mines and Petroleum thereafter.



2.3 Other approval review groups

The Industry Working Group review contributes to a broader review of State approval processes coordinated by the Department of Premier and Cabinet. Figure 1 provides a diagram of the relationships between these approvals review groups.

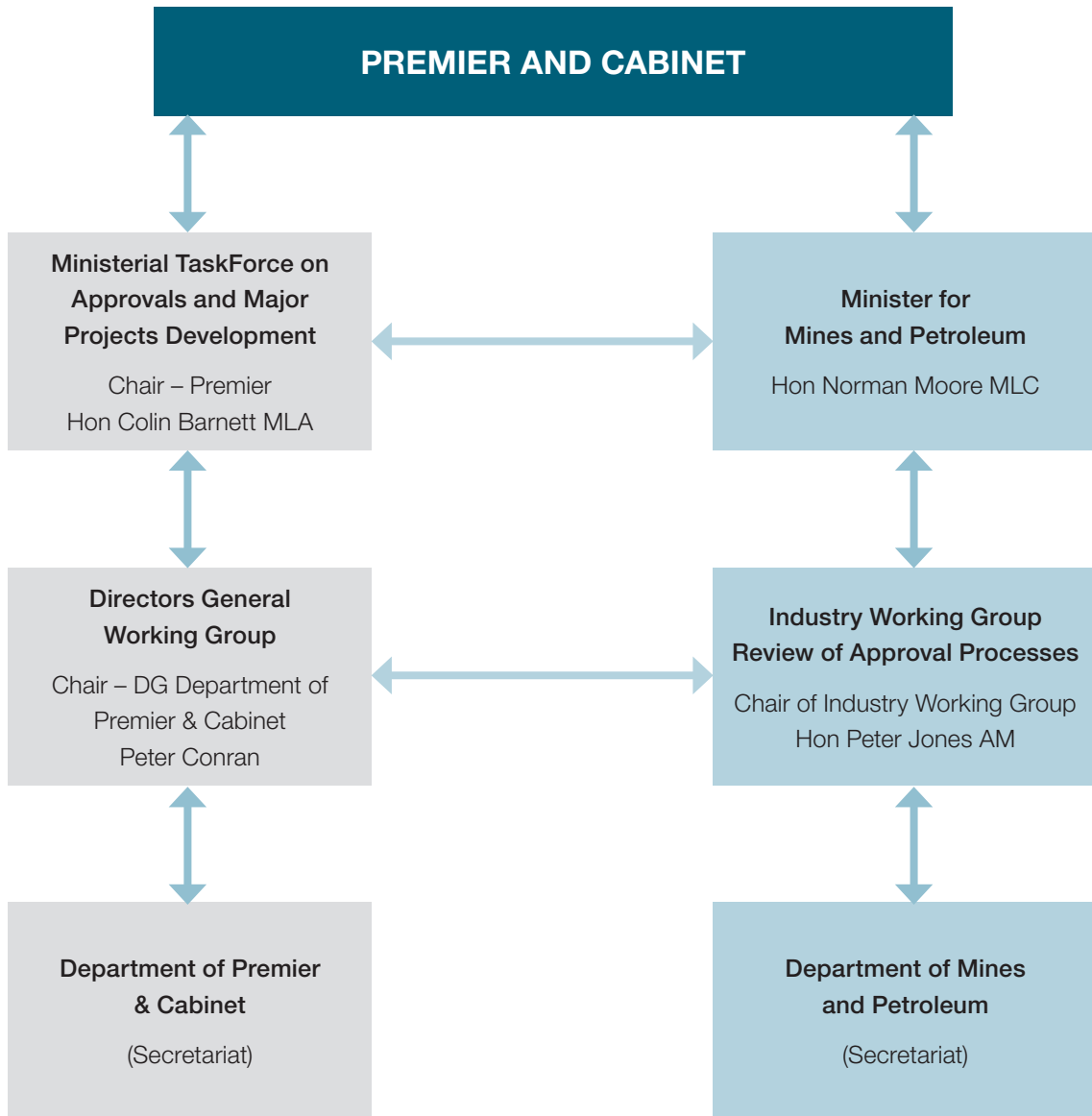


Figure 1: Relationships between the Industry Working Group and other approval review working groups.

3. Native title and Aboriginal heritage approval issues

This chapter provides information regarding the key approval issues identified by the Industry Working Group, Government departments and other stakeholders. The key issues are broadly grouped into native title and Aboriginal heritage, environmental and other related approval issues. In each of these broad groupings, case studies relevant to the resource sector are provided to illustrate the impact of the issue on project approval processes.

Section 3.1 details the specific native title and Aboriginal heritage issues that adversely impact on the Western Australian approval process. Case studies relevant to native title and Aboriginal heritage are provided to place the issues into context. Where possible, the submissions are provided in their original form.

3.1. Native title and Aboriginal heritage issues

The *Native Title Act 1993* (Cth) (NTA) is Commonwealth law, intended to provide for the recognition and protection of native title. It also provides a means by which land tenure for resource projects can be validly obtained in coexistence with potential or actual native title. This section provides information from a resources industry perspective regarding the issues associated with the administration of this legislation.

The *Aboriginal Heritage Act 1972* (WA) (AHA) is the principal Western Australian legislation providing for the protection and management of the Aboriginal cultural heritage of the State, for the benefit of the whole Western Australian community. Information regarding the operational issues associated the administration of the AHA is provided in this section.

Native title issues

A key objective of the *Native Title Act 1993* (Cth) (NTA) is to provide certainty of process and outcome in relation to native title matters. The NTA encourages agreements about the resolution of native title claims and the obtaining of project approvals over land where native title exists or may exist. The NTA also provides a relatively clear means to resolve these issues through administrative and/or judicial process where agreement is not reached (or not required).

The NTA in some cases confers very significant procedural rights on persons who hold or claim to hold native title. The processes include the “right to negotiate” and “right to consult”¹. These rights apply regardless of whether the claim has validity or is successful or not. There is therefore an incentive, particularly where there are multiple claimants, not to have the claim resolved. Those processes apply to most exploration, mining and infrastructure tenures required for exploration and development projects in Western Australia, and can, and often do take many months even years, to complete. A failure to comply with the requirements of the NTA can lead to the invalidity of project approvals².

The effective and efficient administration of the processes contemplated by the NTA is critical for the development of projects in remote and regional Western Australia.

¹ Subdivisions M and P of Division 3, Part 2 of the NTA.

² NTA, section 24AA(2).



Delays in completing native title processes and/or the imposition of onerous conditions have the potential to delay or stop development that may otherwise proceed, particularly in difficult economic circumstances or where there are other alternatives within Australia or internationally. The relocation of the massive INPEX LNG project to the Northern Territory is one example where the lack of certainty regarding land access was a factor in determining that a major project would not proceed in Western Australia.

Although there are many examples of agreements to resolve native title approval issues (and among those agreements some have resulted in significant benefits to native title claim groups), the vast majority of Aboriginal people in Western Australia receive no significant direct benefit from native title agreements. Most of the (reported) major native title agreements benefit a relatively small number of Aboriginal people and a few groups have received (and continue to receive) very large financial payments as a result of the development of multiple large projects within their claim areas.

There is also a history of native title claim groups splintering after an agreement has been entered into with a proponent. This has sometimes resulted in multiple overlapping native title claims being lodged over the same project areas. Examples can be found in the Pilbara region where BHP Billiton and Rio Tinto have entered into such agreements.

Consequently, although agreement making should continue to be encouraged as a priority, it is not a panacea. Although the NTA is a law of the Commonwealth, the State has a critical role in its implementation of the material aspects of this legislation, and in supporting Western Australian resource exploration and development.

The State is a party to all native title claims that affect land and waters in the State and is generally the “lead” respondent to each claim. Consequently, the State is able to have, and should take a significant role in any agreed or litigated outcome of native title claims and can influence how quickly particular native title claims are progressed by the Federal Court.

The State is responsible for implementing the “future act” processes under the NTA which enable the valid grant of land tenure. It is generally up to the State to decide when (and in some cases whether) to start these processes and in most cases they cannot be completed without the State’s co-operation and participation.

Some State approval processes³ give native title claim groups significant procedural rights in addition to (or as a consequence of) the processes in the NTA. The State administers those laws and is responsible for the decision making processes under them.

Despite the very significant resources committed by Government and project proponents to the resolution of native title claims and negotiation of agreements, these processes remain cumbersome and in some cases additional barriers to development appear to have been imposed as a result of policy decisions by the previous government.

Despite the passing of some 15 years since the enactment of the NTA, most native title claims and potential claims remain unresolved: even in some cases where the claims have been fully litigated and dismissed (Wongatha). The former government adopted a policy of not litigating native title claims in almost every instance. Instead it tried to resolve all native title claim issues by agreement, with a strong bias toward the recognition of native title. The result of this approach was that there have been more determinations that native title exists but most of these have been in areas where the existence of native

³ Such as under the *Mining Act 1978* and the *Environmental Protection Act 1986*.

title is uncontentious. Little progress has been made in areas where there are overlapping claims and/or the existence of native title is more contentious. In many cases, in light of the risks posed by a Federal Court trial, native title claim groups often have little incentive to resolve their claims. This is particularly so where there are competing claims, because a native title determination generally results in a reduction in the area and content of registered native title rights⁴.

The lack of certainty about whether native title exists, and if so who holds it, adds significantly to the uncertainty and delay involved in addressing native title issues in at least four material respects:

- until native title claims are resolved (particularly where there are multiple claims) it is difficult to determine which Aboriginal groups should be negotiated with and what (if any) their rights are. In the absence of a determination of native title, many native title claim groups are fragmented and poorly organised;
- in some cases, there are two or more overlapping native title claims, with each Aboriginal group contending they are the “right” group for the area (sometimes to the exclusion of the other group(s));
- agreements entered into in good faith by industry in the Pilbara have in some instances not delivered certainty of land access despite ongoing compliance by the proponent including the making of very substantial monetary payments. A major factor in this failure is that the groups who entered into the agreements have split or re-organised in such a way that they no longer co-operate with each other (or the proponent) including by refusing to participate in heritage surveys or facilitate development. In practice, agreements are very difficult to enforce against an unincorporated Aboriginal group with an uncertain and changing membership; and
- where native title claims are resolved by consent, technical problems can arise from the recognition of native title (such as doubts about the validity of miner’s rights and access to “stranded” tenements). The Industry Working Group has been advised that the former government declined to address these issues during the negotiation of consent determinations.

Although the NTA contemplates that the same “future act” processes apply in relation to native title claim land and land where native title has been determined to exist⁵, some native title holding groups have contended that more onerous processes should apply and native title holders (as opposed to claimants) should have entrenched rights to control development over and above those conferred by the NTA. The former government appeared inclined to accept this position of native title holding groups at least in part, such as by declining to use the “expedited” procedure for the grant of exploration titles.

Objections to mining tenement applications before the Warden are commonly made by native title parties who also have procedural rights under the NTA. The issues ventilated by native title parties before the Warden in most instances mirror those that can and are raised under native title processes.

This gives rise to the following issues:

- there are a very large number of objections before the Warden which are maintained largely to obtain commercial leverage. However, the Warden’s Court is grossly under resourced, and the office of Warden is a part time one. For example, the Karratha Warden has only 8 sitting days in calendar year 2009. This means that relatively routine objections can take years to be heard and determined.

4 Native title “future act” processes recognise whatever claimed native title rights are on the register. The scope of these rights is often reduced (particularly where there are areas where native title has been extinguished) after a determination has been made. Where 2 or more claim groups exist and dispute the entitlements of the other, the claimed rights of each group are recognised under the future act process even if ultimately one or more of the groups is found to not hold native title at all.

5 Subject to some limited exceptions such as the “low impact” future act process in section 24LA of the NTA.



- the Department of Mines and Petroleum (DMP) is sometimes reluctant to commence native title processes while there are unresolved objections before the Warden.

Aboriginal heritage issues

The *Aboriginal Heritage Act 1972 (WA)* (AHA) is the primary Western Australian legislation providing for the protection and management of the Aboriginal cultural heritage of the State, for the benefit of the whole Western Australian community.

The Minister for Indigenous Affairs has overall responsibility for the administration of the AHA⁶. Where the AHA provides, the Minister must have regard to the advice of the Registrar for Aboriginal Sites (Registrar) and the Aboriginal Cultural Material Committee (ACMC)⁷ but is not obliged to follow that advice. The Department of Indigenous Affairs (DIA) has day to day responsibility for the administration of the AHA, under the direction of the Minister.

The AHA protects all places and objects that meet the criteria provided for in sections 5 and 6 of the AHA (protected matters)⁸. The ACMC's functions include the evaluation of the significance of places to which the AHA may apply but the requirements of sections 5 and 6 are paramount.

The AHA provides for the maintenance by the Registrar of a register of all protected matters in a manner and form determined by the Minister⁹ (Register). The Register is the only public source of information available to determine whether an area contains protected matters. Consequently, the efficient maintenance of the Register (to include the most comprehensive and accurate information possible) is fundamental to the effective operation of the AHA.

However, the Register is not a comprehensive record of all protected matters and the protective provisions of the AHA generally extend to all sites and objects that meet the criteria in sections 5 and 6 of the AHA.

Consequently, where there is any uncertainty about whether protected matters may be impacted by development, it is commonplace for proponents to make additional enquiries to identify any places or objects which may be of archaeological or ethnographic significance. Those enquiries can include a review of previous research, consultations with Aboriginal people and the conduct of ethnographic and/or archaeological heritage surveys. The latter do not require the participation of Aboriginal people in order to identify archaeological material but Aboriginal people often participate, particularly when consultation is undertaken as a precursor to the consideration of a notice given under section 18 of the AHA. Ethnographic surveys require the participation of Aboriginal people with appropriate cultural knowledge.

The only means by which a developer can ensure with absolute certainty that a major development will not result in an inadvertent contravention of the AHA is to obtain the permission of the Minister under section 18 of the AHA to conduct the relevant development activity.

6 AHA sections 10 and 11A.

7 The members of the ACMC are appointed by the Minister. One of the members must have anthropological expertise and selected by the Minister after consultation with relevant experts at universities in the State. The other members must have special knowledge or experience which will assist in the evaluation of matters of cultural significance before the committee. The members may be Aboriginal people but that is not mandatory. AHA, section 28.

8 Not all places that are identified by Aboriginal people as being associated with their culture are protected by the AHA. For example, ceremonial sites need to be of "importance and special significance" in order to attract the protection of the AHA.

9 AHA section 38.

Section 18 of the AHA operates (in summary) in the following manner:

A proponent¹⁰ who is concerned that its activities might impact on protected matters gives notice to the ACMC stating that it seeks the permission of the Minister to use the relevant land for a specified purpose. The ACMC evaluates whether there are any Aboriginal sites (that are protected matters) on the land, their significance and makes a recommendation to the Minister about whether permission should be given to use the land for the purpose proposed and if so on what conditions.

The Minister decides whether permission should be given and if so what conditions will apply. The Minister is not bound to follow the ACMC recommendations, and may take into account any matter relevant to the general interest of the community (such as the economic benefit of the proposed development).

If the proponent is aggrieved by the Minister's decision, it may appeal the Minister's decision to the State Administrative Tribunal (SAT).

Many significant projects (particularly in remote and regional areas) require the giving of the Minister's consent under section 18 of the AHA in order for development to lawfully proceed. Consequently, as with other major approvals processes, it is essential that the administration of section 18 of the AHA is undertaken in a timely and transparent manner, in accordance with the requirements of the AHA.

The effective administration of the AHA requires two critical features: competent and well trained administrators and effective and transparent processes.

