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Bespoke Course Aboriginal Heritage and Native Title

Practical Tenement Management WA



WIFI and WIKI Logon

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- WIFI Log on and Password
- go to wiki.landtrack.com.au
- Select “Training Resources”
- then “Practical Tenement Management Training Course”
- You can find two links relevant to the course
 - “Bespoke Course - Aboriginal Heritage and Native Title” course notes
 - “[Aboriginal Heritage and Native Title](#)” links reference material
- Introduction

Outcomes

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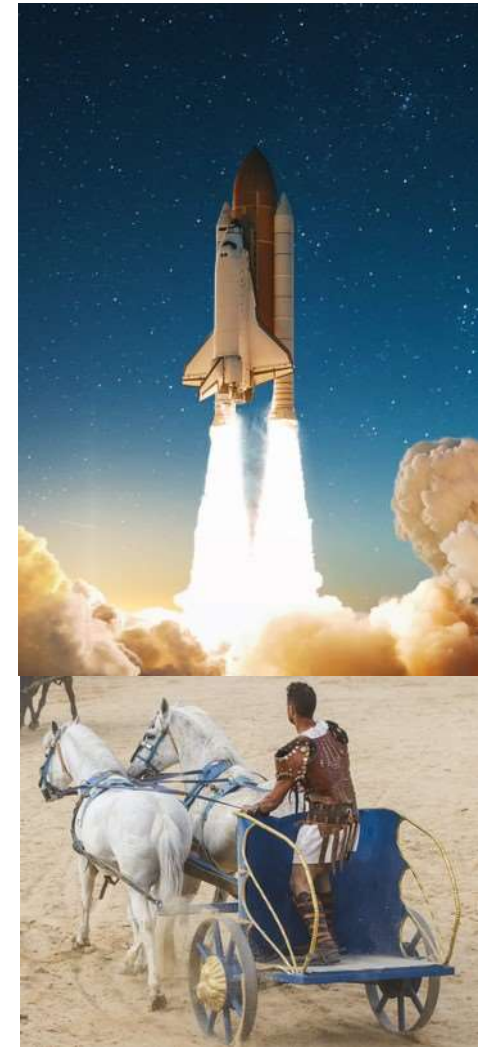
- Participants will be able to:
 - Describe the Development of Native Title from Mabo to the present day
 - Outline the Influences to Native Title in WA
 - Describe how tenement applications in WA are granted under Native Title
 - Define ILUAs and RSHAs
 - Outline the implications of the recent developments of Native Title
 - Sheffield case
 - Timber Creek case
 - Santos - Barrosa v Tipakalippa
 - Understand the recent Aboriginal Cultural Heritage Act 2021
 - The effect of the ACHA on exploration

Development of Law

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The US standard railroad gauge is 4 feet, 8.5 inches (1.42m)

- Following the English standard of tramways
- Being the same width as horse drawn wagons
- Being the same width as ruts in the Roman Roads
- Which are the width of a Roman Chariot
- The width of 2 war horses' asses
- The Space Shuttle's side fuel tanks were limited in size as they were transported by rail that passed through a tunnel, slightly wider than railway tracks.
- The Space Shuttle design feature, of what is arguably the world's most advanced transportation system, was determined over two thousand years ago by the width of a horse's ass.



Common Law, Equity and Statute

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- Common law (also known as judicial precedent or judge-made law) is the body of law derived from judicial decisions of courts and similar tribunals
 - The defining characteristic of "common law" is that it arises as precedent
 - The body of law derived from judicial decisions, rather than from statutes or constitutions
 - The precedents can begin in the 1600 century
- A statute is a formal written enactment of a legislative authority that governs the state and country
- Statutes are rules made by parliament

Doctrine of Precedent

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- Judges to follow the rulings and determinations of judges in higher courts (*stare decisis*)
- The court hierarchy is critical for the doctrine of precedent to function effectively
- A precedent set in one court applies to all lower courts – but only in the same hierarchy
- A precedent can be overturned in a higher court in the same jurisdiction.
 - For Native Title; The High Court was following the precedent set in England
 - This allows some flexibility, review and challenge of precedents; they are not set in stone
- A Higher Court may set a new precedent
- One of the most important roles of precedent is to resolve ambiguities in other legal texts, such as constitutions, statutes, and regulations.

Common Law and Native Title

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- Native Title Background
 - In the 18th century international law recognized
 - conquest,
 - cession, and
 - occupation of territory that was terra nullius
 - as three of the effective ways of acquiring sovereignty.
 - If land is cultivated by the indigenous inhabitants it was not terra nullius
 - However it could be extinguished by the government

1992 Mabo Case

- 1992 Mabo Case the High Court decided that Mere Island was not terra nullius as the natives cultivated the land and the doctrine of Native Title did exist
- Native Title *"the recognition by Australian law that Indigenous people have rights and interests to their land that come from their traditional laws and customs"*
- However it could be extinguished by the government

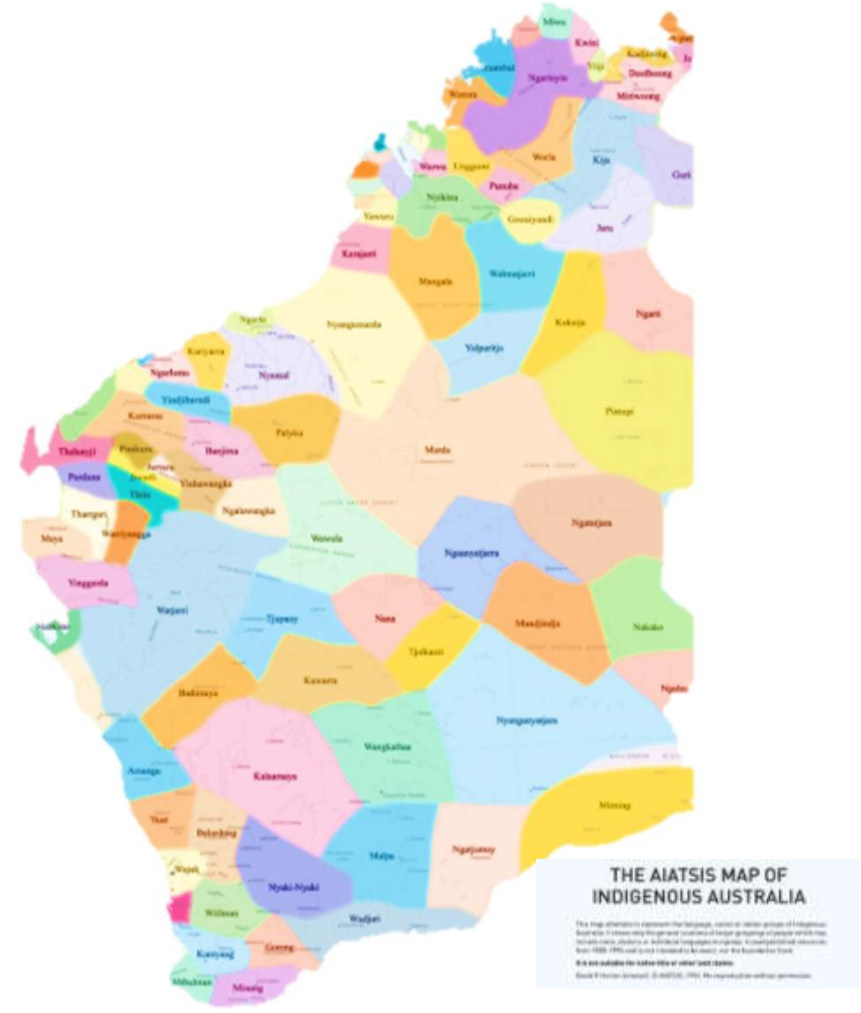
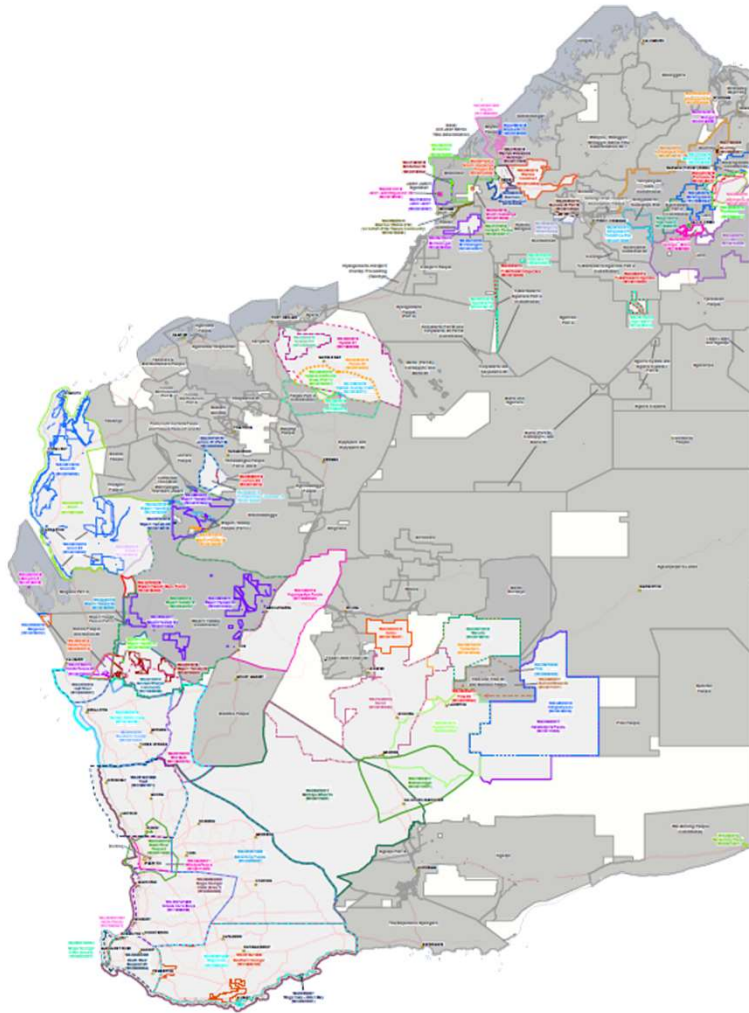


