

The below points are focused mainly on the intersection between native title processes and cultural heritage management in Western Australia, given that cultural heritage management is my area of expertise, as a professional heritage consultant with 16 years' experience in WA.

#### **Agreements: registration and transparency**

- Heritage consultants occasionally encounter Exploration agreements that have been developed in order to prevent and/or remove objections to the expedited procedure and outline the process by which ground disturbing and non-ground disturbing activities can be undertaken. These agreements often include heritage management protocols that provide information about survey and reporting methods and standards.
- Current state government policy in WA dictates that applicants for exploration licences demonstrate that they have a standard heritage agreement, or, alternative heritage agreement with the relevant NTP, or, are in the process of negotiating one, prior to the grant of the licence being considered.
- It is not always possible for heritage consultants to gain access to these agreements, or the heritage protocols within them, as one or both of the parties cites confidentiality concerns. Heritage consultants have no need to access provisions related to non-heritage matters i.e., financial payments and/or other forms of community support or compensation. However, as third-party individuals or organisations engaged to assist with implementation of the heritage protocols in the agreements, it is important that heritage consultants have access to the relevant protocols.
- Without access, heritage consultants in WA often default to applying the standards and definitions of the *Aboriginal Heritage Act 1972* (AHA) only, which gives no consideration to native title rights and interests or considers broader social or cultural significance but instead focuses on tightly interpreted archaeological or anthropological definitions of 'site'. Indeed, the WA Government has previously stated that *"The Act is also restricted in its application to those places determined to be of significance and importance, and not Aboriginal cultural heritage generally"* (WA Govt submission, pg. 2).
- The ancillary agreements often include broader definitions of Aboriginal heritage, such as s.237 of the NTA and the definition within the ATSIHP Act, in addition to the definition in the AHA. If heritage consultants and NTHs on relevant heritage surveys (i.e., in an exploration context) are not aware of the broader definitions of heritage within the agreements, it can result in a lost opportunity for NTHs to meaningfully protect areas of social and cultural significance, by amending exploration work programmes in order to avoid those areas. For example, waterways often have social and cultural significance that can be recognised through the provisions of the NTA (i.e., s.237 – areas of particular importance or significance), however, they would not be recognised under the AHA unless they had associated tangible cultural heritage (archaeological) or specific mythological, ritual or ceremonial values (anthropological).
- The net result of this is that heritage surveys may be carried out, and reports delivered, in ways that do not align with the heritage protocols contained in the agreements and additionally, with the principles or provisions of the NTA that provided the impetus for the agreement in the first place. For example, the opportunity for NTHs to ensure that the proposed exploration activities (permitted through the grant of the exploration licence under the FA regime) do not impact sites or areas of particular significance, such as creeks or other watercourses that have social and cultural significance, or, other important resource rich areas. This misalignment

results in an incomplete record of places that NTHs may prefer be avoided during the undertaking of the proposed development activities.

- Registration of ancillary agreements and/or clauses that allow for distribution of particular provisions or protocols to other parties, that may be engaged to assist with implementing those particular provisions, would greatly assist heritage consultants undertaking archaeological and ethnographic surveys. This would ensure that the methods and practices in the field, along with standards and definitions in resultant reports, are aligned with the agreements between NTPs and grantee parties and are therefore meeting the requirements and principles enshrined in the NTA, in addition to the AHA, and allowing NTHs to fully exercise their rights to protect cultural heritage from avoidable impacts.
- It is important that NTHs always have the opportunity to fully implement the provisions within the agreements. Particularly so in instances where the expedited procedure has been applied and there is no opportunity for substantive compensation regarding subsequent impacts to native title rights and interests, including cultural heritage. Having agreements, or selected elements of agreements readily available to NTHs and consultants as a matter of course, would assist with ensuring NTHs are appropriately informed and better able to make decisions and exercise their rights and interests when engaged on heritage projects.