An examination of the practices of the DIA, ACMC and Registrar in the administration of the AHA (and particularly in relation to the maintenance of the Register and the operation of section 18) has identified the following significant issues:

- DIA officers appear to draw adverse inferences against proponents where Aboriginal groups decline to participate in heritage surveys for reasons not directly connected with heritage issues, such as to increase commercial leverage on proponents to obtain a financial settlement. This can lead to conferring a quasi-veto in favour of Aboriginal groups over heritage processes, including the completion of heritage surveys and the seeking of consent under section 18 of the AHA.
- the practice of DIA requiring evidence that environmental approval has been granted is unnecessary and effectively means the environmental and heritage approval processes cannot be run in parallel;
- where a proposal the subject of a section 18 notice has been referred to the Minister for Indigenous Affairs, pursuant to s41 of the EP Act, the Minister cannot grant unconditional section 18 consent if that would "allow" the implementation of the proposal for the purposes of the EP Act. In these circumstances, the Minister should grant a section 18 consent subject to a condition that provides that implementation of the proposal cannot occur until the referral under the EP Act has been finalised;
- the Register maintained by the Registrar (and the DIA by delegation) does not conform to the requirements of the AHA. It appears to be a collection of information about actual or potential Aboriginal sites rather than places to which the Registrar has determined the AHA applies;
- for example, the Register includes "interim" listings which have not been the subject of evaluation to consider whether they are places that meet the criteria in section 5 of the AHA. It is not clear whether the "interim" listings are intended to form part of the Register under the AHA; and
- some of the places included in the Register are demonstrably not places that the Registrar has been satisfied meet the requirements of section 5. Examples include where the information regarding the

¹⁰ Who must be the "owner" of land within the extended meaning of that expression in section 18 of the AHA.



site is recorded as “insufficient”, “unreliable”, “lodged” or “stored data” (the latter denoting that the place has been evaluated by the ACMC and found not to meet the criteria in section 5 of the AHA).

Related to the above, the process by which potential Aboriginal sites are assessed by the ACMC and Registrar is not clearly articulated or applied. Concerns include, it is not clear how and against what criteria potential sites are assessed nor in all instances by which person or office the assessment that resulted in the inclusion of a site on the Register is made.

The ACMC and the Registrar generally do not give persons (such as the holders of interests in land) whose interests may be adversely affected by the inclusion of a site on the Register an opportunity to be heard in relation to the proposal to include a site on the Register or notice of the fact that a site is being considered for registration; information provided in support of a contention that the site meets the requirements of the AHA, including submissions by Aboriginal groups or any recommendations or assessment of the ACMC in relation to potential sites (in some cases, the ACMC and DIA have declined to provide this information in the face of an express request); or the fact that a site is included on the Register.

The Register and other information relating to places to which the AHA may apply is difficult to interrogate and in some instances information such as heritage reports lodged with DIA are not made available for easy inspection. Much of the spatial information about sites on the Register is unreliable and not verified before it is included.

The formulation of conditions that are imposed on some section 18 consents are perceived in some instances as being unworkable or impractical. Failure to comply with a condition exposes a developer to an offence under the AHA. However, because of the delays associated with the timeframes in applying for section 18 approvals it can be difficult for a proponent to seek review of the conditions.

The process by which notices under section 18 of the AHA are considered by the ACMC and the Minister are cumbersome, unduly onerous and not transparent. For example:

- proponents are generally required to lodge section 18 notices and supporting information two months before each ACMC meeting;
- the DIA imposes highly prescriptive requirements as to the form and content of section 18 notices and supporting materials, which sometimes change without notice. These include a requirement to provide multiple hard copies of Aboriginal heritage reports in a particular form as well as electronic copies;
- the DIA purports to withhold notices from the ACMC if its requirements are not met, and the ACMC routinely defers consideration of section 18 notices for many months, despite the requirement in section 18 of the AHA for it to perform its functions as soon as it is reasonably able. The minutes of ACMC meetings are poorly kept and correct versions are often difficult to locate;
- there is no well understood and consistently applied process by which proponents are given an opportunity to be given notice of, and heard by, each of the ACMC and the Minister in relation to matters affecting a section 18 notice (including but not limited to representations made by Aboriginal groups); and
- no regulations have been made in accordance with section 34 of the AHA governing the ACMC procedure.

3.2. Case study: Exploration native title issues

This case study is provided by Backreef Oil Limited to highlight native title issues relating to petroleum exploration in Western Australia. The submission provides information about the history of negotiation and company concerns regarding delays and lost opportunities caused as part of the native title negotiation process.

A group comprising Backreef Oil Limited 45%, Net Oil Limited 45% and Northern Oilfield Services 10% made applications for petroleum permits in the Canning Basin south of Halls Creek early March 2007. On 22nd March, 2007, the group was told by the DMP (then DOIR) that they were the preferred applicants for this acreage and that they would be given ten years to reach a native title agreement on it.

The Aboriginal group that has sole possession of the area underlying the acreage is the Ngurrurpa. This is determined area WADO357/06, which was determined on 18th October, 2007. The Native Title representative body for the Ngurrurpa in that process was Central Desert Native Title Services (CDNTS).

The Ngurrurpa abandoned the settlement on their country at Yagga Yagga in 2003 and moved 90 km north to Balgo, which they share with the Tjurabalan.

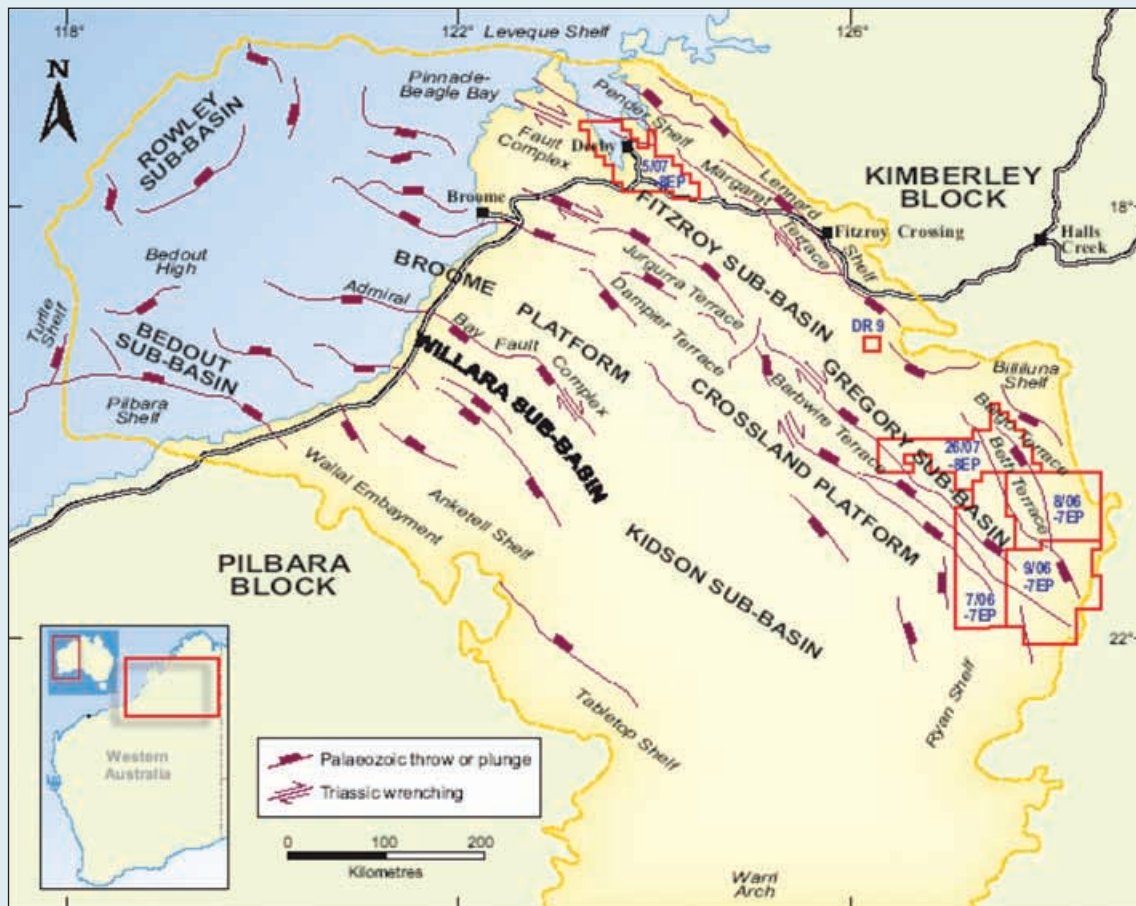


Figure 1: Location of Application Areas in the Canning Basin



History of the Negotiation

At the outset, the explorers had thought that CDNTS would want to proceed to a settlement in a timely manner. CDNTS were not good at responding to letters or phone calls though. In late 2007, the State asked for the matter to be put to the National Native Title Tribunal (NNTT) for mediation. CDNTS were reluctant starters at the NNTT. At the NNTT meeting, CDNTS undertook to have a meeting between the Ngurrurpa and the explorers at Balgo in March 2008. CDNTS said that they did not have a draft agreement for oil exploration and invited the explorers to provide one.

The first meeting with the Ngurrurpa was held at Balgo on 30th April, 2008. It became apparent that it is CDNTS' style to state that the Ngurrurpa had decided upon certain conditions prior to meeting. CDNTS ran the meeting to minimise interaction between the Ngurrurpa and the explorers. The meeting ended without agreement. The sticking point was that CDNTS would not agree to it being a conjunctive agreement. When asked why CDNTS did not want a conjunctive agreement, the CDNTS representative said that environmental considerations with petroleum leases were the reason. As that was not a valid reason, no agreement was reached.

At the request of the explorers, the matter went back to the NNTT for mediation on 8th August 2008. That mediation meeting was notable for two things:

The DMP representative stated that the DMP had not meant the explorers to have a conjunctive agreement; they only wanted the explorers to conduct exploration and not go on to produce oil and gas.

That meeting did not result in any progress being made. The DMP representative made the statement re conjunctive agreements in order to support the CDNTS position, rather than to advance exploration in Western Australia.

Backreef Oil is recognised as the operator of the acreage applications by the DMP. Subsequent to that NNTT meeting, Native Title section of the DMP and CDNTS decided that they would only negotiate with another party of the JV, Net Oil, based in Darwin.

Net Oil, attended a meeting with the Ngurrurpa at Balgo in October in order to introduce himself to them. There was to be a follow-up meeting one month later. CDNTS emailed through notice of that follow-up meeting a few days before it was supposed to be held and gave three hours to agree to a number of conditions set by CDNTS for the explorers to attend that meeting. CDNTS gave the three hour deadline because the representative stated that she would not be contactable in the field. As it was, she was contactable over the following three days, as evidenced by emails. The explorers could not agree to the conditions set by CDNTS and thus did not attend that meeting.

Another sticking point in the negotiations with CDNTS is that the explorers want to conduct a heritage survey prior to being granted the licences. The purpose of that is so that petroleum exploration operations can begin as soon as the titles are granted. Under the agreement proposed by CDNTS, there is no requirement for CDNTS to undertake a heritage survey in a timely fashion.

In March 2009, CDNTS contacted Net Oil to state that they would seek to have the DMP withdraw the explorers' applications.

The explorers believe that they will be able to successfully negotiate a Native Title agreement with the Ngurrurpa. In the very small amount of contact between the parties to date, there has been quite a lot of good will evident between the Ngurrurpa and the explorers. It is evident that progress in negotiations will require face time between these two parties.

It is now evident that it is CDNTS' negotiating style which has delayed progress as they have attempted to keep the Ngurrurpa and the explorers as physically separated as possible. This goes against the spirit of the Native Title Act. As it is more than one year since the Ngurrurpa gained determination, they should have had a body corporate instituted by now. As such, they should be negotiating on their own behalf as owners of their land.

Summary

Considerable delay and lost opportunity to the State of Western Australia has occurred in negotiating Native Title on this acreage. This has resulted as a consequence of the negotiating style of CDNTS.

South Australia was in a similar situation with respect to Native Title negotiations on petroleum titles in the late 1990s. The Petroleum Department of that State solved that problem by instituting a standard agreement with a royalty of 1% and a payment of \$150,000 on signing. The standard agreement also has provision for Aboriginal Heritage surveys to be completed in a timely fashion. All agreements in South Australia are posted on the PIRSA website so that the process is open and transparent. The South Australian agreements can be accessed at:

http://www.pir.sa.gov.au/petroleum/environment/native_title,_aboriginal_lands,_iluas/current_native_title_agreements

It is suggested that:

- that Western Australia drops the provision for non-conjunctive exploration licences and only allows conjunctive agreements. Otherwise, years would be wasted in negotiating Native Title on subsequent production licences and this will slow down development of the State; and
- that Western Australia adopt the South Australian solution of a standard Native Title agreement in order to significantly speed up the Native Title process and provide certainty to all parties. As South Australia is a Labour state, there should not be any political opposition to this outcome.

3.3. Case study: Exploration Aboriginal heritage issues

In this case study, Backreef Oil Limited has provided further information regarding Aboriginal heritage issues and the involvement of the Kimberley Land Council. A single exploration well site was planned south west of Fitzroy Crossing and Aboriginal heritage clearance for the site was sought.

Drilling Reservation 9 (DR 9) was granted to Backreef Oil Limited on 30th June 2007 for a three year term. The work commitment for this permit is the drilling of one well. The permit was taken up based on the Selene prospect identified in the early 1990s. The name Selene could not be used again so the prospect has been renamed Emika.

Upon grant of title, Backreef Oil contacted the Kimberley Land Council (KLC) to conduct an Aboriginal Heritage Survey on the proposed well site. Verbal assurances were made by a KLC officer that the KLC would schedule an Aboriginal Heritage Clearance in the remainder of the dry season of 2007. That did not happen. The KLC was contacted again during the subsequent wet season and Backreef Oil was told that the clearance of DR 9 would be one of the first scheduled activities of the 2008 dry season. That did not happen.



The KLC appointed an officer dedicated to Aboriginal Heritage Clearance. Backreef Oil was told in March 2008 that the clearance of DR 9 would take place in June. One week before the clearance was to take place, the KLC emailed through the budget of the survey. It was for \$24,800. This is to clear an area approximately 100 metres by 100 metres. The KLC stated that this clearance was for the area of the drill site only. If any other type of activity was to be undertaken on the area, for example seismic, that would require a further clearance of the same area.

Only \$1,200 of the \$24,000 was to pay the Traditional Owners for their attendance. The rest was to fund the white anthropologists etc of the KLC. This is for ten minutes perhaps examining the well site and a five hour round trip from Fitzroy Crossing. In particular, the female anthropologist was to be employed for five days under the budget. I asked the KLC what on earth she would be doing for five days and did not get an answer.