Development of Native Title

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- Native Title Development
 - 1993 Native Title Act - excluded all freehold land from native title
 - 1996 Wik Peoples v Queensland - pastoral leases
 - 2002 WA v Ward (High Court - 4 Judges) - Bundle of rights
 - Affirms the Wik decision
 - A native title claim in the Kimberley's
 - Native title rights can co exist with some other rights, such as pastoral leases.
 - Native title legislation allows for partial and total extinguishment of native title.
 - Proof is based in traditional laws and customs, not occupation.
 - The Native Title Act recognises these rights and interests
 - Mining Leases don't necessarily extinguish NT
 - 2002 Yorta Yorta v Vic - strict requirement of continuity of connection
 - 2019 Timber Creek case - valued Native Title Rights

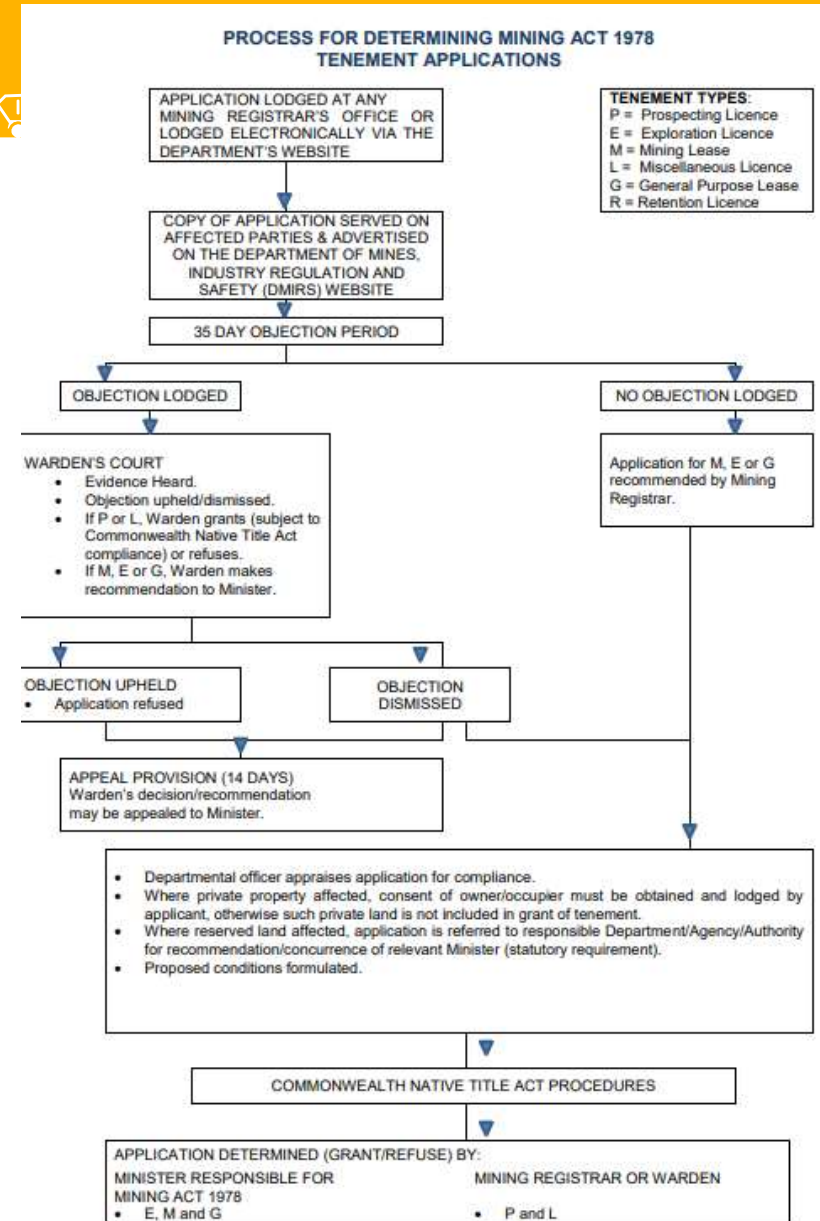
Influences Behind Native Title WA



Link: Aboriginal Heritage and Native Title > 11. Native Title Map WA

Process Under the Mining Act

- Lodge Application
- Application Served on Affected Parties
- 35 day Objection period
- If an Objection Lodged referred to the Warden
- Warden Decision
- 14 day to appeal
- DMIRS reviews application
- Then Referred to the Native Title Process