### **Impact-based model**

- There is some merit to the idea of an impact-based model, particularly as a tool, or, an alternative means of managing the expedited procedure. In WA the expedited procedure is used as an entirely alternate pathway to undertaking certain future acts, rather than as an exception to the RTN process. As a heritage consultant that routinely undertakes surveys in a range of development areas, it's evident that many exploration activities undertaken on licences granted using the expedited procedure are not actually so low impact as to be in keeping with the intent of the NTA provisions under s.237.
- The fast-track process and range of activities which occur subsequent to the grant of an exploration licence can result in impacts to, or impairment of, native title rights without any compensation being considered in relation to those impacts. The possibility for compensation is usually avoided once the grantee party is able to bypass the RTN process through the application of the expedited procedure. The expedited procedure allows for a range of activities with varying disturbance and impact levels at a scale that may not have been contemplated when the NTA was first introduced. For example, the cumulative impacts of dozens of ever-expanding drilling programs across native title lands do, over time, result in major disturbance and ever-increasing disruptions to NTHs abilities to exercise their rights and interests.
- This is not to say that compensation for these activities should necessarily be contemplated, particularly during early-stage exploration. Many small exploration companies generate no income outside of raising capital and could not meet any such requirements. However, as a result of that situation, it is incumbent upon the grantee party to acknowledge and understand the rights of the NTHs and take seriously the obligation to minimise impacts to, or, interference with those rights. That is quite often not the case. I have encountered numerous small exploration companies that execute agreements with little understanding of what they mean or how to implement them and expect that the process of undertaking a heritage or cultural survey is to gain a clearance that will permit them to carry out whatever activities they like, wherever they like.

- The adversarial stance that is adopted by many of these companies toward heritage consultants and NTHs, as a result of resentment toward having to consider native title heritage matters at all, often means that even when cogent advice on these matters is provided, that could result in greater efficiencies, that advice is ignored. This situation of grantee parties that oppose the potential cost factors related to native title and heritage management while also seeking to assert their rights over the native title holders (i.e., by doing what they want, when and where they want and ignoring the obligation to also respect the rights of NTPs and manage activities in ways that respect the country and cultural heritage) is unfortunate. Better education around native title, heritage and culture is probably required for individuals and/or organisations proposing to use the land in native title areas, whether it's for activities that are compatible or incompatible with native title.
- An impact-based model could also take into account previous disturbance in native title areas and exploration application areas (i.e., cumulative impacts). This does not appear to be taken into consideration when the government party makes decisions about the application of the expedited procedure and, as a result, grantee parties can retain exploration licences for many years and continuously increase their disturbance footprint without any change to the basic ancillary agreements executed at the beginning of the process. This includes proceeding all the way through various exploration stages to the resource definition drilling stage, an activity that results in what most reasonable people would consider high impacts and major disturbance. The ability of grantee parties to take advantage of the expedited procedure to that extent, using basic ancillary agreements with few benefits for NTHs, sits uncomfortably against the principles of minimising disturbance and impacts outlined in s.237 of the NTA.

#### **Aboriginal and Torres Strait Islander cultural heritage**

- It would be useful if the NTA did contemplate requirements and processes, or at least some form of minimum standard, to manage the impacts of FA on cultural heritage.
- Particularly in WA, there is enormous disconnect between NT processes and state heritage legislation, mostly on account of the AHA being tragically outdated. Indeed, in the WA Government's submission to the Juukan Gorge Inquiry this is recognised through the following statement *"The Act precedes the Native Title Act 1993 (NTA) and is not aligned with Native Title processes or principles. It does not recognise the heritage outcomes resulting from agreements made under the NTA between land use proponents and Native Title holders"* (WA Govt submission, pg. 4).
- As a result of the repeated and demonstrable failures of the AHA to protect and preserve Aboriginal cultural heritage in WA, there are numerous NTPs in WA that choose to preference the available native title processes, specifically agreement making resulting from the RTN and expedited procedure, over the AHA for the majority of their heritage management matters. This approach invariably necessitates total disengagement, or a strong disinclination unless absolutely necessary, to interact with the state heritage legislation.
- In the context of a failing state legislative regime, the NTA is extremely important as a fail safe for NTHs in regards to managing their heritage. To say that the AHA is a failure is not an exaggeration. By their own admission *"the Western Australian Government considers the Act to be outdated, not reflective of Aboriginal community aspirations and, as detailed below, requires replacement with modern legislation"* (WA Govt submission, pg.4). The WA Government's Juukan submission went on to outline the improvements that were expected under the updated *Aboriginal Cultural Heritage Act 2021*, a piece of legislation that was in operation all of 5-weeks before being repealed and the outdated AHA reinstated with only