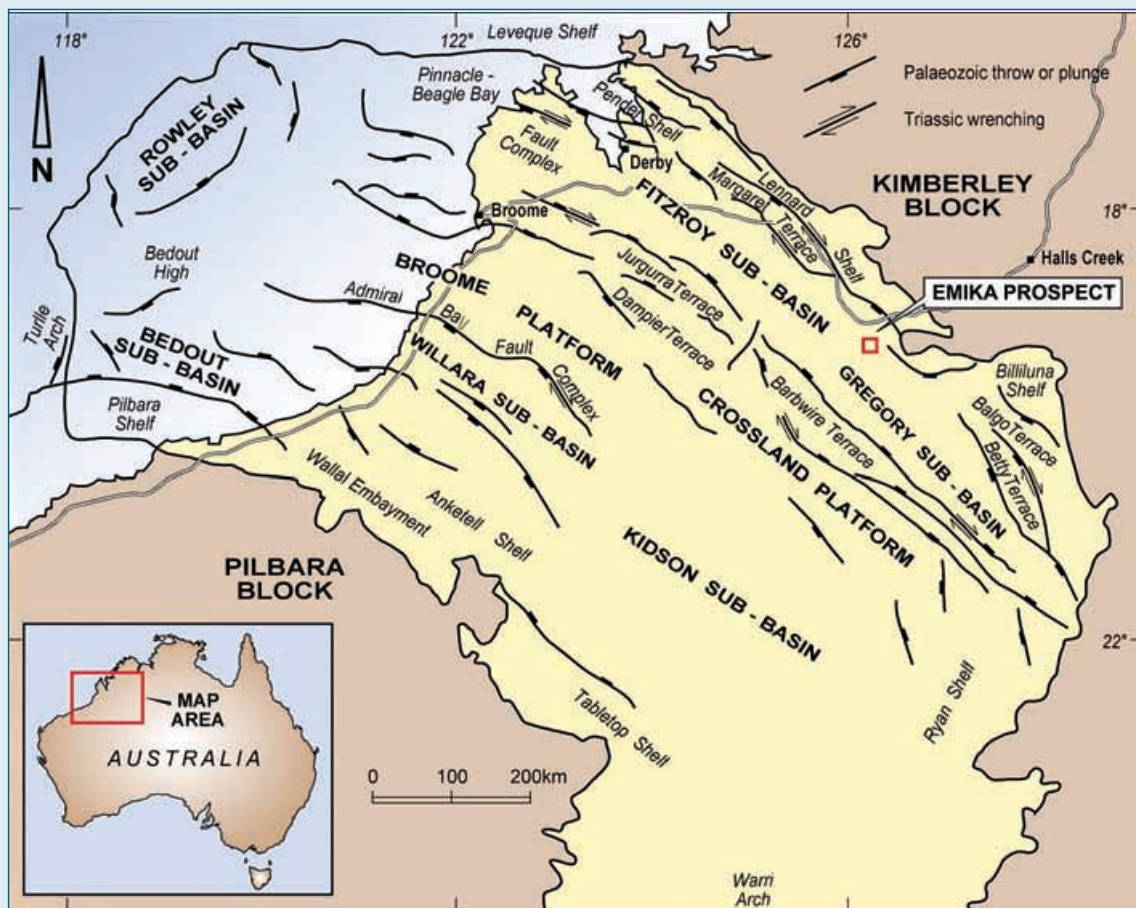


Figure 2: Location of the Emika Prospect in DR 9 in the Canning Basin

As the proposed \$24,000 budget was obviously inflated, I made a counter offer of \$12,000 to the KLC which was received with indignation.

The Native Title agreement with the KLC on DR 9 did not specify that the KLC would conduct any subsequent Heritage Survey. I asked contacts in the oil industry for the names of anthropologists who might be able to conduct the survey and was given three names. All three said much the same thing. That is that the Act does not specifically require a survey to be completed and that the KLC

would blacklist them if they operated in KLC controlled country without the KLC's blessing. On the first point, the anthropologists said that a place on flat ground away from a river course would be very unlikely to have heritage values. They recommended that I walk the site; record the fact that I had walked the site and found no Aboriginal objects and then the project would be in the clear. While that might be the intent of the Act, the KLC has a track record of injuncting operations that have started without completing an Aboriginal Heritage survey. The total daily operating rate of an onshore oil rig is at least \$60,000 per day.

The area of DR 9 had been the subject of an Aboriginal Heritage survey in 1982 conducted by Dr Erich Kolig of Otago University for I.E.D.C. which held a much larger permit over the area at the time. The original Kolig report is now missing from the Department of Indigenous Affairs library. Extracts from the Kolig report remain available from that library to describe individual Aboriginal Heritage sites. It is evident from those extracts that the Kolig report is a high quality report. I contacted Dr Kolig in Dunedin, New Zealand. He says that it is very unlikely that he still has a copy of that report.

In November, 2008, I met the Minister for Indigenous Affairs. On telling him that I was having trouble getting heritage clearance on DR 9, he suggested that I use a Section 18 Notice. I duly went to Wonkajonka, southeast of Fitzroy Crossing the following week and submitted the requisite copies of a completed Section 18 notice to the Aboriginal Cultural Materials Committee. I subsequently received correspondence from that committee saying that they did not recognise Aboriginal Heritage reports more than five years old which effectively means that heritage surveys will be done on the same patch of ground in perpetuity.

Experience of Other Operators in the Canning Basin

One of the worst examples of KLC run heritage surveys impacting badly on exploration outcomes is the experience in 2008 of another operator which set out to clear a 1,000 km seismic survey. The KLC officer in that case told the company concerned that the Traditional Owners wanted to do the survey on foot. The company gave up on the survey after completing 160 km at a cost of \$700,000. This translates to \$4,000 per km. Onshore seismic costs \$9,000 per km to acquire, and thus heritage clearance was consuming nearly half of the budget.

After three weeks into the survey, a group of Traditional Owners approached a company officer on the survey and asked why it wasn't being done by helicopter. Apparently the KLC officer had not asked the Traditional Owners how they wanted to have the survey conducted.

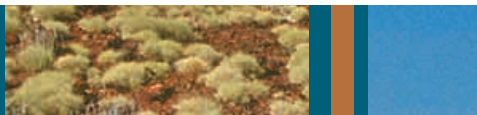


Table 1: Original clearance budget for DR 9 received from the KLC 23rd June 2008

Title of Project: heritage Work Program Clearance Backreef Bulka Station Gooniyandi

Project Code: TBA

KLC File No: 6-00-885

Item No	Description	Quantity	Number of days	Rate (\$)	Amount
1	Anthropologists				
	Female-Daily Rate	1	5	\$880.00	\$4,400.00
	Male-Daily Rate	1	3	\$880.00	\$2,640.00
	Travel Allowance	2	3	\$95.00	\$540.00
	Accommodation	2	2	\$180.00	\$720.00
3	Field Officer				
	Travel Allowance	1	4	\$95.00	\$380.00
	Accommodation	1	3	\$180.00	\$540.00
	Daily Rate	1	4	\$350.00	\$1,400.00
4	Traditional Owners				
	Provision allowance	8	2	\$50.00	\$800.00
	Daily Rate	8	2	\$300.00	\$1,200.00
	Project Officer	1	1	\$650.00	\$650.00
	Traditional Owners				
	Project Meeting	1	1		\$2,000.00
	Transport	2	3	\$250.00	\$2,100.00
	KLC 4 Wheel Drive				\$2,250.00
	Sub-total				\$19,620.00
	KLC Administration Fee			15%	\$2,943.00
Budget Total:				\$22,563.00	
GST 10%				\$2,256.30	
Total Payable				\$24,819.30	

Note the five days budgeted for the female anthropologist. The KLC were not able to say what she would be doing for all that time. It is estimated by industry practitioners that the work required would take one half a day at the most.

Also note that the Traditional Owners were to be paid only 5% of the total budgeted clearance cost.

Summary

Administration of the *Aboriginal Heritage Act 1972* has departed significantly from the original intent of the Act. It has evolved into a means of employing white advisers going over the same ground over and over again. The KLC has abused its monopoly position in providing clearance services in the Kimberley region. Apart from the cost of redoing surveys unnecessarily, the process causes enormous delays while operators wait for the KLC to get organised.

It is suggested that:

1. that once an area has been cleared for Aboriginal heritage, it is recognised as being cleared for Aboriginal heritage in perpetuity;
2. that native title representative bodies such as the KLC not be allowed to conduct Aboriginal heritage clearances due to their history of abusing their market power; and
3. that the *Aboriginal Heritage Act 1972* be amended so as to ensure that an operator who has documented that he has taken reasonable steps to determine that he does not harm Aboriginal heritage be protected from rent-seeking third parties.

3.4. Case study: Exploration Aboriginal heritage issues

The following observations regarding the current Aboriginal heritage survey approval process were provided to the Industry Working Group by an experienced exploration consultant.

“With regard to Aboriginal interests, companies wishing to explore are required to comply with the *WA Aboriginal Heritage Act 1972* and the *Federal Native Title Act 1993*.

The Federal Government recognises native title representative bodies, [almost always land councils], as legal representatives of the claimants and these are the bodies that companies must deal with in respect to native title.

The Heritage Act is much less clear. Under the Act, companies must do everything in their power to ensure that sites of cultural/ethnographic significance are not disturbed during a survey. This requires consultation with the relevant Traditional Owners and the completion of an anthropological and/or an archaeological survey if required. The Act is administered by the Western Australian Department of Indigenous Affairs (DIA), but they have little or no direct role in the administration or compliance of the Act, from an explorer’s viewpoint.

The company has the right, under the Heritage Act, to appoint an anthropologist to consult with the relevant traditional owners, determine the necessity or otherwise of a survey, and complete a report for the company. This does not work in practise as the land councils acting as representative bodies, refuse to allow independent anthropologists to do heritage work. The refusal is based on the assertion that this is the wish of the claimant groups.

The reality of heritage work is that the company approaches the land council with a request for a heritage clearance, the land council requires the company to sign their standard Heritage Agreement and then organises for the company to meet with the relevant traditional owners at a time and place nominated by the land council. [The company funds the meeting and all travel costs for anyone associated with it]. When this meeting occurs, the company representative is given an opportunity to present the work program and answer any questions that arise. The representative then leaves the meeting and the land council later get in touch and advises when a clearance is going to happen, the



methodology of the clearance and a budget. Desktop clearances are not an option, notwithstanding the number of existing clearances done over the same area.

A recent example of this process, I am aware of, involved the company writing to the land council in early November 2008 with a full work program including maps. They will have an opportunity to present the program to the traditional owners at the end of April, six months after their approach to the land council. The timing of the actual heritage survey could be a considerable period after that.

It should be noted that when surveys are completed by the land council, no information regarding sites etc is passed on to the DIA or the Registrar of Sites at the museum.

A recent clearance I was involved in was in a very remote area of the Great Sandy Desert. At the initial meeting with traditional owners I put the case that due to the remoteness and rough terrain, it would be necessary to use a helicopter to complete the survey. The only objection to this, raised at the meeting, was by a land council anthropologist. The company was later advised that after we had left the meeting the traditional owners (T.O.'s) had stated that they wanted to do the survey by vehicle and that was the method we had to use. Needless to say, the survey was a fiasco, with only about a third of the required clearance completed, at huge expense to the company. I was approached, towards the end of our activities, by representatives of the traditional owners. They stated that the use of vehicles was not their desire, but had been forced on them by the land council. I put this to the anthropologist and was abused for my temerity.

Clearly, the current system of Heritage Clearance is not working. The process is very slow, very expensive and does not deliver good outcomes. I am familiar with the Northern Territory model and feel that this is far superior. In the Territory, companies are required to deal with the Land Councils with respect to native title, but all heritage work is done under the auspices of the Department of Natural Resources, Environment and the Arts. The company employs a suitably qualified consultant who in consultation with the Department identifies the relevant T.O.'s and conducts the required survey. If it is clear that the heritage requirements can be met with a desktop study, this is quite acceptable. The whole exercise usually is complete in a matter of weeks.

Another area of the approvals process that is inordinately slow and probably unnecessary, is the requirement to obtain a license to take water for every water bore drilled for seismic or drilling operations. These bores are only used for short periods of time and draw minimal quantities of water.

Regrettably, I must ask that my name be not publicly used in any document that might be construed as critical of the Land Council. I know from past experience that anyone seen as openly (even mildly) critical of the Land Council, its staff or operations, will be effectively blackballed."

3.5. Case study: Industrial project Aboriginal heritage issues

The following excerpts from industry submissions relate to Aboriginal heritage surveys associated with road works in the Pilbara and the planned Oakajee Industrial Estate. These examples demonstrate that apparent unacceptable work practices are not limited to the mining and petroleum industry but also impact on Government projects and public funds.

“Approximately \$750,000 of public money was spent on engaging archaeologists to measure, photograph, draw pictures of and catalogue all the artefactual debris in the path of the section of the Karratha to Tom Price Road known as the Millstream Link (around 120 kilometres long). I would suggest to you that this was a waste of public money. A senior archaeologist indicated that this entire exercise had no scientific value whatsoever. Neither the Department of Indigenous Affairs (DIA) or the Aboriginal Cultural Materials Committee (ACMC) should have attached this requirement to their recommendation to the Minister”.

“The planned Oakajee Industrial Estate is at present a dust bowl. The Forest Products Commission, in conjunction with landowners LandCorp, proposes to resolve some of this problem by a major sandalwood/acacia tree planting programme near the two rivers (Oakajee River and Buller River). At least two archaeological surveys were previously conducted over the area. The three relevant Aboriginal groups supported the proposed tree plantings and signed off on the project. A draft Section 18 Notice was submitted to DIA for tabling at the next ACMC meeting (November 2008). DIA advised that a further archaeological survey would be required before the Notice would be considered. Protests that two such surveys in the same area had been carried out fell on deaf ears. The reason given was that the area had been ploughed since the last survey and new sub-surface material may have been exposed. A senior archaeologist stated that such material would have no scientific value as it would be out of context. This was simply another job creation exercise. In this case, Landcorp simply carried out the unnecessary and unwarranted survey.”

“There are many such examples that all point to an unacceptable state of affairs in Western Australia. The situation is as follows:

- by and large, Aboriginal people support development in their traditional lands as they bring employment opportunities. I hear this from one end of the State to the other;
- the major impediment (and expense) thrown constantly in the way of developers is archaeological interests;
- remove these archaeological interests from the situation and the process instantly streamlines;
- minor changes to the Aboriginal Heritage Act 1972, making Aboriginal interest’s paramount and removing the final say on developments from archaeologists could remove those interests; and
- the associated reduction in the number of “sites” being reported and registered, would enable the staffing levels at DIA (at least in the Culture and Heritage Division) to be greatly reduced.”



4. Environmental and related approval issues

Significant government, industry and community resources are dedicated to environmental impact assessment processes and decision making. This chapter identifies key environmental and related issues through a series of case studies provided by companies seeking approvals. These case studies and examples illustrate the difficulties encountered with the current approvals system. Case studies relevant to environmental, planning and water management approvals are provided. Where possible, the submissions are provided in their original form.

4.1. Case study: Mid West iron ore approvals

Gindalbie Metals Limited

When a project within an 'environmentally sensitive area' is 'in the process of assessment', normal exploration activities that can be approved under the Memorandum of Understanding (MOU) with the Department of Mines and Petroleum (DMP – formerly DoIR) are suddenly all referred to the Department of Environment and Conservation (DEC), regardless as to whether they believe the proposal to be environmentally significant or not; e.g. ongoing Programme of Works (PoW) programs or geotechnical assessment drilling required to progress an assessment.

This can result in untenable delays in exploration drilling (months if not years, due to the uncertainty created by the proposal being before the Environmental Protection Authority (EPA). A potential solution is to relieve the DMP of that obligation to refer Environmentally Sensitive Area (ESA) submissions to the DEC and allow the ongoing judgement of the environmental section of DMP.

Assessments

Part IV of the *Environmental Protection Act 1986* intends that it deal with 'significant proposals' i.e. a proposal LIKELY if implemented to have a SIGNIFICANT effect on the environment.

Where a decision is made to assess, it would be desirable that the EPA publish an explanation as to why it has concluded that the project as proposed is LIKELY to have a SIGNIFICANT effect. If the EPA is going to require a considerable delay and expenditure, it should, as a minimum be required to explain its demand. The decision whether or not to assess can be appealed to require assessment, or a higher level of assessment, but not to lower the level. A rigorous risk based approach should be taken to each level setting, for example, scoping, evaluation, assessment and approval condition setting.