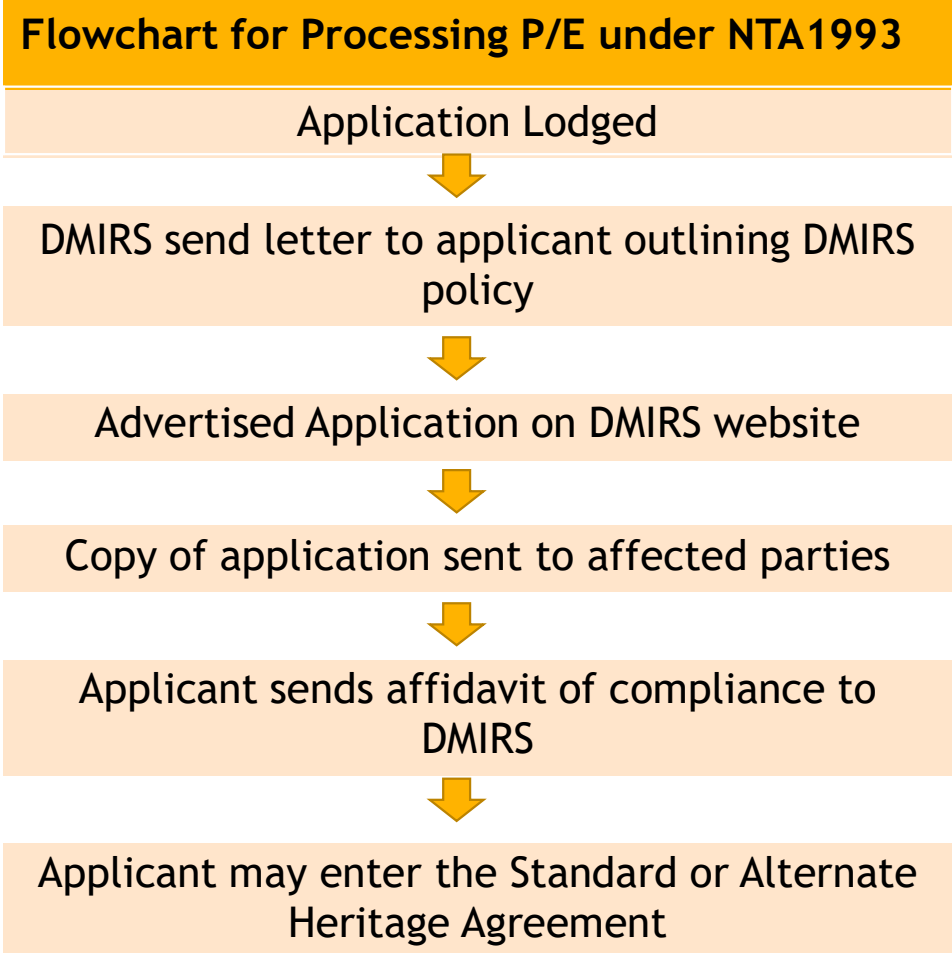


Native Title Act Process

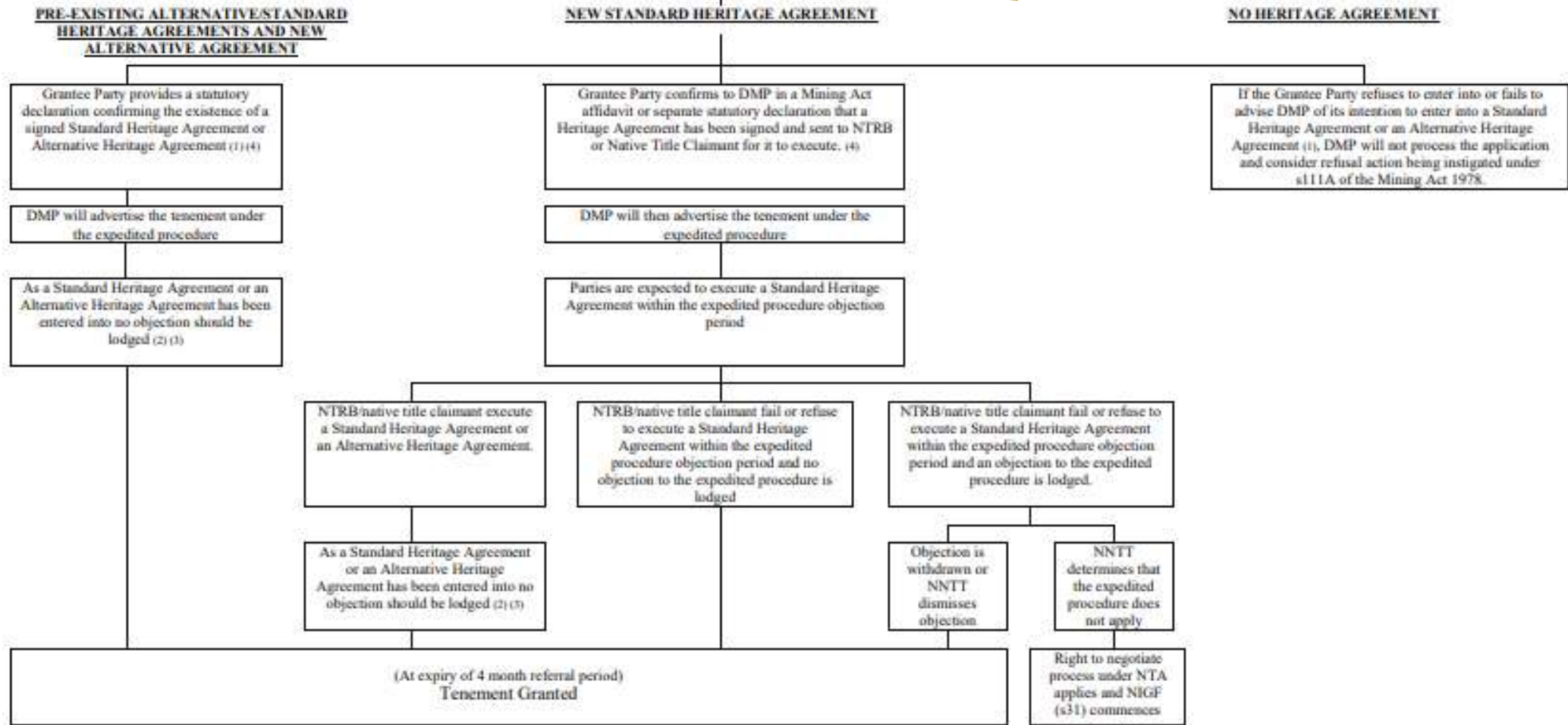
- Grant of a tenement is a “future act”
- A grant of tenement must follow the future act process, by either:
 - The expedited procedure
 - Right to negotiate
 - The Infrastructure procedure s24MD
- Require the signing of an ILUA or RSHA
- Or DMIRs will deem the tenement is invalid

Expedite Procedure, RSHA and DMIRS Process

- DMIRS Fast track process for Es and Ps with the Expedited Procedure
- Expedited Procedure as a fast-track process for the grant of Es, Ps and Ls that have minimal impact on native title
 - not likely to interfere directly with the community or social activities
 - not likely to interfere with areas or sites of particular significance
 - not likely to involve major disturbance to any land or waters concerned
- DMIRS have Negotiated Regional State Heritage Agreements (RSHAs)
- E or P Applicants sends the NT rep bodies an executed RSHA within 29 days
- The Applicant sends DMIRS a stat dec of compliance

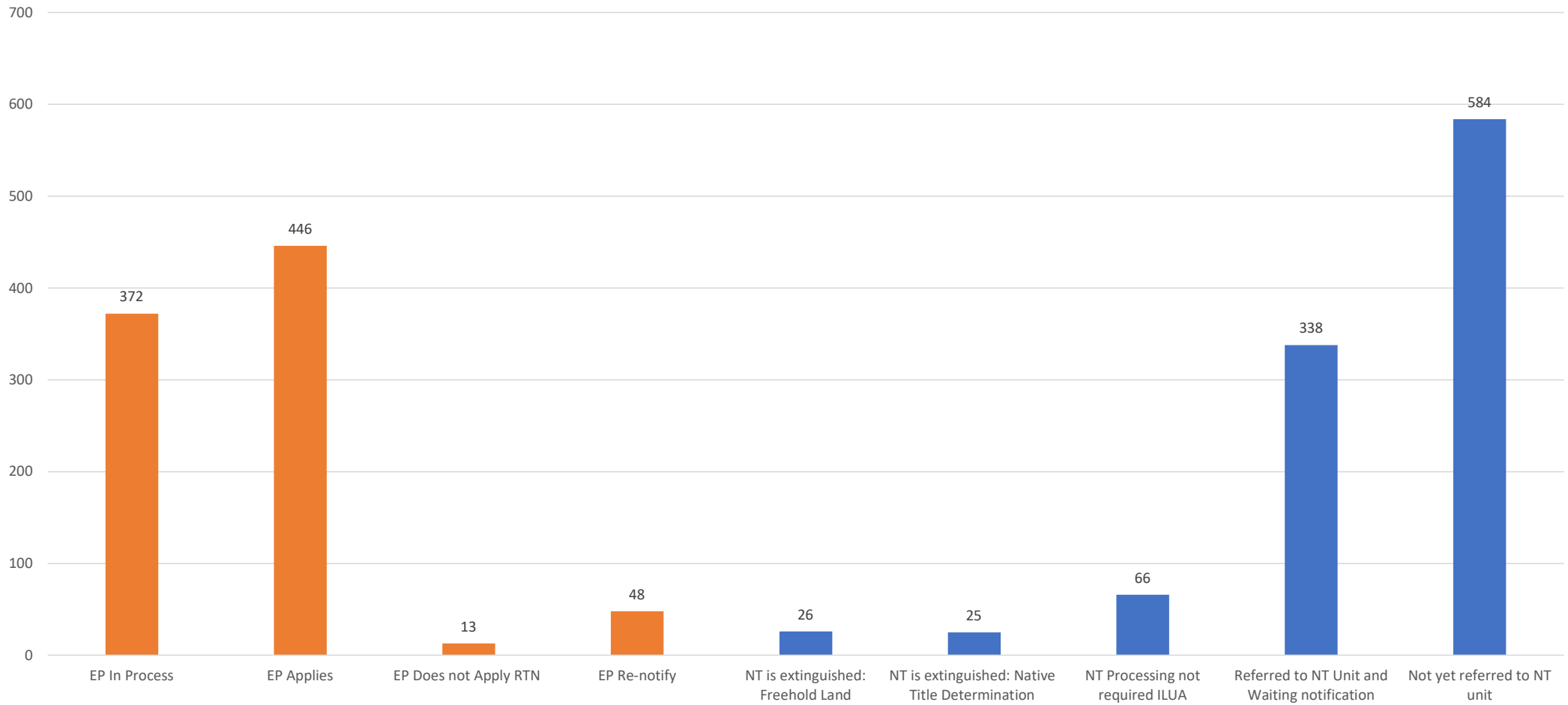


Expedite Procedure, RSHA and DMIRS Process (cont.)



Expedited Procedure Statistics

Es, Ps, Ls Subject of Expedited Procedure since Jan 2019 to June 2020



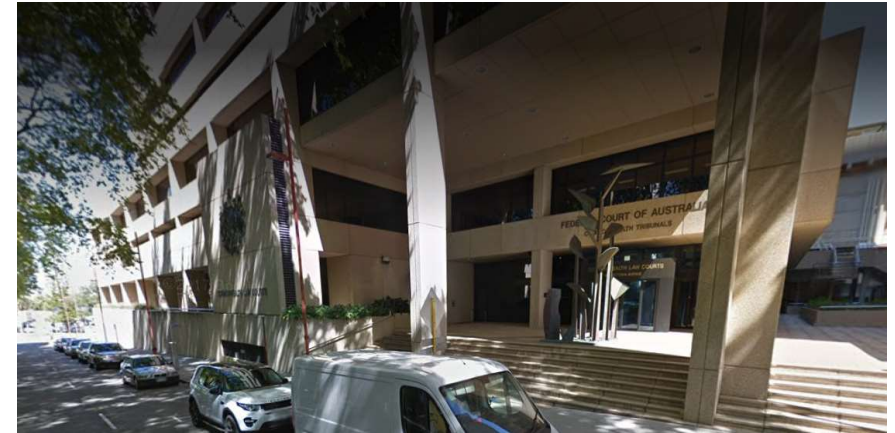
[Link: Aboriginal Heritage and Native Title > 12. Native Title Act Process](#)

Right to Negotiate Process

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- The NTA gives the Native Title Parties the Right to Negotiate with Government and Tenement Applicant
- DMIRS gives 'Section 29 Notice' to
 - Native Title holders
 - Representative bodies
 - National Native Title Tribunal
 - The grantee and public
- 4 months to negotiate a settlement
- A NT party may register their interest within 3 months