very modest amendments, none of which address or remedy the disconnect between native title and state heritage processes.

- Furthermore, the WA Govt explained that *“One of the Act’s greatest weaknesses is that it does not expressly provide for consultation with Aboriginal people in the identification, management and protection of their heritage”* (WA Govt submission, pg. 2), a fact that would seem to be inconsistent with the rights afforded by native title.
- In circumstances where there is inaction at a state level on these issues, or, outright exploitation and manipulation of state processes, it would be appropriate for Commonwealth legislation to set a minimum standard below which state processes were not permitted to fall.
- This may result in some duplication of process, or, requirement to satisfy criteria under multiple processes but this would have to be a preferable situation to one in which government or grantee parties in certain states could opt for reaching only the ‘lowest bar’, regardless whether it’s to the detriment of the rights of NTHs.
- The ability that exists within the NTA, for NTHs to negotiate agreements that include heritage protection measures that are potentially beyond those contemplated in state legislation has to, at least remain in place, and ideally be strengthened, in order to provide NTHs a viable alternative for protecting and exercising their rights, rather than allowing for the possibility of those rights to be subverted through the cynical use of ineffective state legislative frameworks.
- In their submission responding to the Issues Paper, the Association of Mining and Exploration Companies (AMEC) suggested the following:
  - *“The phrasing of Section 237 of the Native Title Act does not align with a single jurisdiction in Australia. This provides two alternative pathways for the ALRC, each jurisdiction can amend their legislation so that it aligns. Alternatively, the ALRC could clearly define ‘sites of particular significance’ as a site that is covered by the existing State legislative framework. The inclusion of “sites of particular significance” in the Native Title Act contributes to the confusion of Aboriginal Cultural Heritage with Native Title”* (AMEC submission, page 8).
- The above suggestion to redefine s.237(b) as ‘sites’ covered by existing state legislation would, in the case of WA, be a step backward. This is because the definition within the AHA is restrictive and excludes many types of heritage that are potentially important and significant to NTHs. The AHA focuses on archaeological and anthropological values to define Aboriginal sites. This is a reflection of the fact that this definition was constructed in the 1970s, when the protection of ‘sites’ and ‘objects’ was viewed more so through the lens of Museum archaeologists and anthropologists, rather than reflecting any sort of sophisticated understanding of how Aboriginal groups viewed their heritage. Indeed, the WA Government has also stated that *“The current Act has a limited definition of Aboriginal heritage, with no definition of cultural landscapes or intangible heritage”* (WA Govt submission, pg. 5). Fifty years later, the definition of site contained in the AHA is no longer suitable as a means of describing Aboriginal cultural heritage and would require a significant update before any attempt to use it as the default definition under the NTA could be considered or made.
- Additionally, the inclusion of “areas or sites of particular significance” in the NTA is not especially confusing. NTHs generally know exactly what this means and are able to express it during heritage works. Essentially, as any location where the values of the area or place are important enough to them that they’d prefer they aren’t impacted by development. This is a key difference between the AHA and the NTA. Under the AHA sites, places, objects may have rights, while under the NTA people have rights. Including the right to decide what is important and significant to them.

## References

*AMEC Submission: ALRC consultation on Future Acts regime*, Australian Law Reform Commission

*Western Australian Government submission to the Joint Standing Committee on Northern Australia inquiry into the destruction of Indigenous heritage sites at Juukan Gorge*, Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia, Submission 24.