EPA/proponents should negotiate timelines for the assessment of each project at the commencement of the process, to assist in active project management of the assessment process. Clear criteria needs to be established during this negotiation as to what constitutes acceptable completion of each stage of the assessment process.

Advisors / DMA's who input to the assessment process (e.g. different branches of the DEC, DoW, DMP etc) should have to demonstrate that any concerns that they express about a period or technical elements of a project, have a reasonable basis in terms of risk to the environment. This would reduce the potential for personal views to have undue weight in the assessment process.

Technical advisers to the EPA (e.g. officers within the DEC) often change their requirements as the assessment progresses. For example, flora and vegetation surveys are undertaken in accordance with the EPA's published Guidance Statement, but then officers advise that the spring session in which the survey was undertaken is not considered to be 'normal' and require that another survey be undertaken the following spring. This adds a minimum of 1 year to the assessment timeframe. The definition of a 'normal' season is open to individual interpretation and bias.

Strategic Framework/Strategic Assessments

The State Government needs a strategic framework to provide the context within which individual projects can be assessed. For example, prioritise and undertake a Strategic Impact Assessments or Regional Impact Assessments covering Western Australia.

Many assessments on individual projects get delayed for wider issues on whether there is sufficient environmental protection in conservation reserves, (as currently being pursued under international standards guidelines to meet comprehensive, adequate and representative (CAR) reserve status).

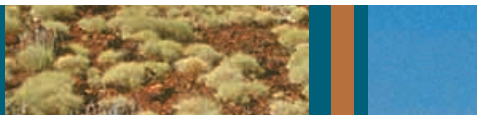
The State Government needs to prioritise those currently 'deficient' representative areas (nominally defined as less than 15% of that area being represented in reserve status) for priority funding and assessment.

Consistent with the issue above, proponents are as a result required to address issues which go beyond the scope of their own project (e.g. conservation of the Banded Iron Formation (BIF) range of the Yilgarn Craton) until such time as a clear status exists for such an area.

Federal/State Relations

Improved communication is required between the State and Commonwealth Governments for projects which are being assessed under the Bilateral Agreement. This will ensure that proponents are not caught out in terms of project assessment (e.g. changes to the project accepted by the EPA, but not communicated to the Commonwealth Department of Environment, Water, Heritage and the Arts (DEWHA), therefore leaving the proponent legally exposed in terms of the requirements of the *Environmental Protection and Biodiversity Conservation Act 1999*).

As a consequence of the protracted assessment and approval process, the natural evolution of project definition and design causes the optimised design to progressively diverge from the approved project. A mechanism is required to either deal with evolution or to make the approval process much shorter. A mechanism is also required to deal with necessary changes. The real impediment is the regulatory desire to specify detail and bind proponents to those specifications.



Western Australian approvals process feedback

The following feedback is provided against the broad category of issues raised in the 2002 Keating Review. As can be seen through the examples provided, problems still abound. Solutions have been identified in the Keating Review (as illustrated in the Suggestion for Improvement), but there has been a clear failure to accept or effectively implement many of the Keating recommendations.

Asia Iron Holdings

Issue	Example	Suggestion for Improvement
Ensuring Timeliness of Approvals and Developing Improved Accountability		
Referral of exploration Programmes of Work to DEC	<p>Program of Work for exploration drilling program split into 3 separate areas following discussion with DoIR. Access via existing tracks and drilling from existing pads – minor clearing only (<1 Ha). Area 1 coincided with an EP Act Part IV assessment area, Area 2 fell outside the Part IV area and had no Environmentally Significant Issues, and Area 3 fell outside the Part IV area but coincided with a “File Notation Area” placed by DEC.</p> <p>Expected DoIR action:</p> <p>Defer assessment of Area 1 pending final satisfaction of Ministerial conditions attached to Part IV assessment.</p> <p>Proceed with assessment of Area 2 without delay.</p> <p>Consult with DEC prior to referral to DEC under MoU or proceed to process.</p> <p>Actual DoIR action:</p> <p>DoIR referral took place on 7 June</p> <p>All POW’s referred to DEC and no processing by DoIR for 14 weeks.</p> <p>DEC response received 19 September.</p> <p>Still waiting processing by DoIR.</p>	<p>Review DoIR-DEC MoU with respect to exploration activities.</p> <p>Clarify circumstances in which PoW’s to be considered for referral (e.g. what is an Environmentally Sensitive Area, what is a material impact)</p> <p>NOTE: Latest DoIR publication of Environmentally Sensitive Areas incorporates the ENTIRE south-west land division south west of a line from Kalbarri to Esperance. This is the sort of process that ignores materiality.</p> <p>Establish and enforce response timeframes (current MoU apparently allows 20 working days for DEC to respond – this is rarely if ever enforced and in our case, DEC response took 53 working days)</p> <p>Keating Recommendation No. 4. – Where agencies are consulted, or are required to be consulted, as part of any action towards an approval, then their response must be available within the allocated timeframe to be included in considerations. Where the consulting agency fails to respond in the given time, the approving agency will take it to mean that there is no objection to, or issues with, the approval being granted</p>
Timeframe following EPA Bulletin and Recommendation.	<p>Project EPA Bulletin published 105 weeks after level of assessment set at PER. A further 88 weeks required to go through appeal process, Ministerial Decision and DEC approval of management plans. Total elapsed time 193 weeks (3 years and 8 months). No timeframe for:</p> <p>Appeals process</p> <p>Ministerial statement</p> <p>DEC approval of conditions</p>	<p>Require development of timeframe guidelines for:</p> <p>Appeals process</p> <p>Ministerial statement</p> <p>DEC approval of conditions</p> <p>Keating Recommendation No. 1. – Both primary and secondary approvals legislation and regulation should include processes and timelines, including stop the clock mechanisms, in sufficient detail to guide the process without introducing inflexibility into the system. This could mean changes to legislation to introduce concepts, and providing more detail in regulations and administrative guidelines.</p>

Issue	Example	Suggestion for Improvement
Timeframe for “minor amendments” S45C EP Act	<p>Amendment proposed to approve mine layout to reduce the area of clearing by locating buildings on a disused airstrip rather than clear virgin bush. Application made 13 February 2008. Advised 22 weeks later that the DEC would not process application as their records indicated the presence of a rare spider in the vicinity.</p> <p>Objected to this because:</p> <p>The presence of this particular spider was not raised as a matter of importance during the PER process;</p> <p>The presence of this spider was not disclosed during a database search conducted by DEC;</p> <p>This spider had not been recorded during extensive surveys and trapping programs during the assessment process; and</p> <p>The DEC record was 53 years old (i.e. from 1955!) and of questionable location.</p> <p>45C Application approved 26 August 2008. Time taken 28 weeks.</p>	<p>Keating Recommendation No. 6. – Issues to be addressed by the proponent during an approvals process should be identified to the proponent at the outset. The introduction of new issues should be the exception and processes should be in place to discourage this happening. The Director General of the approval agency would need to be satisfied that there is good reason why any such issues were not raised earlier in the process.</p>
Timeframe to assess secondary approvals. EP Act Part IV delays and parallel processing	<p>No secondary approval applications processed during the Part IV Assessment (193 weeks!)</p>	<p>Keating Recommendation No. 7. – The Environmental Protection Act should be amended to allow DMAs to give approvals without waiting for the completion of formal assessment of a project. However, it should be made an offence to commence implementation of a proposal that has been referred to the Environmental Protection Authority (EPA) until either the EPA (or the Minister on appeal) has decided that the proposal does not require formal assessment or Ministerial conditions are issued.</p>
Removal of Overlap and Duplication		



Issue	Example	Suggestion for Improvement
<p>Duplication of approvals</p>	<p>Mine development requires removal of declared rare flora. Assessed under EP Act Part IV. Separate approvals needed to clear land include:</p> <ul style="list-style-type: none"> EPBC Act authorisation; EPBC Act Management Plan authorisation; EP Act Part IV authorisation; EP Act Management Plan authorisation (from DEC, EPA and Minister); Mining Act authorisation – Mining Proposal including a separate Environmental Management Plan; Wildlife Conservation Act authorisation – Permit to Take needed for seed collection, land clearing and even to travel through or enter buffer zone around declared rare flora. <p>Effectively, cannot commence project implementation until:</p> <ul style="list-style-type: none"> Ministerial Statement Issued (EP Act) Ministerial Approval (EPBC Act Cth) Management Plans Approved (EP Act) Mining Proposal Approved (Mining Act) Mine Management Plant Approved (MSI Act) Permit to Take DFR (Wildlife Cons. Act) <p>Then cannot operate project until:</p> <ul style="list-style-type: none"> All of the above plus EP Act Part V licensing Explosive and Dangerous Goods licensing Rights in Water and Irrigation licensing Building Act licensing Health Act licensing Liquor Act licensing Main Roads Act licensing Transport Coordination Act licensing Rail Safety Act licensing Planning and Development Act licensing Etc (47 Acts apply) 	<p>Establish Hierarchy of Approvals that deems approval under secondary Acts if higher level Act approvals are already in place.</p> <p>Keating Recommendation No. 8. – All environmental conditions related to a proposal that has been formally assessed under the Environmental Protection Act should be considered in any subsequent approval to have been conclusively determined under the processes of that Act. Any other approvals should not revisit or reconsider those environmental matters and should frame their conditions to be entirely consistent with those conditions.</p>

Issue	Example	Suggestion for Improvement
Procedural based conditions and management plans promulgated.	<p>EP Act Part IV assessment culminated in Ministerial conditions requiring development of 14 separate management plans. Clearly, outcome based conditions were NOT formulated for the Ministerial Statement</p> <p>The DEC rejected management plans totalling some 700 pages as being insufficiently detailed. Ultimately negotiated the development of a risk based plan covering all of these areas – total less than 80 pages – but this took 41 weeks!!</p>	Keating Recommendation No. 9 – Where a proposal is to be formally assessed under the Environmental Protection Act and a works approval and licence will subsequently be required, then the formal assessment process should focus on setting a framework approval through outcome based conditions. Matters of detail and operations should be deferred to the works approval and licence process. The level of information required in the formal process should be appropriate to the setting of outcome based conditions.
Approvals Information		
Lack of understanding by Agency Staff of the complexity and inter-relationships in Approvals Process.	<p>Process maps available at http://www.odac.dpc.wa.gov.au/documents/ODACProcessMappingReportat16May2007.pdf http://www.epa.wa.gov.au/docs/1139_EIA_Admin.pdf http://www.doir.wa.gov.au/documents/000079.kylie.sinagra(1).pdf</p> <p>The first of these documents illustrates the extraordinary complexity that exists and appears to be the first time that a comprehensive process map across all agencies has been developed. The individual agency maps do not reflect this complexity, and so are of limited value.</p> <p>The results of a recent survey of satisfaction is available at: http://www.odac.dpc.wa.gov.au/documents/2008StakeholderSurveyReport_000.ppt</p> <p>This clearly shows dissatisfaction from the proponents, but satisfaction from the agencies. It is only the proponents who see the entire process. Each of the agencies only deals with their little bit of the overall process and they are oblivious to the interagency problems.</p>	Keating Recommendation No. 18. – Agencies with approval responsibilities should maintain comprehensive and current information on their respective approvals processes in a form that is readily available and understandable by a proponent. The Department of Mineral and Petroleum Resources (MPR) should draw together these processes into guidelines that clearly show how the processes interact, and that set out the roles of the different agencies and Ministers involved. These guidelines should include project management charts covering the approvals required for a particular project, so that the most efficient path to obtaining all approvals can be identified.
Resourcing of Agencies		
Inadequate response from agency staff	<p>Program of Work for minor exploration activities lodged with DoIR. DoIR assigned assessment to case officer, but has passed through 3 officers during the assessment process, each of which has had to “come up to speed”.</p> <p>In other instances (e.g. within DEC and DoW), assessments have been held up because individual officers have taken leave or training.</p>	Staff resourcing could be freed-up if duplication was eliminated!
Integration of State and Commonwealth Approvals		



Issue	Example	Suggestion for Improvement
<p>Management Plan requirements differ between DEHWA and DEC for the same issue.</p>	<p>The nomenclature (e.g. Recovery Plan, Conservation Plan, Restoration Plan) differs between Federal and State agencies, as does the format, style and scope of the different plans. This leads to different plans and different reporting regimes for the same actions.</p>	<p>Bilateral assessment agreements should be extended to include bilateral approval of plans and compliance reporting.</p>
<p>Sustainability – Regional Forward Planning</p>		
<p>Facilitation of access to common user land and corridors.</p>	<p>Planning for Midwest port developments has failed to adopt an integrated approach. The upgrade of Geraldton Port has separately involved, without consideration of foreseeable issues, development of projects for:</p> <ul style="list-style-type: none"> Channel and harbour deepening; Ship loading facilities; Rail and road capacity; Rail unloading facilities; Power and water needs for the expanded port; Services corridor to link Port with the Hinterland. <p>This has severely restricted the ability of proponents to fully utilise public infrastructure.</p> <p>Oakajee development is adopting the same fragmented approach.</p>	<p>Establishment of a regional infrastructure and corridor planning framework.</p> <p>Keating Recommendation No. 47. – Government should undertake strategic planning for development sites on a regional basis. Government should encourage development projects and industries to locate where there are fewer environmental and social constraints by the greater use of strategic level EPA assessments, strategic planning for industrial estates, and regional environmental management plans. These plans should be made available to potential developers as a basis for development so that developers could expect approval so long as their proposal complied with the plans.</p> <p>This planning should be undertaken within the State Sustainability Strategy framework.</p> <p>Keating Recommendation No. 48. – Local government, environment, planning, regional development and other relevant legislation should be examined to assess the extent to which these permit forward strategic environmental assessment and planning for regional development sites. Where necessary, amendments should be made to facilitate such strategic plans to create the expectation that approval would follow for proposals that complied with these plans.</p> <p>Keating Recommendation No. 49. – Common user infrastructure required in designated development locations and industrial sites should be established or committed to by government as early as is consistent with sound financial management.</p>
<p>Net regional benefits not given weight</p>	<p>Regional scale environmental impacts are not adequately considered. Impacts are assessed on a very small scale with concepts such as floristic communities being used to argue to the case for recognition of “unique”, but small scale (<1 Ha) communities worthy of protection.</p>	<p>Improved acceptance of offsets and net environmental benefits rather than focus on small scale preservation.</p>

Issue	Example	Suggestion for Improvement
Sustainability and Major Projects		
Assessment process framework does not consider matters of Sustainability	<p>Projects are assessed primarily on environmental matters, but sustainability is not merely environmental sustainability. Sustainability assessment involves consideration of a balance between Environmental, Community and Economic matters.</p> <p>In WA, the Environment Protection Act has supremacy and Environmental Protection Authority advises the Environment Minister on development applications. Matters relating to Community and Economics are not included in the EP Assessment and decision making in relation to a true sustainable development framework is not transparent.</p>	<p>Keating Recommendation No. 55. – The government should consider the overall impact of a major project within a sustainability context and inform the community of its approval or otherwise by reference to the State's objectives in this regard. Criteria against which the overall impact can be assessed will need to be developed, based on the government's sustainability strategy. The Ministerial conditions under the Environmental Protection Act would be released at the same time as the government's approval or otherwise. These recommendations should be also considered in the development of the State Sustainability Strategy, which should reach a final position on the criteria against which the Government will assess developments in terms of sustainability.</p>

Lastly, comment needs to be made on merger of the Department of Environment with the Department of Conservation and Land Management to form the Department of Environment and Conservation. This merger failed to recognise the fundamental difference between the requirements of Assessment and Licensing activities and Conservation and Preservation.