The parties must negotiate in good faith

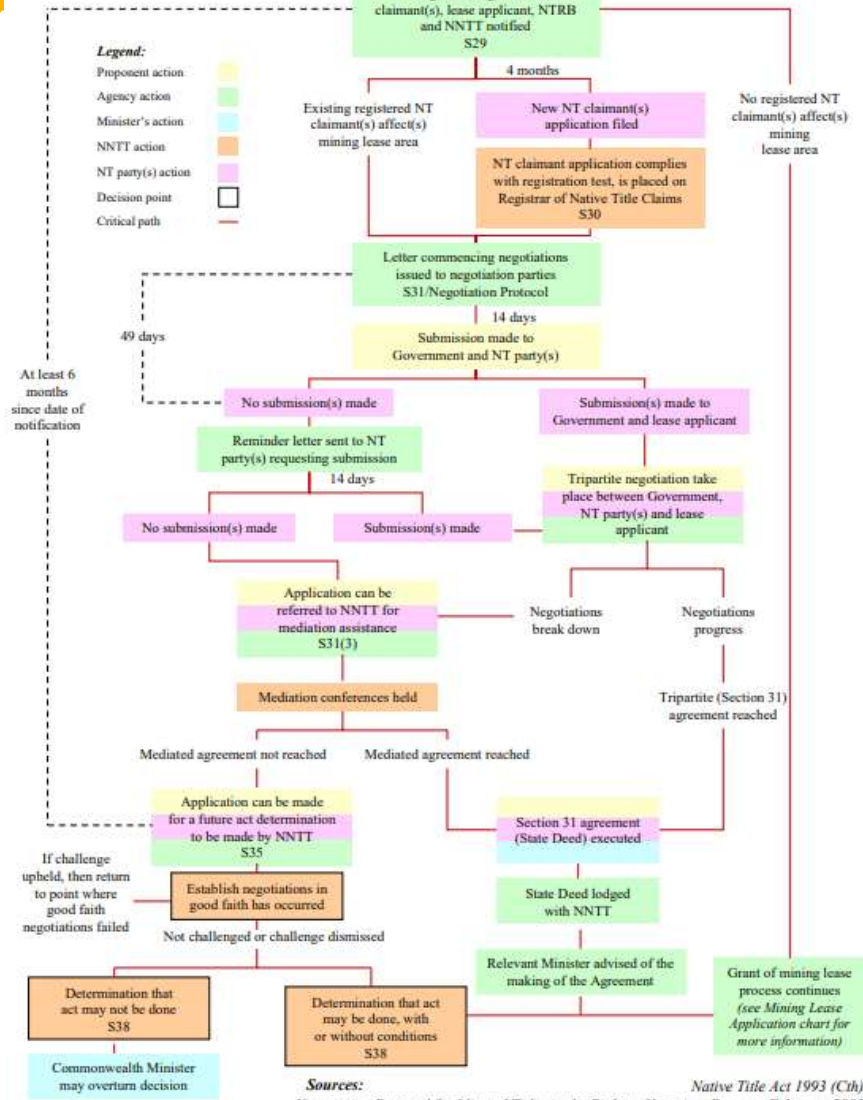


- Links : [Aboriginal Heritage and Native Title](#) > [12. Native Title Act Process](#)
> [13. Future Act Process for Mining Lease](#)
> [14. How to Negotiate in Good Faith](#)
> [15. Consultant Guidelines with Indigenous People](#)

Right to Negotiate (cont.)

- Flow Chart for Right to Negotiate for the grant of a mining lease
- National Native Title Tribunal can assist the parties to reach agreement through mediation.

Native Title Act 1993 (Cth) Future Act Provisions Right to Negotiate Process for Mining Lease Applications



Good Faith Negotiation

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- NNTT used the dictionary meaning
- “Good faith” means “honesty of purpose or intention, sincerity”, and “doing what is reasonable in the circumstances”
- “negotiation” can be understood by its dictionary definitions, and “involves communicating, having discussions or conferring with a view to reaching an agreement”

- **Not** good faith negotiation

- Delaying eg notification and meetings
- Not communicating
- Lack of response
- Not providing information
- Negotiators lacking authority
- Failure to accommodate a reasonable position



Infrastructure Process

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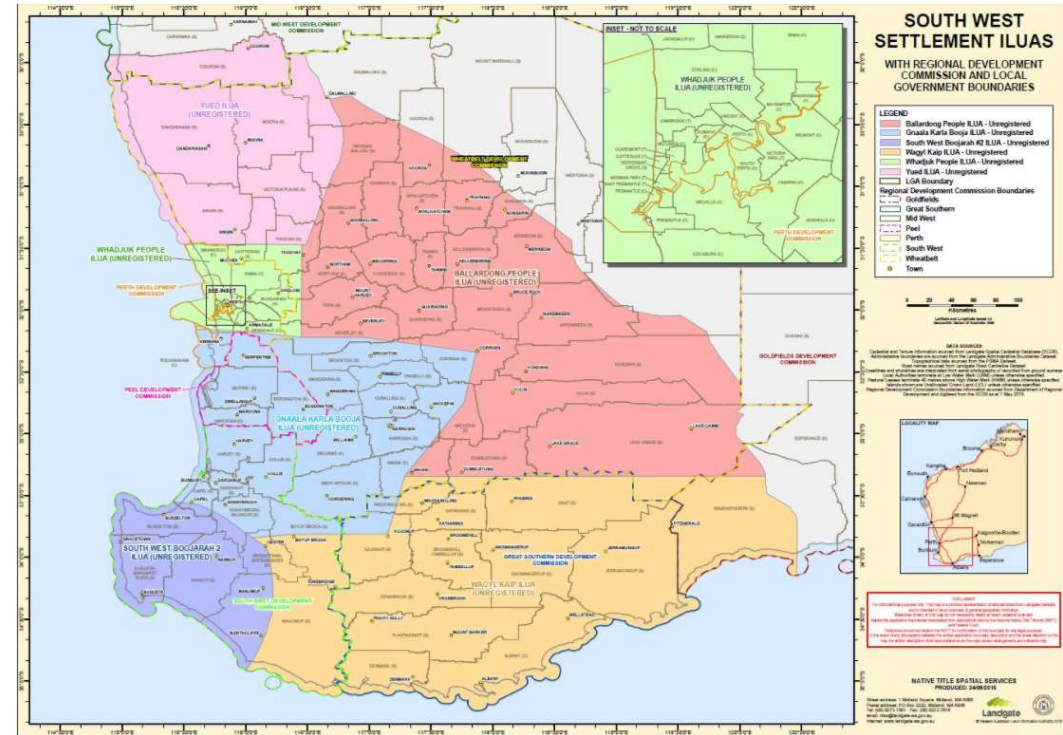
- Infrastructure is defined in s253 of the NTAct and is usually located on an L or G
- The process is under s24MD(6A)(6B) of the *Native Title Act*
- The NT parties are served notice by the L or G applicant
- The applicant provides a stat dec to the Mining Registrar
- The NT Party has 2 months to object
- If Objection lodged parties negotiate
- Search for ground water Ls – DMIRS notifies NT Party who then get the right to comment



Indigenous Land Use Agreement

- An ILUA Contractual Agreement between Native Title Parties and Tenement Applicant
- Tenement granted under ILUA will be valid
- ILUA must be register with NNTT
- 1210 registered ILUAs
- *McGlade v Native Title Registrar*
 - Invalidating ILUAs
- 120 at risk ILUAs
- NTA Amendment Act 2021 rectified the McGlade case

18/10/2018 – Noogar and WA ILUA Formally accepted to be registered



Native Title Amendment Act 2021

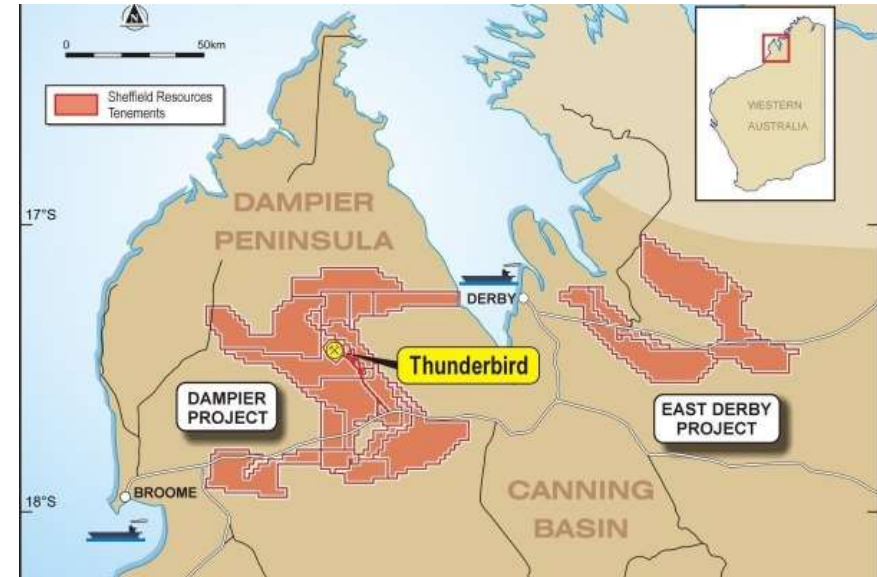
21

- Changes made by the Amendment Act include:
 - changes to how native title applicants can act and make decisions, and their relationship to the broader native title claim group
 - allowing historical extinguishment of native title in areas of national and state parks to be disregarded where the relevant parties agree, and
 - improving the accountability, transparency and governance of Registered Native Title Bodies Corporate (RNTBCs, also commonly known as Prescribed Bodies Corporate or PBCs), with a particular focus on membership and improved dispute resolution pathways.