The final annual report of the old DoE reported significant progress on implementation of Keating Reforms – the next annual report of the new DEC showed that this process had stalled. It is suggested that assessment and licensing of environmental matters be managed by a separate and autonomous section of the public service. The conservation branch of the DEC will be consulted and will inform decisions made by the licensing branch.



4.2. Case study: DBNGP project approvals

Overall, the current WA Project approvals process is cumbersome and disjointed. There are multiple approvals required, with multiple approval levels and quite often an overlap between those various approvals. In some instances there is also a lack of recognition of the documentation for a similar process to enable succinct approvals and relevant and useful documentation to be prepared, rather than approval specific documentation that is not appropriate or easily used for project implementation on the ground.

Typically, whilst there are some individuals who make significant contributions, WA Project approvals tend to have the following traits:

- lack of sense, and recognition, of urgency from staff processing approvals. This is particularly evident when there are multiple tiers of internal agency processes;
- lack of understanding of project systems and processes to enable project implementation. This relates to various aspects including the link of approvals and approval stages to finance and insurance aspects of a project. These key milestones are usually linked and timely execution of those milestones is essential to planning and scheduling for both project implementation and also resourcing;
- lack of understanding of practicalities of project execution. This is particularly evident when the focus of an approval process is on one aspect of a project and the regime within which that approval can be made compromise and impact on other aspects of the project in such a way that impact cost, safety, environment, schedule and others;
- there does not seem to be an outcome based approach, rather process focussed. This creates a system that loses sight of the outcome that is most appropriate for the project as a whole and has a big impact on cost and schedule;
- there are inconsistencies in legislation and this creates issues with implementation as well as hierarchy of required approvals. These inconsistencies often create confusion within a project and usually result in legal consultation for clarification;
- there is often inconsistency in the application of legislation or application of policy within a department. This relates to different case officers managing different projects. Precedent may be set with an approval on another project in a similar circumstance, but this is not necessarily acknowledged. These inconsistencies often create angst between case officers and project personnel and impact on project implementation planning;
- there seems to be a lack of responsibility for implementation of approvals for a project. As there are multiple agencies/departments as well as internal agency processes, there creates a sense of lack of ownership or responsibility for a project approval. This also sometimes creates an opportunity for “gaps” between processes which can impact a project approval at the last minute resulting in significant costs and schedule impacts; and
- there is a lack of a global view of approval impacts and processes on a single project, owing to the number of approvals required for major projects and the fact that the majority of them are managed by different agencies/departments. This creates a beehive effect where each cell is managed and processed in isolation of the other. This process creates opportunity for approvals processes to impact on each other without the consideration of each individual approval process. Without a global view of approvals there is also opportunity for companies to be unaware of the entire approvals, and associated processes, required for a project and therefore be caught with an unexpected schedule and cost impact.

As each approval process is different, the timing and scheduling of approvals varies from project to project. Some projects require all approvals upfront; others have them upfront and throughout the project life and others are only immediately prior to start up. This creates a situation where a project may be ready for start up and there may be a significant issue that prevents that or that project may have a significant impact on another project that could have been identified, managed and resolved to the satisfaction of both projects if both were subject to the same schedule of approvals.

Some specific approvals issues which have been experienced include:

- the DBNGP Expansion Project required a specific environmental approval, assessed at PER level, even though the looping was to be constructed within the existing previously cleared corridor which is designated by legislation to be for the purpose of gas pipelines;
- the result was that some of the areas of the previously cleared corridor are subject to stringent clearing restrictions even though the entire corridor was cleared for the original construction and the clearing is only of regrowth. The fact that the regrowth is considered to be of such high quality is testament to the fact that the rehabilitation from over 25 years ago was very good and therefore the improvements of rehabilitation over that time should have been accepted that the regrowth after further clearing would be similar if not improved;
- the requirement for such approvals in a designated corridor imply that the rights granted for the use of that corridor and the previous use are not recognised to the degree they should be. In addition to this, the clearing restrictions in these areas of regrowth did not take into account the constructability of the asset and therefore have in some instances placed conservation of regrowth as a higher consideration than the ability to safely construct an asset;
- pipeline environmental approvals recently have a tendency to limit open trench lengths which restricts productivity and increases costs. Other states in Australia have similar approvals that do not place such restrictions and enable the industry to manage the implementation in a satisfactory manner to ensure minimal impact on the environment, in this case fauna. Consideration should be given to management of open trench, rather than blanket restrictions. Again, more outcomes based approaches rather than strict regulation;
- the processes for gas pipeline approvals under the *Petroleum Pipeline Act 1969* are very stringent and have a high level of case officer involvement. Regardless of the other legislation responsibilities, the pipeline approvals through the Department of Mines and Petroleum are detailed from conception, licensing, design, construction through to commissioning and operations. This process has a high level of regulator review and approval of the project implementation of the legislative requirements, including Australian Standard interpretation and implementation; and
- the environmental approvals under a pipeline licence are reasonably streamlined, and the implementation of the MoU between DMP (formerly DoIR) and DEC has enabled more interaction between the two if both approvals are required; however if a proponent is unaware of the two levels of approvals this may impact schedule and cost of a project as well as the ability to implement. These two areas under the pipeline licence have recently worked well together and enabled the one CEMP to be used for both approvals, which has streamlined that lower level approval.

The safety and design approvals under a pipeline licence are very involved and have a high level of scrutiny. The establishment of a separate resources safety division (whether within DoCEP or within DMP), has created unnecessary divisions under one licensing arrangement. Interdepartmental communications or inter divisional communications have resulted in a process that requires



management and awareness by any proponent to limit the potential impact on the project. This has created an ability for a recommendation to go to one department and it not being accepted or for a lack of responsibility to form. Recently there have been significant delays on the progressing of various stages of approvals under the pipeline licence regime as a result of this communication barrier, as well as conflicting communications with proponents and the lack of decision making. This has been clearly evident on the Stage 5B Expansion Project where it was advised that some of the works could be completed under a Management of Change system, rather than a formal variation to the pipeline licence due to their scope. This was then adopted by the project and planning implemented. During the following months there were personnel changes and seemingly a change of direction and the project was questioned over why that decision was made, when the advice was provided by that very department in the first place. The resolution of this issue has progressed since March 2008 and to this date is still an unknown quantity as within DMP, different divisions have different opinions. This has created a lot of angst and has the potential to impact project schedule and cost if the current status is changed mid-implementation.

The pipeline licence safety and design approvals require numerous documents to be subject to regulatory review and approval. The comments and queries received by proponents on these documents are at times contradictory to the third party independent advice, focussed on non-critical safety or design issues and require significant time and effort to manage with little or no change to the final outcome or documentation.

Recent experiences have also shown a lack of understanding of project schedules and implementation processes. Delays in processing procedural paperwork has created much angst and resulted in cost and schedule delays. There have also been occasions where the refusal to grant a construction approval due to a potential or perceived operational concern cost the project significant schedule delays and financial impact, when this issue could have been discussed and managed over the following months and resolved prior to granting the operational approval. In the end, there were no resulting changes to the design and the project was constructed as planned, although at significant cost and schedule impact to the project.

New or additional heritage approvals were required for the DBNGP corridor even though it had been previously disturbed for its entire width and designated for gas pipeline use. In addition, recent application of the *Aboriginal Heritage Act 1972* has seen the section 18 process granted and then an additional section 16 granted at a later date. On reviewing the legislation this is clearly a policy application as the legislation enables both the section 18 and section 16 to be granted at the same time, if indeed a section 16 is required. The protocols and requirements of the section 16 can be included in the section 18 grant and therefore negate the need for a section 16 if a section 18 is granted. This again relates to policy application of the legislation which can create confusion for proponents.

The application of the various planning approvals is inconsistent and again relates to various departments/agencies having various levels of responsibility and various understandings of that responsibility. This is particular evident with respect to the Apache Devil's Creek Gas Plant and the various urban developments adjacent to the DBNGP corridor. Some of these developments have received planning approval through the DMP, others through WAPC or local governments, regardless of potential for impact on existing assets and their regulatory regime which results in significant cost and operational impacts on the asset. The DCGP land allotment was provided without consideration of the setback distances required for heavy industrial plant from the DBNGP corridor. The DMP who

designated this allotment of land is also the same department that manages the pipeline licence regime which has the requirements for the setbacks. This is a clear case of lack of communication and consideration of impacts within a department, as well as with adjacent land users.

Urban developments also provide a similar impact with a disjoint between local government consideration of adjacent land users such as the DBNGP corridor and WAPC consideration. In addition to this inconsistency between authorities, the application of the Planning Bulletin 87 which outlines the setback requirements, in addition to the Australian Standard which gas pipelines are designed, constructed and operated under in accordance with legislation, is not required to be applied and is simply a guide. This enables inconsistent application of planning and uncertainty for asset owners and developers alike.

The timing of approvals for various projects is something that is evident with the Devil's Creek Gas Plant (DCGP) issue. As the DCGP is to be licensed as a Major Hazardous Facility (MHF), it in essence only requires a regulatory approval (with the exception of other legislation requirements) prior to operation. This enables the design and construction of the asset to occur without consideration of adjacent land users. This situation has resulted in the design and planning of an asset that creates non-compliance with assets within the DBNGP corridor due to the gas pipeline regulatory regime. As the land use allotment was created by the same department as the pipeline licence regime is managed under this demonstrates lack of consideration and communication on requirements, as well as a lack of consultation with adjacent land users. In addition, the MHF is managed under the same department (formerly DoCEP) and now a division of DMP and yet is unable to resolve to issue without a requirement on the pipeline proponent to comply with the relevant requirements which result in potential for significant cost and operational impacts, as well as potential gas supply issues.

Given the above, it is considered that the following approaches may provide clarity for approvals processes and enable a more streamlined and outcome based process:

- A lead agency should be designated for each project. For example, gas Pipelines are licensed under the *Petroleum Pipelines Act 1969* which is administered by DMP, therefore DMP should be the lead agency to assist a proponent through the minefield of the various approvals processes. This could be taken further were if there was a disagreement between the proponent and another agency or a conflict between two approvals, this would be mediated by DMP and a final decision made by DMP on the implementation. This would enable proponents to have clarity on process and support from an agency with a sound knowledge in their project industry;
- There is a need to change behaviour/attitudes of departments. This needs to occur from the top down and result in officers that have a more grounded approach to approvals which are outcomes based, rather than a process driven approach without consideration for impacts or the practicalities of implementation. Approvals cannot be considered in isolation as all approvals and their associated conditions impact on the implementation of a project; which in turn has the potential to impact on safety, environment, cost and schedule;
- There needs to be more involvement between agencies/government and industry so both parties can learn. Need high level discussions and education/training/assistance for officer level to help them improve their understanding. If a government-industry group were formed this could help implement this cross pollination to enable a better understanding of both processes and possibly improvements to approvals processes to align with an outcomes based and holistic approach; and



- Senior Executive expectations should be emphasised and be outcomes based. This does not need to occur at the sacrifice of due process or the value of safety, environment and the like, but needs to be realistic about the benefits of project implementation to the state and the benefits to all for simple clean approvals processes.

4.3. Case study: Tiwest J.V., Kwinana pigment plant.

Inability to make a decision on areas where there are no existing guidelines

For example, assessment of acceptable carbon monoxide ground level concentrations. Tiwest Joint Venture has recommended assessing against the Occupational Health guideline but as the maximum levels occur off site, the Department of Environment and Conservation (DEC) applies a residential guideline which is not appropriate for a designated industrial area.

Tiwest has reluctantly agreed with DEC to obtain the approval and will now be installing an excessively high stack to meet this inappropriate guideline. It took almost 12 months to reach this resolution.

Redetermination of licence limits for sulphur dioxide emissions

This is a requirement (under Part IV) for Tiwest to expand its plant, however the redetermination is being carried out by the DEC. The redetermination requires all companies designated within the Kwinana Air Protection Zone to provide data to allow the redetermination to occur. One company has been “uncooperative” in providing the required data. As a consequence, the DEC will not conduct the redetermination of Tiwest’s increased licence levels.

This is placing Tiwest’s plant expansion operation at risk and the company will be unable to operate the expanded plant at the existing licence limits. Tiwest requested DEC to carry out a specific redetermination as the company’s emissions are insignificant in the context of the whole area emissions.

DEC agreed to this however, the specific redetermination has not progressed. The situation has been ongoing for more than 2 years although the DEC contribution to the delay has only been in the last 6 months.

Tiwest also advocates that Part IV Ministerial conditions not be dependent on other company contributing data. If the DEC conduct regular redeterminations, then that should be prepared independently of the approvals process.

When an applicant applies for inclusion in this process (or wants to increase their current contribution), the DEC should assess this independently using data previously provided by the other companies. Any issues with another company’s performance should be addressed directly with that company without impacting on the process for the applicant.

4.4. Case study: Resource safety approvals

General comments:

- An aversion to providing written advice or instructions.
- Lack of quality feedback to detailed submissions provided by Major Hazard Facilities operators.
- A preference for verbal direction.
- Verbal direction provided has limited linkage to legislative mandate.
- Lack of decisiveness and inability to accept alternate technical opinion.
- Consistent changing of 'approval goal posts'.
- Inconsistency in advice provided by different safety assessors.
- Safety assessors frequently changing their minds.
- Frequent over-rule of Senior Safety Assessors by the Major Hazard Facilities Section (MHFS) Manager.
- Culture of suspicion rather than approaching operators in a spirit of trust and cooperation.
- MHFS does not have concise policy, guidance material or internal assessment processes.
- Inconsistency of advice between Senior Safety Assessors and the MHFS Manager.

4.5. Case study: Austral Bricks, WA.

Approvals Process – Delays

Many Councils use standard local laws that deal with the day-to-day operations of extractive industry. These laws necessitate the preparation of detailed applications, involving comprehensive survey plans amongst numerous other requirements. The local laws do not, in theory, allow for any discretion by a Local Council in requiring applications to provide a level of information reflective of the type and scale of the extractive industry being proposed.

This issue is noticeable in instances where an extractive industry has already been operating for a period of time and a fresh application is required to allow for the continuation of the site. In these circumstances, it could be appropriate for a Local Council to be able to re-issue a licence without an applicant having to re-submit a detailed application report.

In practice, many Councils appear to overlook the minimum requirements of the local law and therefore accept applications that do not, in theory, comply with the minimum requirements for an extractive industry application.

Solution: Amend Extractive Industry local laws to allow a local Council some discretion in the level of detail to accept in relation to an extractive industry application.

Confusion between Planning Approval and Extractive Industry Licence

In many Councils there appears to be some confusion over the approvals required. In most instances an Extractive Industry is identified as requiring Planning Approval under the Local Planning Scheme. There is usually also a requirement for a local Council to issue a separate Extractive Industry Licence under the applicable local law.

There have been several instances where the requirements, timeframes and implementation process of these two local Council approvals have become confused, however it should be noted that the situation has become less confused over the last five years.

Solution: Clearly differentiate what is being required in each application and provide training to applicants.



Dealing with community comment

Local Councils generally advertise applications for Extractive Industry and it appears that there is a general practice of pandering to community comments received – irrespective of whether there are genuine planning or environmental issues raised or not.

While the views of the community are important, the role and importance of extractive industries should not be overlooked and only bona fide issues should be regarded as relevant by the local Government.

Solution: Encourage and support applications that are detailed enough to withstand public scrutiny.

Local politics can also severely affect the timeframes associated with obtaining relevant local government approvals. Lobbying against applications (often without a sound technical basis – i.e. not in my back yard (NIMBY) frequently results in delays as Councillors try and grapple with community objection. On occasions, direct political stalling tactics have also been evident, even if the relevant Council Administration has made a positive recommendation to Council. Lack of access to elected Councillors also proves to be difficult if there are political plays underway.

Solution: Encourage applications for Extractive Industry to be dealt with at Administration level under delegation from Council.

Approvals under the Metropolitan Region Scheme

Within the metropolitan region, responsibility for issuing planning approvals for Extractive Industry is not delegated to local Councils and decisions are therefore made by the Western Australian Planning Commission (WAPC). This occurs even although the majority of the issues associated with extractive industry are of local importance rather than regional or State significance. This situation has led to the following:

Excessive delays as a result of another party in the approvals process

Local Councils not being held accountable for their comments and suggested conditions as they are not the approving authority

Encouraging local politics to overtake rational planning and thus local government recommendations that are not rational

Applicants being unable to discuss matters with the WAPC due to that agency's reluctance to meet or discuss

Lack of priority given to extractive industry applications by the WAPC.

Solution: Delegate powers to determine extractive industry applications to local Government under the Metropolitan Region Scheme.

Timeframes for approvals

Historically, planning permissions have had no timeframe attached, and the maximum period allowed for an extractive industry was 21 years. This situation was considered appropriate as:

Planning permission related to the long term suitability of a use on a site over time and this should not change in a short period.

The extractive industry licence related to the day-to-day operation of the site and could be adjusted to suit the application at hand. This provided certainty to the operator of the extractive industry.

Over time, there have been more restrictions placed on approval timeframes. Planning approvals and extractive industries now generally apply for a maximum of five years, and some Council's only permit licences of 12 months at a time. This situation provides no certainty to an operator and makes it difficult to invest resources into a project.

Transport linkages

In some instances, particularly in rural areas, it is necessary for vehicles (trucks) associated with extractive industry to pass through more than one Council. Even although a Planning Approval and Extractive Industry Licence may be issued by a particular Council, further permits may be required from adjoining Councils to allow vehicles to travel on Council-controlled roads.

It is possible for an adjoining Council to impose a restriction on vehicles moving through a Council area at any time, thus posing a major impediment to the continued operation of an extractive industry site that otherwise has all approvals in place. It can be very difficult to challenge such restrictions, and a clearly defined right of appeal may need to be considered in such circumstances.

Solution: Access arrangements through adjoining Councils should be considered at the same time as extractive industry approvals if necessary. Access should remain current for the period of the Planning Permission and Extractive Industry, and clear processes for appeal against decisions should be established.

To further explain some of the above issues, a recent application involving Austral Bricks can be considered. Details of this application are as follows:

Date of Application:	27th February 2008
Application applied for:	Continuation of Existing Operation on Lot 51 Great Northern Highway, Chittering
Application result:	Approval with Conditions
Final decision date:	3rd October 2008
Issues considered:	Public comment & timeframes Confusion between Planning Approval and Extractive Industry Licence Political interference

**Application details:**

This application should have been relatively straight-forward. It essentially related to the renewal of an existing operation – one that had been previously approved by the Shire of Chittering and which, at the time of the original approval five years earlier, had foreshadowed the continuation of the operation for approximately 10 years in total. During the previous five years of operation there had been no public complaints regarding operations at the site and Austral Bricks had worked well with the Shire.

The application was lodged in February 2008 and was duly made available for public comment. The application sought continuation of planning approval and extractive industry licence for a further five years.

One comment received from a nearby landowner who had a long-term plan for rezoning and development of their site requested that a shorter time limit be placed on any approval. The Council Administration proceeded to write a report to Council that reduced the period of approvals from the five years requested to three years. This was done without any reference or discussion with the Applicant.

The matter was subsequently considered by Council and approved, albeit with 27 conditions of approval, including a restricted timeframe of three years. Many of these conditions were unwarranted and could not be complied with. Council was subsequently asked to reconsider seven.

On receipt of the request for reconsideration, Council Administration liaised with the Applicant and recommended to Council that all of the seven requests made by the Applicant be met. The Council, within their rights but nevertheless without the benefit of any discussion with the Applicant, agreed to amend five conditions but retained two contentious conditions. These conditions related to:

Limiting the timeframe to three years

Limiting operations on the site to Monday – Friday only.

It should be noted that the previous approval had been for five years, and had allowed operations on a Saturday. Both of these issues were seen by the Applicant as being essential to the continued viability of the operation.

An application to the State Administrative Tribunal had also been made in relation to the original determination by Council. Following the earlier reconsideration of conditions by Council, the matter before the Tribunal was now, however, limited to the two issues above.

Following a significant amount of work, both on side of the Applicant and that of the Council, the Tribunal considered the matter and found in favour of the Applicant. Eight months had passed since the original application had been lodged, and a considerable amount of time and effort had been expended (by all parties) in contesting what were essentially unnecessary conditions.

A more practical solution would have been for the Council Administration to discuss any significant changes to the proposal with the Applicant prior to the matter being considered formally by Council. While this may not necessarily have solved the matter it is likely that informed discussion between the Applicant and the Shire could have resolved many issues without Council or the Tribunal becoming involved.

4.6. Case study: Company name not provided.

Cumulative impacts of water abstraction and use in the Pilbara

Whilst the issue of cumulative impacts may have wider application than the Pilbara, there is a present and growing intention on the part of regulators to come to terms with this issue. This is manifesting itself in growing regulatory requirements on individual companies to address the broader issue of cumulative impacts, yet by definition, this requires input and participation from all water users in the relevant catchment.

Thus mining proponents are being asked to deliver something which cannot be effectively delivered without an active facilitation and coordination role on the part of Government. In the Pilbara, where many catchments are characterised by a few mining operations, cooperation amongst water users is hampered by concerns regarding anti-trust issues. This exacerbates the need for Government facilitation.

Currently it appears that “cumulative impacts” means different things for different regulators and there is a need for alignment and clarity as to what is meant when a regulator refers to cumulative impacts.

The Department of Water have committed to developing a policy position on the management of cumulative impacts (draft Pilbara Regional Water Plan: p19), but this cannot successfully be achieved without the active involvement of the DEC and DMP.

Ability to consider approvals challenges for projects that cross Governmental portfolio boundaries

Growing regulator focus (primarily DEC) on discharge of surplus water to the environment arising from dewatering activities and proponent realisation that this water could be put to more beneficial use is encouraging mining concerns to look to innovative uses for that surplus water.

Potential initiatives that will address regulator’s concerns could range across stand and graze agriculture opportunities, agro-forestry opportunities, seeds for regeneration activities, water bottling, water sharing with other mining operations within catchment, and provision to regional water infrastructure.

These initiatives will lead to more sustainable outcomes that could have significant implications for regional development and economic diversification in the Pilbara region, but which inevitably cut across government and regulator portfolio boundaries.

In order for Government to deal with the regulatory challenges that these types of initiatives present, there is a need for mechanisms or processes that are outcomes focussed that will bring relevant regulators and government agencies to the same table to consider ways to address inhibitors to these projects and to coordinate progression of these projects through the relevant approvals processes to ensure that government facilitation is “joined-up”.

Native Vegetation Clearing Permit Regulation

Water bore drilling was considered a low impact activity and was exempt from Native Vegetation Clearing Permit (NVCP) system where tenure is held under the *Mining Act 1978*.

However if tenure is not held under the *Mining Act 1978*, such as under State Agreement tenure, then water bore drilling requires an NVCP Permit.



I believe this is an oversight in the legislation and that all water bore drilling activity should be recognised as low impact and should be exempt from NVCP.

Internal preparation of, and regulator processes for granting of an NVCP for water bore drilling took 10 months in 2008 at a pre-disturbed, proposed expansion project site on State Agreement tenure.

4.7. Case study: Action Sands, Western Australia.

Review of a decision to refuse a Land Clearance Permit.

Action Sands appealed a decision of the Department of Environment and Conservation (DEC) after being refused an application for a permit to clear approximately 2 hectares of native vegetation at The Lakes in the Shire of Northam in 2004.

The appeal was dismissed by the Minister for the Environment.

The clearing was for the stated purpose of sand extraction, in relation to which Action Sands operates a mine adjacent to the area proposed to be cleared.

The DEC undertook an inspection of the land in April 2005. The Assessment report was completed after the site inspection and noted that the vegetation was in very good condition.

Action Sands met with the Office of the Appeals Convenor in December 2007 to discuss the appeal.

An inspection of the site was conducted.

The Appeals Convenor prepared a report on matters raised.

Action Sand's objection to the decision to refuse the permit application was based on the following grounds:

- unreasonable delay in dealing with the application;
- salinity assessment based on incomplete data;
- no consideration given to offsetting loss of vegetation through replanting;
- burning operations by the DEC have elevated recharge;
- inadequate consideration of rehabilitation activities; and
- impact of refusal on sourcing building sand for Hills area.

Action Sands submitted additional information including a hydrologists report in January 2008, which the Appeals Convenor provided to the Department of Water (DoW) and the Water Corporation (WC) for comment.

Both the DOW and the WC provided advice opposing any further clearing associated with the extractive industry based on concerns that the clearing and extraction of sand would result in an increase in salinity with the Mundaring Catchment, which is already raised due to other land uses.

The DoW's most recent advice suggests the salinity concerns may be addressed through a revised proposal, incorporating an offset planting of deep rooted perennial vegetation on cleared land up gradient of an existing saline discharge area, at least twice the ultimate mine clearing area.

The Minister for the Environment was of the opinion that DEC was justified in refusing to grant a permit to clear two hectares of native vegetation.

Action Sands believes that the rehabilitation of previously mined areas was not sufficiently reflected in the DEC's assessment of the application.

Both the DoW and the WC have provided advice opposing any further clearing associated with the extractive industry based on concerns that the clearing and association of sand would result in an increase in salinity with the Mundaring Catchment, which is already raised due to other land uses.

Action Sands has lodged another clearance application with the Department of Mines and Petroleum and has been advised that after 7 years, the application will now be readvertised.

4.8. Case study: *Rights in Water Irrigation Act 1914*

The issue: s26D RiWI Act licences and monitoring bores legal clarification

In February, the Pilbara Regional Office of the Department of Water (DoW) advised of a clarification of s26D of the *Rights in Water and Irrigation Act 1914* (RiWI Act). Arising from a question posed by industry, DoW sought advice as to whether 26D well construction permits are required for monitoring wells and advised the following:

Under the *Rights in Water and Irrigation Act 1914*, Part 1 Section 2(1) a 'well' is defined as "an opening in the ground made or used to obtain access to underground water".

A piezometer (or monitoring bore/observation well) therefore falls under the definition of a 'well'.

All groundwater in the Pilbara region is proclaimed under the *Rights in Water and Irrigation Act 1914*, and any construction of artesian or non artesian wells, or any enlargement, deepening or altering of an existing well in proclaimed areas requires licensing under the RiWI Act.

The DoW has advised that the activity of drilling and construction of piezometers or monitoring bores is therefore an activity that requires a 26D licence under the RiWI Act.

Key concerns arising from s26D licence clarification and recommended action

The key concerns that company have with the clarification, including an estimate of the business impact, are identified below. It appears that the impacts of this clarification are significant for company (and other proponents) and will almost certainly impact on the capacity of the DoW Pilbara Regional Office to efficiently process all licences and approvals, not just s26D licences in relation to monitoring bores.

This raises a question as to the policy imperative for licensing monitoring bores. It suggests that, beyond responding to any immediate need arising from the legal clarification, there is a need to consider means by which both current and future legislation might be amended or qualified to ensure that the regulatory response is proportionate to the water management needs of the State.

It is noted that in limited discussions with DoW to date, that there is both a recognition on the part of some departmental officials of the need to address the impact of this clarification, and an intention to take action.

Nevertheless, the company strongly recommends that the following course of action is taken to minimise the impacts on both the mining industry and on the DoW's capacity to appropriately conduct its regulatory functions:



- In the first instance, the need to process monitoring bores that are now required to be licensed in a way that speeds the process and reduces compliance costs. This includes a need to notify the affected companies in writing, outlining a clear and agreed process to address the immediate licensing imperative, noting the immediacy of the change in interpretation and specifying a reasonable time in which respondents address the licensing requirement; and
- Concurrently, address this issue via an exemption from 26D under a legal instrument/order that qualifies the interpretation of s26D if the RiWI Act.

In the long term, address this in the context of the proposed Water Resources Management Bill that is currently being drafted.

Outline of key concerns

Interruption to scheduled work in the short term

The organisation has four monitoring bore drilling programmes scheduled for March-April 2009 totalling the drilling of 63 monitoring bores. Due to mobilisation requirements, these programmes were scheduled in advance and cancellations not only cause a direct business cost (demobilisation or standby charges) but also delay the commencement of required monitoring. No transitional period was nominated for the requirement and the company had no prior notice of the change from previous advice. It should be noted that the clarification (provided on 20 February 2009) was contradictory to previous advice received from the Department of Water (DoW) and hence applications for the scheduled March works were not prepared.

Applications have subsequently been submitted to cover the requirements for the March works; however licences have not yet been received and works may still need to be cancelled or delayed.

Numerous other monitoring bore installation programmes are scheduled in the coming six months in addition to the above works. Works planning for late 2009 – 2010 is still in process.

Clarification of scope of requirements

Requirements for contaminated site investigation

The organisation has historically (and presently) installed monitoring bores for the purposes of detailed contaminated site investigation. These bores are required to help ensure proper delineation of the severity and extent of suspected or known contaminated sites by ensuring that any groundwater quality impacts are understood (and subsequently remediated). In addition, these bores may be required to ensure that company complies with the requirements of the Contaminated Sites Regulations 2006. Clarification has been sought as to whether these bores will also require licences prior to installation.

Requirements for evaluation drilling used for monitoring or opportunistic sampling

In some instances, casings are installed down mineral exploration holes to provide early baseline data. These holes are being drilled primarily for mineral exploration and are used to opportunistically derive time series water level information that would help company's understanding of groundwater systems and ensure adequate baseline knowledge for future developments. It is not necessarily known in advance which mineral exploration drill holes will be appropriate for conversion to monitoring bores.

If the company were required to obtain licences in advance and these were not obtained in a timely manner, valuable data from this opportunistic monitoring would be lost as the drill holes would instead be capped and rehabilitated.

Clarification has been sought as to whether these bores will also require licences prior to installation.

Requirements for replacement monitoring bores due to the advancement of mining operations or other changes

Monitoring bores are regularly 'mined out' by advancing pits or by other activities or lost. To facilitate the companies on-going monitoring (and licensing) requirements, it is preferable that these bores are re-drilled or replaced as soon as practical. The timeliness of replacement or re-drilling will be impacted if company must apply for 26D licences in advance.

Clarification has been sought as to whether replacement or re-drilling for existing bores will also require licences prior to works.

Processing and Administrative Time

Our understanding is that the DoW has a significant backlog of applications for a range of licensing and other approvals. This is supported by the length of time (currently greater than 120-150 days) it currently takes for applications to be processed. For example, our most recent GWL amendment (amendment application only, not new licence) took 113 working days (excludes public holidays and weekends) to be processed. Of this time, 111 days were taken for the application to get to the front of the processing queue.

This clarification will increase the number of applications received by the DoW and hence it is anticipated that the backlog will increase and processing time lengthen yet further.

Our understanding is that there is no prioritisation of application types as applications are processed in order of receipt. Hence these 26D applications, even if simple and quick to process, would still need to wait in the processing queue. In addition, the company have many outstanding business-critical applications already with the DoW. A growing backlog of section 26D applications may cause even greater problems for further business-critical approvals.

The clarification will require additional time from company personnel to prepare applications as well as to administer received licences as well as ensuring on-going compliance with any relevant conditions. It would be preferable that environmental personnel were able to focus their efforts on work related to managing and improving environmental performance rather than preparation and administration of licences that do not focus on environmental impact.