Sheffield Case

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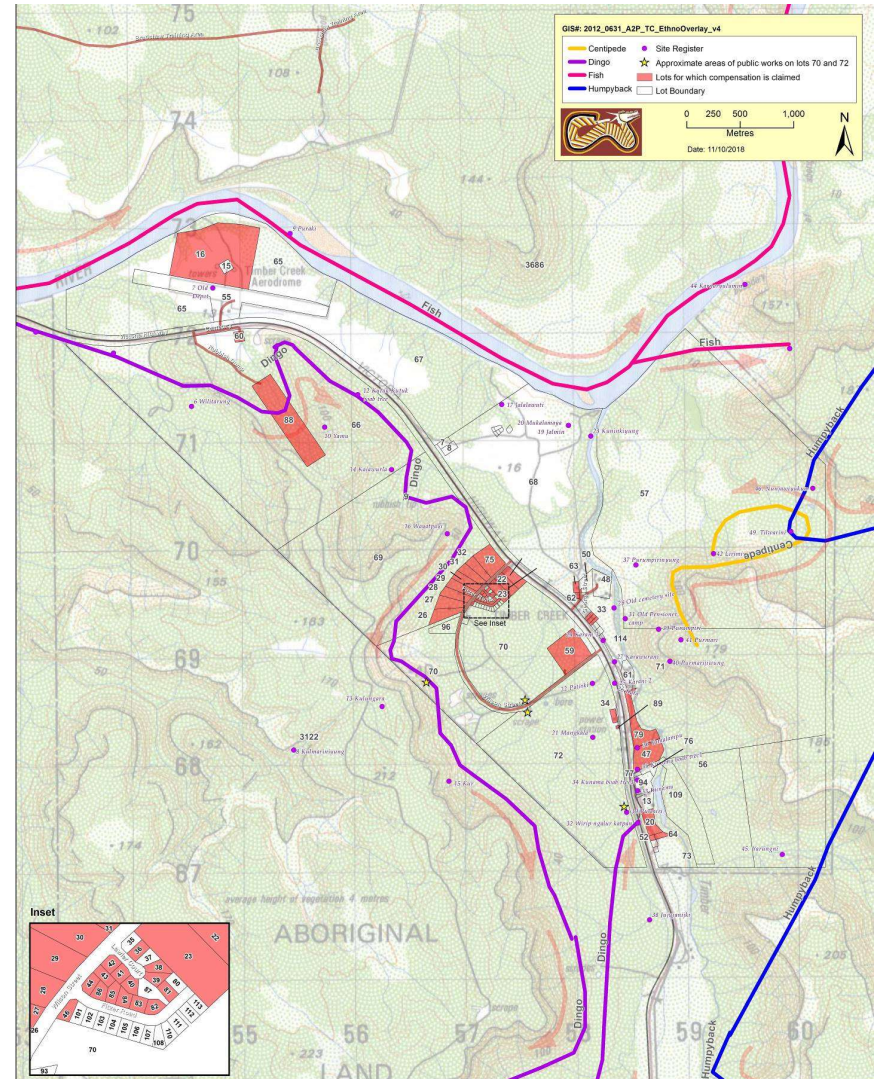
- 8 August 2014 – DMIRS gave notice M04/459 was a Future Act Process
 - Jowlaenga applied for Native Title
- 24 October 2016 – No Agreement Sheffield applied to NNTT for decision under s35
- 22 May 2017 – NNTT hearing
 - Sheffield by passed Rep Body KRED and approached NT parties
- 14 June 2017 – NNTT decided Sheffield negotiation in good faith doesn't apply to s35
- 21 September 2017 – Single court judge said good faith doesn't apply to s35
- 8 December 2017 – Full Court disagreed
- 20 February 2018 – NNTT hearing
- April 2018 – Next Hearing
- August 2018 - Decision NNTT & Agreement made
- 1 Nov 2018 – Sheffield and Traditional Owners to Jowlaenga sign an Agreement



Links : [Aboriginal Heritage and Native Title](#) > [17. Sheffield Case](#)
> [18. Sheffield Federal Court Case](#)
> [19. Sheffield Full Federal Court Case](#)

Timber Creek Decision

- *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples*
- Native Title Rights 50% value of Freehold Rights \$320,250 plus interest \$910,100
- The interference with the dreaming trails
- “person's perception of and engagement with the Dreamings”
- Compensation for non-economic loss \$1.3M



Bindunbur Decision

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- *Bindunbur Native Title Claim Group v State of WA* [2018] FCAFC 238
- In 2013, applications were made by Jabirr Jabirr, Bindunbur and Goolarabooloo people, for determinations of native title to areas in the Mid Dampier Peninsula.
- The primary judge found that rights and interests arising from a rayi connection (a spiritual phenomenon that can lead to an attachment to a particular place or animal), **were not native title rights** and interests for the purposes of the Native Title Act 1993 (Cth) (NTA)
- The Full Court recognised that while the rayi association may give rise to some limited personal rights and interests, **they were not territorial or proprietary rights**, and therefore did not give rise to rights or interests 'in relation to the land or waters' for the purposes of the NTA.
- The High Court found public access to beaches (which is not prevented by the laws of the State) has a legal status to co-exist with native title rights



Aboriginal Cultural Heritage Act 2021

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- McGowan Labour government drafted the new Aboriginal Cultural Heritage Act 2021. Royal assent in December 2021
- Transitional Period of 12 months
- Currently 3rd and last session for consultation with the community
- The Regulations will be finalised in late 2023



Aboriginal Cultural Heritage Act 2021

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- Problems with the old *Aboriginal Heritage Act 1972*
 - Lack of consultation by the authorities
 - Cumbersome appeal process
 - The Minister approves all section 18s (being a request for consent to disturb a site)
 - Under staffing in the ACMC
 - Site recording form inhibits site registrations
 - Staff lack qualifications
 - All decisions reside with the Minister
 - DAA does not monitor or enforce the Act
 - Lack of Knowledge can be used as a defence
- Amending Bill lodged in 2014 and thrown out



- Links : [Aboriginal Heritage and Native Title](#) > [8. Findings of the Barnsby Report](#)
> [9. Effectiveness of the Aboriginal Heritage Act](#)
> [10. Changes to the Aboriginal Heritage Law](#)
> [23. Aboriginal Cultural Heritage Bill Website](#)

Juukan Gorge

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- Rio Tinto destroyed a 46,000-year-old heritage site early in 2020
- Rio Tinto was granted a section 18 by the Barnett government in 2013, a right which was not affected by the discovery of ancient artefacts such as stone relics.
- While archaeologist Michael Slack described it in his report to Rio as having "*the highest archaeological significance in Australia*", Mr Chapple summed it up as "*the dawning of humanity on record*".
- The traditional owners of the Juukan caves, the Puutu Kuntj Kurrama and Pinikura (PKKP) people, said they were distressed that their requests the Juukan caves not be detonated were not acted upon by Rio Tinto or federal or state bureaucrats.
- Rio Tinto has apologised for causing this distress, something it said resulted from a "misunderstanding", but is still suffering from the reputational fallout.
- What should Rio have done?



Links : [Aboriginal Heritage and Native Title](#)

> 23. [ABC News - Juukan Gorge won't be the last priceless record of human history to be legally destroyed by mining](#)

Aboriginal Heritage Act 1972

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- Conditions on tenements
 - “Abide by the *Aboriginal Heritage Act 1972 (WA)*”
- Standard Native Title Deed – “undertake a heritage survey”
- ILUAs also have the same clause.
- **Note:** the ACHA management agreement and permits will now be inserted



[Link: Aboriginal Heritage and Native Title](#) > 1. Heritage Goldfields Agreement

Aboriginal Heritage Act Definitions

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- *Aboriginal Heritage Act 1972* protects
- *Places*
 - 'All places' that Aborigines used for traditional culture, sacred, ritual or ceremonial sites;
- *Objects*
 - "All objects, whether natural or artificial ... [that are of] sacred ritual or ceremonial significance to Aboriginal persons used for traditional cultural life"



Links : [Aboriginal Heritage and Native Title](#) > [2. Aboriginal Places](#)
> [3. Aboriginal Objects](#)

Aboriginal Cultural Heritage Act 2021 Definition

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s12 Aboriginal cultural heritage –

(a) means the tangible and intangible elements that are important to the Aboriginal people of the State, and are recognised through social, spiritual, historical, scientific or aesthetic values, as part of Aboriginal tradition; and (b) includes the following –

(i) an area (an Aboriginal place) in which tangible elements of Aboriginal cultural heritage are present;

(ii) an object (an Aboriginal object) that is a tangible element of Aboriginal cultural heritage;

(iii) a group of areas (a cultural landscape) interconnected through tangible or intangible elements of Aboriginal cultural heritage;

(iv) the bodily remains of a deceased Aboriginal person (Aboriginal ancestral remains), [except in cemeteries]...



ACHA Definition

s12 Aboriginal cultural heritage –

*(a) means the tangible and **intangible** elements that are important to the Aboriginal people of the State, and are recognised through social, spiritual, historical, scientific or aesthetic values, as part of Aboriginal tradition; and (b) includes the following –*

...
(iii) a group of areas (a cultural landscape) interconnected through tangible or intangible elements of Aboriginal cultural heritage; ...

What are the implications of this change?



Aboriginal Cultural Heritage Act 2021

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- Summary of *ACH Act 2021*

- Significantly increasing the penalties imposed for harming Aboriginal cultural heritage
- Introducing a new tiered assessment system for different categories of activities
- Approvals required for low and medium, to high impact activities (to be defined by regulations)
- Modernising the definition of 'Aboriginal cultural heritage' (ACH) to include intangible elements (as shown beforehand)



[Links : Aboriginal Heritage and Native Title > 26. ACH Act 2021 Co-design process](#)

Aboriginal Cultural Heritage Act Penalties

Purpose	Section	Amount \$AUD
Not reporting to the ACHC an Aboriginal place, object or Aboriginal remains	68(1)	10,000
Serious harm ACH (irreversible, of a high impact or on a wide scale) or in a protected area) by an individual	92	1,000,000 or 5 years jail or both. Daily penalty 50,000
Serious harm ACH (irreversible, of a high impact or on a wide scale) or in a protected area) by a corporation	92	10,000,000 Daily penalty 50,000
Accidentally harming ACH by individual	93(1)	500,000 Daily penalty 25,000
Accidentally harming ACH by a corporation	93(1)	5,000,000 daily penalty 250,000
Material harm to ACH by an individual	94	100,000 - daily penalty 5,000
Material harm to ACH by a corporation	94	1,000,000 daily penalty of 50,000
Contravening an ACH Permit condition	133	20,000
Breach of condition of an ACH Management Plan	173	100,000

Aboriginal Cultural Heritage Act 2021

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- Creates an Aboriginal Cultural Heritage Council (ACHC) to replace the Aboriginal Cultural Material Committee (ACMC).
- The Council has broader functions than the ACMC
- The Council will appoint local Aboriginal Cultural Heritage Services (LACHS) for different areas of the State to represent local Aboriginal groups on heritage matters.
- LACHS that can applied to be appointed
 - registered native title claimants or holders;
 - Aboriginal corporations or companies under the *Corporations Act 2001* which represent the Aboriginal community in an area; or
 - native title representative bodies

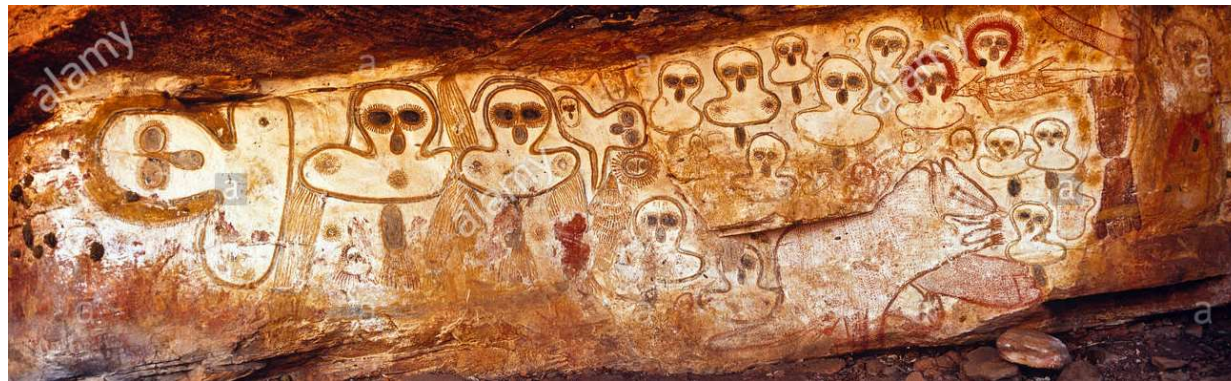


- LACHS Functions

- management of activities that may harm Aboriginal cultural heritage (ACH)
- make, or to facilitate the making of, ACH management plans
- Provide advice on ACH
- Provide information and submissions to ACH to the Council
- undertake, either directly or indirectly, on-ground identification, maintenance, conservation and preservation of ACH
- undertake, either directly or indirectly, any activity in relation to protecting, preserving, conserving or managing Aboriginal cultural heritage,
- LACHs will charge a fee (yet to be disclosed)

Protected Areas

- The Act provides that areas that contain Aboriginal cultural heritage of outstanding significance may be declared protected areas; currently there are 70 sites.
- Similar to National Park, a protected area can only be revoked with a resolution passed by both Houses of Parliament.
- The Minister may give stop work orders, prohibition orders and remediation orders for the purpose of protecting Aboriginal cultural heritage.
- The Minister can also make remediation orders for impacted Aboriginal cultural heritage to be restored to its original condition.



Future Heritage Management

“Practically we believe the current system of [Mining Companies] entering into heritage protection agreements with representative Aboriginal groups and carrying out heritage surveys will continue in the interim.

With an additional overlay of the permit and management plan system.

Over time we expect agreed management plans will take the place of heritage protection agreements”

Hopgood Gamin



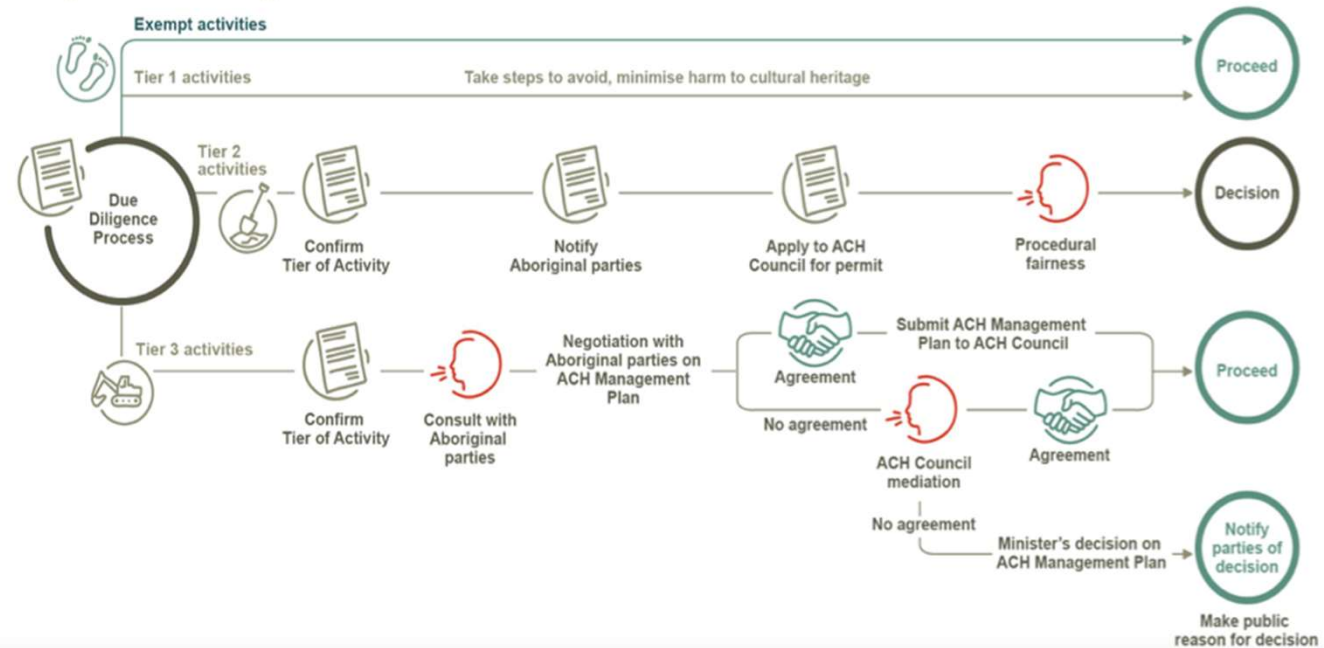
Aboriginal Cultural Heritage 2021

Comparison: AHA Section 18 process and the Aboriginal Cultural Heritage Bill 2021 tiered assessment process