Requirement for existing monitoring bores

It is unclear how existing monitoring bores will be treated. For the 2008 calendar year, the company had legal reporting requirements in the Annual Environmental Report for a large number of Monitoring Bores and in the Annual Aquifer Review for a similar number. Over 2,000 Monitoring Bores (including regional and opportunistic monitoring bores) are included in the companies MapInfo database.

Clarification has been sought whether the DoW require retrospective applications for existing monitoring bores.



Objective of Requirement

It is unclear what environmental impact or water resource protection objective that this clarification is aimed at. The requirement for more administration and additional approvals appears to be in contradiction to the Government's and the DoW's current drive to streamline approvals and remove unnecessary administrative delays.

Estimated Business Impact

The key business impacts expected for the company are delays, both for the additional section 26D licences as well as for other DoW applications that will now take even longer to process due to the increase in DoW's workload. As mentioned above, recent queue length appears to be approaching six months. With the current queue length we have already had instances of needing to delay construction work, demobilising or rescheduling activities as required approvals have not been issued in a timely manner. Demobilisation costs for a drill rig are estimated to be \$6,000 – \$8,000 per day.

5. Recommendations – phase one

5.1. Define the Western Australian resource development policy

It is recommended that the Government clearly define its vision and policy for economic and social development, with special reference to developing the State's mineral and petroleum resources. It is recommended the Government publish a resource development policy to support the vision. This publicly available policy will provide a clear direction for departments and agencies, industry and the community.

The policy will assist project proposal approval decision making. The policy should make clear approval objectives and indicative timelines for all State mineral and petroleum exploration and development proposals.

5.2. Establish a natural resources agency

In reviewing the approvals role and responsibility of the Department of Environment and Conservation (DEC), consideration has been given to its present structure and responsibilities across a wide field of Government bodies and activities. A decision of the former Government resulted in the merger of the Department of Conservation and Land Management (CALM) with the Department of Environment (DoE). As a result, the DEC became a land owner and manager, as well as a licensing authority and a regulator. The DEC also became responsible for several statutory bodies including the Botanic Gardens and Parks Authority, Marine Parks and Reserves Authority, the Zoological Parks Authority and the Conservation Commission. It also brought together two different “cultures” and potential conflicts of interest which we understand has not been an easy merger.

Despite the merger of the Department of Conservation and Land Management and the Department of Environment, significant cultural, philosophical and policy differences continue to create impediments to the efficiency and effectiveness of the State's approvals processes.

To address this, and other impediments, it is recommended that government, through the Economic Audit Committee, consider structural change to establish a natural resources agency.

This proposed Department of Natural Resources would better support the delivery of efficient and effective environmental management services and approvals, and provide an increased focus on conservation and land management to existing and future National Parks and Reserves.

5.3. Establish a “stand alone” role for the EPA

The Environmental Protection Authority (EPA) is the primary environmental policy advisor to Government. Currently the EPA does not control its own resources. Resources are provided by the Department of Environment and Conservation (DEC). DEC funding priorities may limit the ability of the EPA to manage DEC supplied staff and the EPA workload. The success of the implementation of environmental impact assessment and other approval reforms will depend upon the availability of clearly defined resources.

It is strongly recommended that the Environmental Protection Authority (EPA), its service unit and its advisory role be a “stand alone” responsibility. It is proposed that the EPA retains its independent environmental impact assessment advisory role for prescribed or high risk environmental proposals and that the EPA be directly resourced and accountable for its resources and outputs.



It is recommended that the EPA take responsibility for the functions of Part V (excluding works approvals and licences required for activities on mining tenements and petroleum permits, leases or licences) of the *Environmental Protection Act 1986*, contaminated sites and associated compliance monitoring functions to remove duplication and overlap within the environment portfolio.

To reduce duplication and streamline approvals, it is recommended that the requirements for works approvals and licences under Part V of the *Environmental Protection Act 1986* for mining and petroleum proposals and activities be incorporated into mining and petroleum approval processes.

No changes to the EPA advisory role or changes to the authority of the Minister for Environment are proposed.

5.4. Establish an independent “Approvals Reform Office”

The former Office of Development Approvals Coordination (ODAC), formerly resided in the Department of Premier and Cabinet, and was responsible for approvals co-ordination, collection of approval statistics and reporting agency approval performance to government. ODAC has been renamed as the Development Approvals Division and relocated to the Department of State Development (DSD). The role and responsibilities of this group are not clear.

The failure of government to fully implement the Keating Report 2002 “Review of the Project Development Approvals System” recommendations support the establishment of an independent approvals reform office with sufficient authority, independence and capacity to assist government drive reform.

It is recommended that government establish an independent approvals reform office to assist relevant Ministers drive approvals reform. The office would be responsible for overseeing the implementation of Government endorsed reform recommendations.

It is recommended that a Parliamentary Secretary, senior officer or an external person with the appropriate knowledge, who has direct access to the Director General of the Department of Premier and Cabinet, and to the Premier, be appointed to assist relevant Ministers deliver approvals reform.

5.5. Reform Native title and Aboriginal heritage processes

Uncertainty, complexity and the resultant delays associated with native title and Aboriginal heritage have a disproportionate adverse impact on mineral and petroleum tenure and activity approval timelines.

The *Native Title Act 1993* (Cth) (NTA) is Commonwealth law intended to provide for the recognition and protection of native title. It also provides a means by which land tenure for resource projects can be validly obtained despite the existence or possible existence of native title. A key objective of the NTA is to provide certainty of process and outcome in relation to those matters.

The NTA encourages agreements about the resolution of native title claims and the obtaining of project approvals over land where native title exists or may exist. The NTA also provides a relatively clear means to resolve these issues through administrative and/or judicial process where agreement is not reached or not required.

The NTA in some cases confers very significant procedural rights on persons who hold or claim to hold native title. The processes include the “right to negotiate” and “right to consult”. Those processes apply to most, exploration, mining and infrastructure tenures required for exploration and development projects in Western Australia, and can and often do, take many months to years to complete. A failure to comply with the requirements of the NTA can lead to the invalidity of project approvals.

The effective and efficient administration of the processes contemplated by the NTA is critical for the development of projects in remote and regional Western Australia.

It is recommended that there is a renewed focus on resolving native title claims. This includes using the Federal Courts where satisfactory progress in claim resolution through mediation is not being made. Additional resourcing of the Warden's Court is recommended to ensure that any objections lodged by native title claimants are actively progressed to avoid delay to other approval processes. It is recommended that native title "future act" processes be initiated by the State expeditiously and in parallel with other non-native title processes wherever practicable.

The original objectives of the *Aboriginal Heritage Act 1972* (AHA) appear to have been misinterpreted by some parties to the detriment of the protection of Aboriginal heritage. It appears that a heritage survey "industry" has developed over the last 5 years that has contributed to unacceptable work practices, unnecessary surveys, increased costs for the mining and petroleum exploration industry and inaccurate data recordings. Government should resume control of Aboriginal heritage survey methods and costs to ensure the objectives of the AHA are achieved.

It is recommended that new Aboriginal heritage guidelines being developed by the Department of Indigenous Affairs (DIA) are reviewed by the mining and petroleum industry prior to final endorsement by the Minister for Indigenous Affairs. The impact of these guidelines on existing work practices, approval timelines and heritage survey costs should be measured over a 12 month period. It is recommended that DIA and the resource industry jointly develop appropriate impact measures. A report on the impact of the new guidelines using these measures should be provided to the Minister for Indigenous Affairs and published on the DIA website by 1 July 2010.

There are significant opportunities for improving the administration of Aboriginal heritage policy, procedures and guidelines which, if implemented, would help achieve the objectives of the AHA and provide more certainty for the development of projects in the regions of Western Australia.

It is strongly recommended that the efficiency of the administration of the AHA be improved through administrative reform. A series of administrative reforms regarding Aboriginal heritage surveys, section 18, site register, record keeping, condition setting and staff training is required.

It is recommended that appropriate training is provided to the Department of Indigenous Affairs (DIA) officers to ensure they understand the operation of the AHA and the means by which it can be efficiently and effectively administered. The DIA should consider employing staff who have relevant industry experience and demonstrate a more balanced approach to administering heritage issues.

The primary focus in increasing the efficiency of the AHA and removing unnecessary obstacles to development approvals under it should be an overhaul of the administration of the AHA rather than legislation, at least in the first instance.

The existing practice of DIA requiring evidence that environmental approval is in place should be discontinued immediately and replaced with the following:

Where a proposal the subject of a section 18 notice has not been referred under s41 of the *Environmental Protection Act 1986* (EP Act) to the Minister for Indigenous Affairs there should be no delay in the grant of a section 18 by the Minister on that ground. Section 41 of the EP Act does not operate at all in relation to that proposal (unless it is referred before the Minister makes a decision).



Where a proposal, the subject of a section 18 notice, has been referred under s41 of the EP Act to the Minister for Indigenous Affairs the Minister cannot grant an unconditional section 18 consent if that would “allow” the implementation of the proposal for the purposes of the EP Act. In these circumstances, the Minister should grant section 18 consent subject to a condition to the effect that:

- No works which could have the effect of implementing the proposal referred by the EPA can occur in reliance on the consent until the requirements of the EP Act have been discharged in relation to the referral under that Act; and
- The “register” maintained by the DIA and Registrar is reviewed to make it conform to the requirements of the AHA. It is suggested that the guidelines pursuant to which this review occurs be the subject of consultation with appropriate stakeholders including industry before it occur.

The review of the register should include;

- A requirement that all places included on the register must meet the requirements of the AHA (that is, the test for an Aboriginal site under section 5) and be clearly and accurately recorded in a way that is readily capable of being accessed; and
- The status of places included on the “permanent” Register should be reviewed on a case by case basis (particularly where development is proposed) to determine whether they in fact meet the requirements of the AHA.

Assessing the merit of the informal practices that have developed when a site is recorded and reforming those practices and information previously recorded in accordance with them. Examples include the practice of recording polygons and buffer zones and the circumstances in which it is appropriate to record information on a site as “closed” thus restricting interrogation of the information in the future.

The Minister gives directions under section 38 of the AHA as to the manner and form in which the Register is maintained. This will include processes to ensure that persons whose interests may be affected by the registration of a place are afforded natural justice in relation to the proposal to include it on the Register.

Records of the DIA relating to places on the Register and other places (not on the Register) to which the AHA might apply (such as places currently on the “interim” register) are kept separately and made available to be inspected.

The existing practices of the DIA and ACMC relating to the processing of section 18 notices are changed to make them consistent with the AHA and procedurally fair. It is suggested that the development of guidelines in accordance with this review be developed in consultation with appropriate stakeholders including industry.

Adverse inferences should not be drawn against proponents in circumstances where Aboriginal groups have declined to participate in heritage surveys or consultations after having been given a reasonable opportunity to do so.

Aboriginal heritage reports should be reviewed objectively and on scientifically justified grounds. Arbitrary criteria such as whether a report was produced before or after a particular date should not be used and the existing pro-forma section 18 notice provided by the DIA should be simplified. All administrative processes and requirements should be simple, workable and clearly articulated in written form.

A review be undertaken in consultation with appropriate stakeholders including industry of the common forms of conditions currently imposed on section 18 consents to identify appropriate wording for common place consents that does not have the effect of imposing conditions that are not capable of being complied with, which are unworkable or impractical or which contain subjective requirements.

The existing procedures and record keeping of the ACMC are reviewed and new regulations promulgated under sections 34 and 68 of the AHA concerning those procedures.

5.6. Reform of *Environmental Protection Act 1986* appeals process

There are concerns about the manner in which appeals under Part VII (Appeals) of the *Environmental Protection Act 1986* are conducted. There is concern that the whole appeal system is an appeal from 'Caesar unto Caesar'. That is, appeals are made from decisions or advice from the EPA or the DEC, to an appeals convenor that tends to be ex-DEC staff. The Minister then decides on appeals from the EPA (that the Minister appoints) and the DEC (that the Minister oversees).

The fundamental principles of administrative law include: relevant considerations, reasons for decisions, acting within power, bias and procedural fairness. The appeals convenor endeavours to follow these principles. However, the very process that the appeals convenor has adopted means that the principles are immediately breached in part. The appeals convenor does not conduct an open hearing with all parties present so that they can each hear the others' views and test those views. Instead, the appeals convenor or his representative, meets with the parties individually and then informs the other party that he will convey the content of that meeting to them. This system relies on the appeals convenor ensuring that all relevant matters discussed at one meeting are faithfully and accurately relayed to the people at the next meeting. Unfortunately, the result is to create, in some cases, uncertainty and suspicion of the process and the decision maker.

To address the issue of the method of appointment and the level of experience of appeal convenors it is recommended that a retired magistrate is selected as an appeal convenor. This would not cure the issue of the Minister as decision maker but it would go some way to improving the appointment process. It is proposed that the appeal process be reformed to address the issues of procedural weakness and concern about the manner in which appeals are conducted. It is also proposed that the fundamental principles of administrative law are adopted in the relevant current legislation and that those administering the system are properly trained in administrative law.

To address the areas of concern associated with the present appeals process, and to bring procedural integrity and transparent accountability it is recommended that the responsibility for the appeal process be transferred to the State Administrative Tribunal.

Pending this transfer, it is recommended that a retired magistrate be appointed to hear appeals, and to implement appropriate hearing procedures.



5.7. Reduce the backlog of objections at the Warden's Court

The Warden's Court is constituted under the *Mining Act 1978* (WA) and its jurisdiction extends throughout Western Australia.

Any person holding office as a Stipendiary Magistrate may be appointed as a Warden and can preside in a Warden's Court. All proceedings relating to a mining tenement must be filed in the Warden's Court for the designated district in which the mining tenement lies. A Warden's Court has jurisdiction to hear and determine all actions, suits and other proceedings recognised by any court of civil jurisdiction as set out in s. 132 of the Act.

A Warden's Court has power to make orders on all matters within its jurisdiction as set out in s. 134 of the Act. Hearings in the Warden's Courts are held in open court and witness evidence may be obtained by subpoena. Evidence is given under oath or by affirmation and the normal rules of evidence apply as set out in s. 138 of the Act. All decisions arising from the various Wardens Courts are published and available to the public.

During 2007/08 there were 885 objections under the *Mining Act 1978* referred to the Warden's Court. A mining application for new title cannot be progressed until an objection is resolved. Currently, this process can take between 6 – 12 months or longer to resolve. The *Mining Act 1978* provides for any person to object to grant of new title within 35 days of lodgement however there is no timeframe specified for Warden's Court processes.

There are currently five magistrates appointed as Wardens under the *Mining Act 1978*. They are not full time Wardens. It is estimated that between 10 – 50% of their time is spent on mining matters. The number of Warden's Court hearing dates is limited by the number of Wardens available and their workload. For example, there are only 8 hearing dates scheduled in the 2009 calendar year for the Karratha area.

It is recommended that Government consider the appointment of a full time Mining Warden and increase the number of hearing dates. It is recommended that Government consider appointing retired magistrates as additional mining Wardens to address the backlog of objections referred to the Warden's Court.

It is estimated that 95% of all objections are resolved between parties just prior to hearing dates. If this is accurate, government assisted pre court conference meetings coupled with an increase in the number of hearing dates would assist in earlier resolution of objections. It is recommended that government consider appointing suitable fit and proper persons to be wardens of mines as per Sections 13 and 14 of the *Mining Act 1978* to facilitate pre court conference meetings and a reduction in the objections backlog.

5.8. Reform the administration of environmental offsets

The principle of “Offsets” has a wide application and in one form or another, has been associated with the approvals process for a considerable period. Significant benefit can result from a proponent accepting a request to assist with a flora research project, to forego some land to the State in exchange for clearing it requires doing, and similar examples. However, it would appear that “offset” demands have now become an issue of real concern to many proponents, and the demands being made are neither adequately transparent nor fully understood, and often introduced mid or late in the process which can be perceived as a leveraging arrangement.

Requirements for land to be made available to the Crown, funding for additional research having no relationship to the original approval proposal, approvals delayed for at least a year while an additional flora survey is required the following spring, and similar examples requires a more understood and disciplined approach than appears to be the current situation.

It is apparent that the current arrangements for imposing ‘offsets’ and additional requirements of approval proponents are unclear, are not always included in the original scoping of the proponents application and are not transparent, or in respect to disciplined management arrangements. The Industry Working Group has been made aware of several examples where additional demands have been made after the original requirements agreed.

It is recommended that this important aspect be addressed immediately, and that the methodology supporting the decision making involved, be published and clearly understood. This should include the basis for the calculations used for the financial quantum for environmental offsets.

Having regard to the additional inconvenience, financial costs and uncertainty, it is recommended that all offset arrangements be transparent, be finalised in the original scoping of the approval process, and be subject to Ministerial approval and Cabinet endorsement.

Requirements for land to be made available to the Crown, funding for additional research having no relationship to the original approval proposal, approvals delayed for at least a year while an additional flora survey is required the following spring, and similar examples requires a more understood and disciplined approach than appears to be the current situation.

Of great concern are the efforts to impose a considerable sacrifice of land in the Mid-West iron-ore region, as a condition for environmental approval being granted. Similar requirements appear to be imposed to prevent exploration activity in the Yilgarn region and refer to the policy of the Department of Environment and Conservation as stated in EPA Bulletin 1256, released in May 2007. This was the policy of the former Government referred to in the Executive Summary. It is the responsibility of the Environmental Protection Authority to provide advice to the elected Government, which should make and implement such decisions, especially where significant social and economic development is involved and could be jeopardised by such demands.



5.9. Review Government policy

Further information made available to the Industry Working Group strongly suggests that decision making within some agencies is still being made on the basis of previous Government policy and, in some cases, ideological views in some government agencies.

The following comments provided by the Executive Director of a junior mining company illustrate a common industry perception and concern:

“Overbearing environmental influence where strategies and tactics appear contrary to policy is clearly designed to frustrate legitimate exploration activities. The proposed conservation parks, banded iron formation range strategy and the concept of Threatened Ecological Communities are examples of DEC initiatives that are based on emotive rather than hard scientific evidence and avoid any attempt to balance economic and conservation issues.”

“It is pointless DEC controlling large areas of land that they cannot manage, and which they acquired with neither scientific basis nor regard to conservation values. DEC needs to be working with the State and the economy rather than against it.”

It is proposed that Government immediately review the policies of the previous Government that impact on approval processes to ensure that they reflect the current policies of the present government. This would include the document titled “Strategic Review of the Banded Iron Formation Ranges of the Midwest and Goldfields”, the associated “Draft North Yilgarn Management Plan”, other relevant mining and petroleum, environmental, native title and Aboriginal heritage policies.

The Department of Environment and Conservation (DEC) has purchased 54 pastoral leases and part pastoral leases with the intent of including this land in the DEC Conservation estate. The area of land encompasses some 633 active and 724 pending mining tenements. These areas have been classed as “Unclassified Conservation Parks”. The Association of Mining and Exploration Companies (AMEC), in a 2008 briefing paper, identified concerns regarding the use of unclassified conservation park status as an interim level of reservation. It is understood that DEC’s broader intent is to increase the size of the conservation estate to at least 15% of the State’s land surface area and, according to the DEC document “100 year Biodiversity Conservation Strategy for Western Australia: Blueprint to the Bicentenary in 2029”, to have a “system of terrestrial conservation reserves afforded the highest level of statutory protection in perpetuity”. Highest level refers to Class A Nature Reserves which preclude all mineral exploration and mining under existing government policy.

Government should be fully aware of the policy being pursued by the DEC and determine whether it wishes to further reduce future potential exploration to this degree.

This use of unclassified conservation park tenure coupled with a broader intent to eventually prohibit all mineral exploration and mining has significant implications for Western Australia. These include increased sovereign risk, loss of private investment for environmental assessment, reduced economic activity particularly in rural and regional areas and an increased cost to State Government for conservation estate management.

Exploration and mining companies now see clear indications of tenuous tenure and considerable sovereign risks which are too great relative to exploration and mining activities in other regions (both domestic and international). Consequently, the decline in mineral exploration in these areas will exacerbate Western Australia’s loss of mineral exploration. As a result far fewer successful discoveries in Greenfield and highly prospective areas will occur.

Western Australia relies heavily on mineral exploration companies to conduct and pay for environmental assessments. Faced with impediments to tenure and uncertainty with approval processes companies are less likely to invest in comprehensive environmental surveys and environmental management activities leaving the State government to fund these activities.

The reduction in the area of the State seen as suitable for exploration and mining will naturally lead to further decline in the level of exploration and mining in the State. This will lead to a reduction in the value of royalties, GST, income taxes, payroll taxes and shire rates paid to all three levels of government. A decline in economic activity in regional Western Australia, resulting in less local employment and training opportunities, reduced business opportunities and an adverse impact on the economies of regional areas. There is likely to be reduced private investment in infrastructure of regional areas.

There is likely to be a significant increase in the cost to the State Government of managing the additional conservation estate. The cost of managing Western Australian conservation estate increased from \$40.5 million in financial year 1995/96 to around \$103 million in financial year 2007/08. Additions to the conservation estate will require additional funds to adequately manage those lands. In particular, fire management, public access, weed and feral animal control costs will increase.

A more balanced approach is proposed which incorporates the International Union for the Conservation of Nature and Natural resources (IUCN) managed-protected status to facilitate an increase in the size of the conservation estate in Western Australia.

It is proposed the new “Managed Protected Reserves” be created under the *Land Administration Act 1997* and vested under the joint care, control and management of the Minister for Environment and the Minister for Mines and Petroleum. Concurrence of both Ministers would be required before the creation of new reserves. The current practice for the granting of any new mining tenement in conservation reserves would also apply to the creation of new reserves. Section 24 of the *Mining Act 1978* requires the Minister for Mines and Petroleum to seek concurrence with the Minister for Environment prior to a proposed grant of mineral tenement in conservation lands.

The benefits of a Managed Protected Reserve category are:

- The former pastoral lease is endorsed under the IUCN provisions;
- The category reduces sovereign risk and increases certainty for industry at regional, State, National and international levels;
- The identified conservation category provides for a clear and transparent approval process for mineral exploration and mining in potential or interim conservation lands; and
- It provides a balanced and equitable decision making process for government consistent with the internationally established principles of natural resource management, and sustainable development.

From an industry and community perspective, a managed protected conservation reserve category under the *Land Administration Act 1997* would enhance the existing approvals process by increasing the certainty and transparency of the decision making process.



5.10. Encourage agency use of external resourcing

The Industry Working Group support the use of accredited consultants, certified assessors and establish expert panels to assist agencies in the approvals process. There are examples of industry funded expert panels that have greatly facilitated the approvals process without compromising the integrity of the outcome. The Chevron Barrow Island LNG facility proposal and the Anglo Gold Ashanti Tropicana proposal are examples of the beneficial use of expert panels.

The use of expert panels and the concept of co-investment between the resource industry and government is considered to enhance environmental impact assessment processes without additional layers of complexity or regulation. The Industry Working Group supports the further consideration of expert panels and the concept of co-investment programs between industry and government.

5.11. Improve agency access to technical information

The Auditor General's Report Number 8 dated September 2007 titled "Management of Native Vegetation Clearing" highlighted the limited access to technical information provided by DEC. There is restricted access to some of DEC technical databases which are important for assessing applications for clearing native vegetation associated with mineral and petroleum proposals. In particular, Declared Rare Flora and Priority Flora, Threatened Fauna, and Threatened Ecological Community databases are not made fully available.

It is recommended that this information is provided to the EPA database and other relevant agencies to assist government approval decision making.

5.12. Review agency approval processes and timelines

The Industry Working Group consider there are opportunities to further streamline key approval processes and that a review of the necessity of agency application forms, checklists and guidelines for key approval requirements is warranted.

It is proposed that Ministers having responsibility for key approval agencies, such as the Department of Planning and Infrastructure, Department of Indigenous Affairs, Department of Mines and Petroleum and the Department of Environment and Conservation, appoint suitable panels to review agency key approvals processes and provide a report to the Premier by end of September 2009. There is a general lack of approval timelines and transparency in decision making within government.

It is recommended all government departments involved in the approvals processes are required to publish key approval timeline targets and performance measures. Where possible, key approval process timelines should be "hardwired" into environmental regulations.

For example, Regulation 10 of the Commonwealth *Petroleum (Submerged Lands)(Management of Environment) Regulations 1999* specifies a time limit for the Designated Authority accepting or not accepting an environment plan for a proposed petroleum activity. Regulation 10 subsection (1) requires that within 30 days after an operator submits an environment plan, the Designated Authority must accept the plan or refuse to accept the plan or give notice in writing to the operator stating that the Designated Authority is unable to make a decision about the plan within the period of 30 days setting out a proposed timetable for consideration of the plan.

Feedback to the Industry Working Group from both petroleum industry operators and regulators indicates support for approval target timelines being "hardwired" into regulations.

6. Recommendations – phase two

6.1. Establish a single decision making authority (DMA)

It is proposed that Government investigate the merits of establishing a single decision making authority model for all mining and petroleum proposals. A single decision making authority for all mining and petroleum proposals represents a significant change to the current multi-agency approvals system and warrants careful and detailed investigation.

The second phase of approvals reform in Western Australia should work towards the implementation of a “single DMA model”. This model essentially has three elements:

1. only one approval (and one approval document) is given for a particular project;
2. there is only one DMA for a particular project, with other agencies and departments feeding through their recommendations to this DMA for final decision; and
3. who the DMA is will depend on the size of the project.

The approvals process should be strengthened by having a single DMA in a number of ways, for instance:

- having a single approval document will eliminate duplication (for example, the need to secure both Part IV and Part V *Environmental Protection Act 1986* (WA) approvals) and should promote certainty;
- timelines could be set in legislation for the DMA making a decision, for other agencies providing recommendations and for objector input; and
- timelines should be further reduced and simplicity enhanced by having a single point of contact and coordination for an approval.

A single DMA model can take many different forms, and would need to be adapted to the particular commercial considerations governing business activity in the Western Australian resources sector. It would need to be crafted to ensure that principles of accountability, transparency and public participation are enshrined in the system.

In order to consider these reforms in the requisite level of detail, a fully resourced reform body is endorsed. Now, when business activity is low, is the optimum time to dedicate departmental resources to this issue.

Single DMA approval systems have been implemented in different forms, and to varying degrees, in other jurisdictions such as New South Wales, South Australia, Queensland and the United Kingdom. The reform body should use these examples as a basis for its investigation, and report on the advantages and disadvantages of the single DMA model. The reform body could use these examples as a basis for its investigation, and report on both the advantages and disadvantages of the single DMA model. In particular, the reform body should draw on the findings of the New South Wales planning framework inquiry, when these findings are released in December 2009.

Consideration should also be given to the integration of social, economic and environmental aspects when assessing the acceptability of mining and petroleum proposals. Under the existing multi-agency approvals system these aspects are considered separately. A single DMA may provide the mechanism for Government to move toward a more integrated approach to the assessment of proposals.



6.2. Amend Section 41 and Schedule 6 of the *Environmental Protection Act 1986*

Section 41 – Environmental Protection Act 1986

Section 41 of the *Environmental Protection Act 1986* has been interpreted by certain decision makers as preventing them from continuing the normal proposal assessment process. That was never the intent of section 41.

It is recommended that section 41 be amended to:

1. secondary project approvals and tenure can be granted prior to the environmental impact assessment (EIA) approval being granted; and
2. works cannot commence under those project approvals or the title until the EIA approval has been granted.

Schedule 6 – Environmental Protection Act 1986

Native vegetation clearing regulations for the resource sector are currently administered by the Department of Mines and Petroleum (DMP) by delegation from the Department of Environment and Conservation (DEC). It is proposed that the clearing permit requirements be merged into the mining and petroleum approval requirements. This would result in proponents submitting only one document to the DMP for approval. This simplifies the mining and petroleum approval process by reducing the number of approvals required. The standard of assessment would be retained by incorporating the native vegetation clearing principles into the mining and petroleum approval processes.

To address the duplication and overlap of native vegetation clearing assessment between the clearing permit requirements and mining and petroleum activity approvals it is recommended that all native vegetation clearing associated with proposed mineral and petroleum activities be assessed under the authority of the *Mining Act 1978*, State Petroleum Acts and relevant State Agreement Acts. This would require the integration of the clearing principles of the *Environmental Protection Act 1986* (Schedule 5) into the *Mining Act 1978*, State Petroleum Acts and relevant State Agreement Act approval processes.

This would require amendment of Schedule 6 of the *Environmental Protection Act 1986* “Clearing for which a permit is not required” to include clearing that is done under the authority of the *Mining Act 1978*, Petroleum Acts and relevant State Agreement Acts.

This approach has been adopted for the clearing of aquatic vegetation that occurs under the authority of a licence or permit within the meaning of the *Fisheries Resource Management Act 1994*, the taking of flora as authorised under licence of the *Wildlife Conservation Act 1950* and clearing in accordance with the *Planning and Development Act 2005*.

In order to make equivalent clearing requirements explicit consequential amendments could be made to the *Mining Act 1978*, Petroleum Acts and relevant State Agreement Acts. For example, in granting licences under the *Wildlife Conservation Act 1950* a consequential amendment was made stating “the Minister shall have regard for the {ten} clearing principles set out in Schedule 5 of the *Environmental Protection Act 1986*.”

6.3. Amend *Mining Act 1978* miscellaneous licences to include railways

There is demand from both large and small iron ore producers in the Pilbara for railway transport. A *Mining Act 1978* miscellaneous licence is an easement title capable of crossing other mining tenements and other land titles. Importantly, it does not extinguish native title. Title for rail under the *Land Administration Act 1997* requires a resumption of native title and this can lead to delays and increased compensation costs. The lack of a viable title process can delay the commencement of new iron ore projects.

The development of railways to service iron ore projects has in the past been accomplished under State Agreement Acts, and this has to date only applied to the Pilbara region. Initially land tenure for railways was administered by lease under the *Land Administration Act 1997* after proposals had been approved under the State Agreement Act. Since the introduction of native title however, miscellaneous licences under the *Mining Act 1978* have been utilised. The use of miscellaneous licences ceased in August 2008 when the regulation that provided the purpose for a railway was repealed.

It is proposed that the *Mining Act 1978* be amended to allow for a miscellaneous licence that includes the development and use of railways.



7. Summary of recommendations

Phase one recommendations

1. Define the Western Australian resource development policy
2. Establish a natural resources agency
3. Establish a “stand alone” role for the EPA
4. Establish an independent “Approvals Reform Office”
5. Reform Native title and Aboriginal heritage processes
6. Reform of *Environmental Protection Act 1986* appeals process
7. Reduce the backlog of objections at the Warden’s Court
8. Reform the administration of environmental offsets
9. Review Government policy
10. Encourage agency use of external resourcing
11. Improve agency access to technical information
12. Review agency approval processes and timelines

Phase two recommendations

13. Establish a single decision making authority (DMA)
14. Amend Section 41 and Schedule 6 of the *Environmental Protection Act 1986*
15. Amend *Mining Act 1978* miscellaneous licences to include railways



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