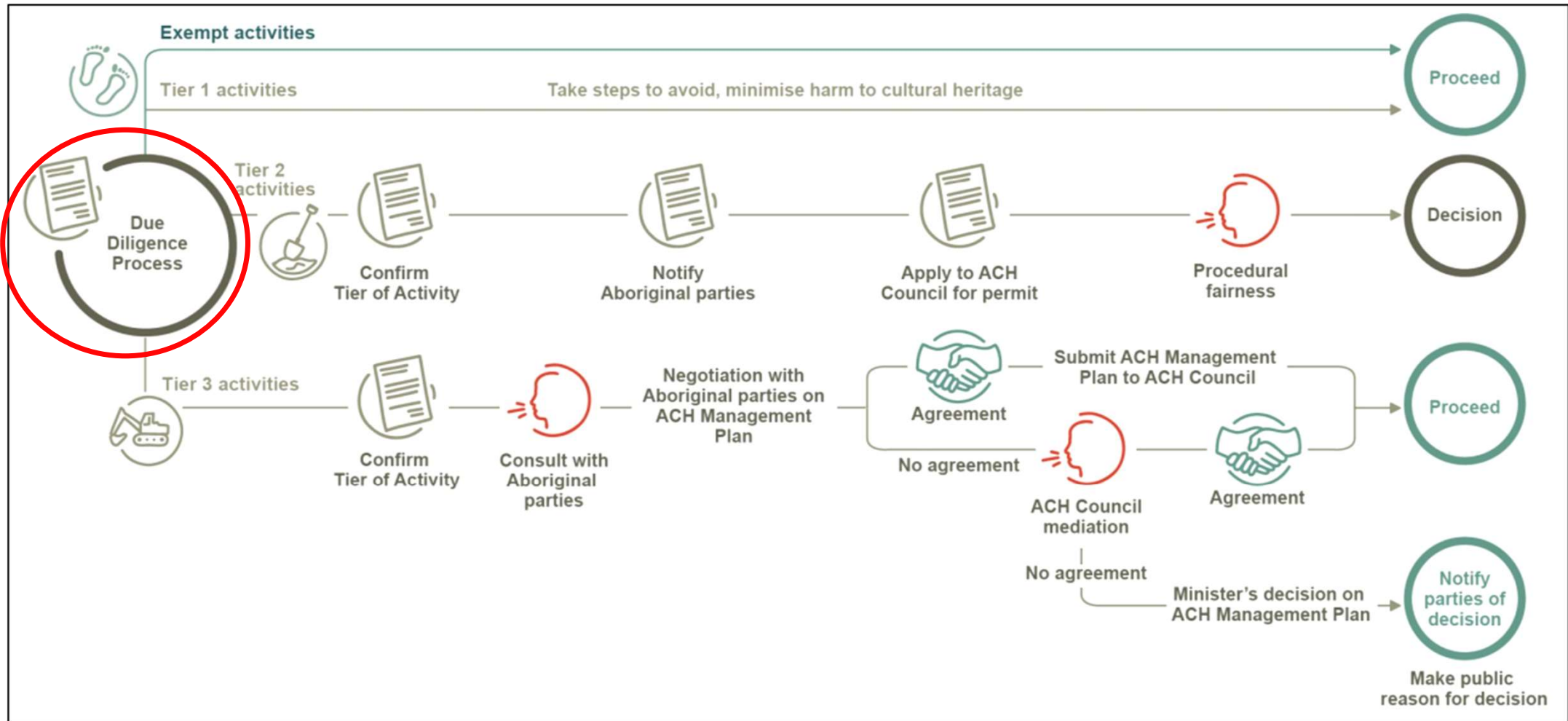
Aboriginal Heritage Act 1972



Aboriginal Cultural Heritage Bill 2021



Aboriginal Cultural Heritage 2021- Due Diligence



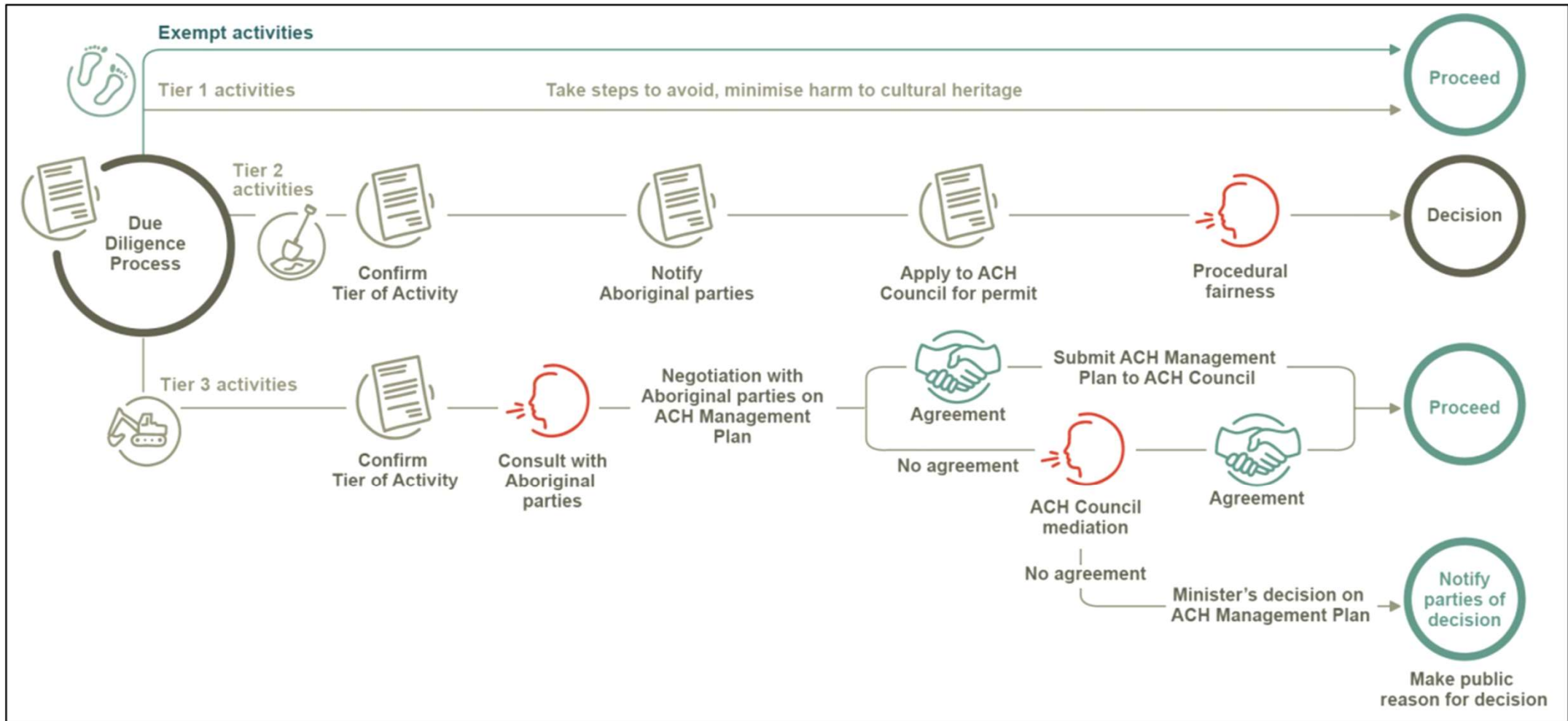
- **Tier 1 activities** involve no, or a minimal level of, ground disturbance.
- **Suggested Tier 1 activities:**
 - aerial and remote sensing surveys,
 - ground surveying, metal detecting,
 - feral animal and pest control,
 - sampling flora and rocks and soil up to 20kg by hand,
 - erecting signs, maintaining existing facilities, establishing temporary camps,
 - pegging Prospecting Licences and Mining Leases.

Tier 2 activities are activities involving a low level of ground disturbance.

- **Suggested Tier 2 Activities:**

- Revegetating of degraded areas using ground disturbance and fencing,
- seismic surveys along roads and tracks;
- erosion control along existing roads and tracks;
- vehicle mounted auger sampling;
- archaeological materials analyses both surface and subsurface;
- installing water bores;
- tree removal;
- jetty and boat maintenance;
- backfilling historic mine features.

Aboriginal Cultural Heritage 2021- Tier 3 Activities



- **Tier 3 activities** mean those activities that involving a moderate to high level of ground disturbance.
- **Suggested activities** are:
 - any ground disturbance including,
 - subdivisions,
 - mining and exploration activities including tracks and drill pads,
 - drilling for any purpose,
 - construction of anything at all earthen or steel.

To undertake a Tier 3 activity, you need an ACH Management Plan approved by the Council.

Developing an ACH Management Plan

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The process for developing an ACH Management Plan:

- The Proponent undertakes due diligence assessment and confirmation that the activity is Tier 3 (or Tier 2) activity that may harm ACH.
- The Proponent consults with the interested Aboriginal parties.
- The Proponent undertakes ACH investigations to identify and obtain understanding of ACH characteristics.
- The Proponent gives written notice to each interested Aboriginal party and ACH Council about its intention to reach agreement and enter into ACH Management Plan.

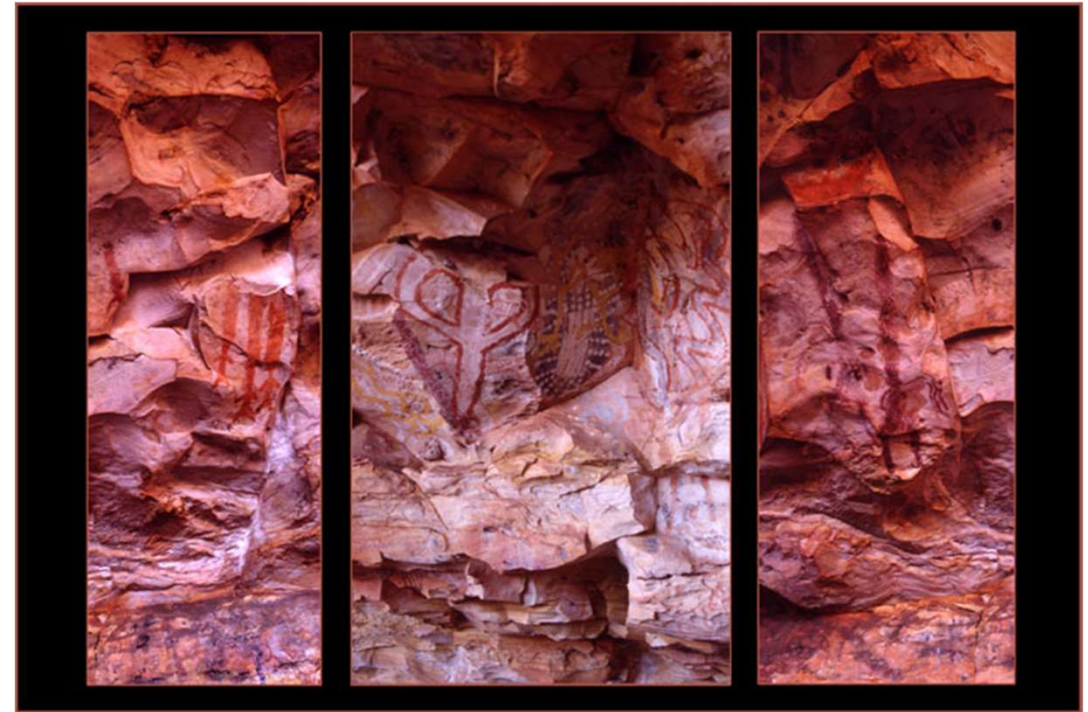
Legislated Matters to be contained in the ACH Management Plan:

- The relevant parties
- The activity to occur in a defined area
- The ACH identified in the Due Diligence
- Impact statement on the ACH
- Process to be followed including if new information comes to light
- How damage can be minimized or avoided
- The extent of the harm to the ACH
- Any conditions the activity
- The period of the plan



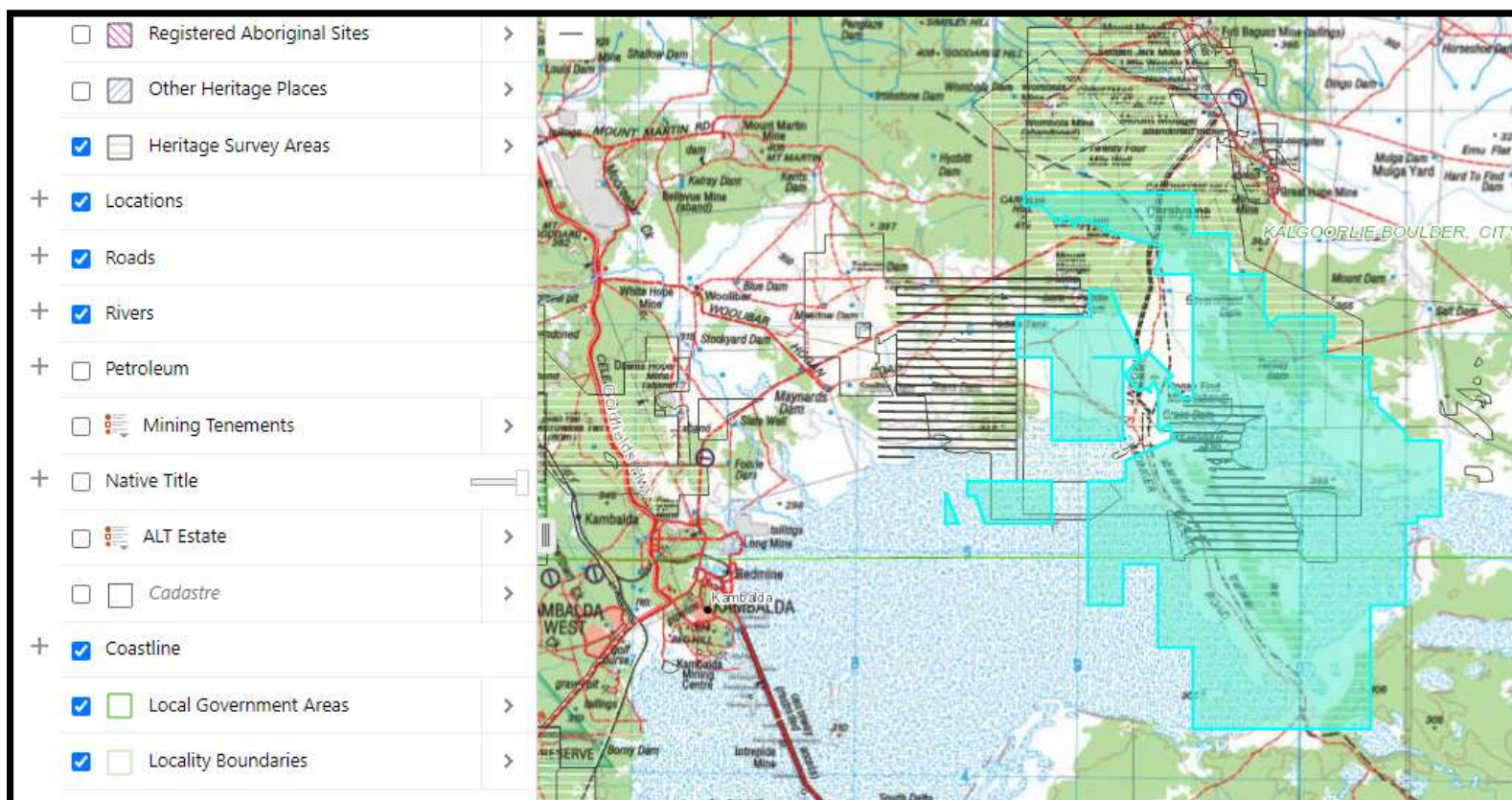
ACH Act Protected Areas

- Protected Areas provide the highest level of protection to an area of outstanding significance, they are addressed in Part 4 of the ACH Act.
- An ACH Permit or ACH management plan cannot be applied for over a protected area
- To repeal a protected area requires approval of both houses of Parliament
- There are 70 protected areas throughout the State

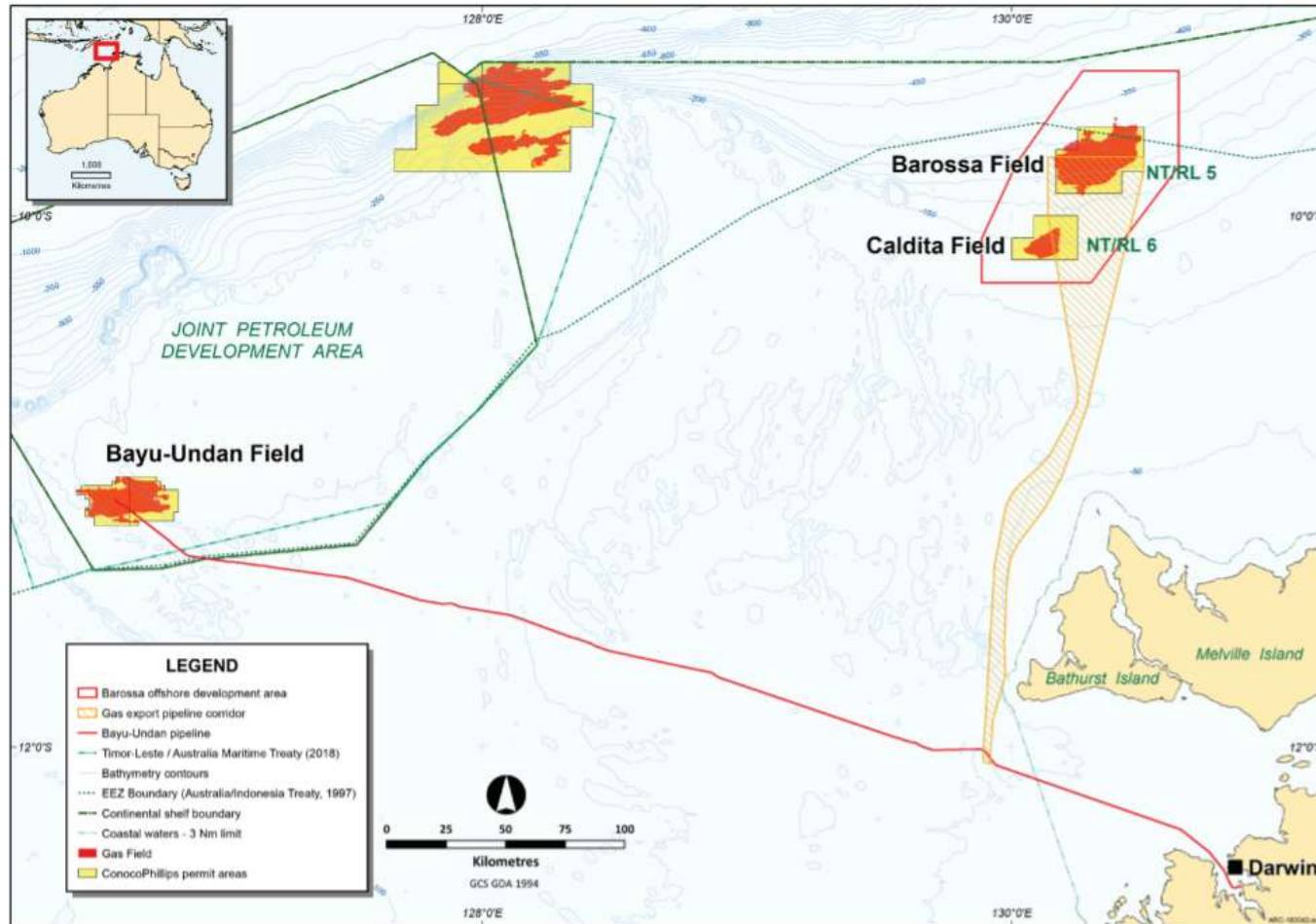


Spatial information on protected sites

- <https://www.wa.gov.au/government/document-collections/search-aboriginal-sites-or-heritage-places-ahis>



Barossa Decision



Map of the Development Area and Pipeline Corridor

Barossa Decision

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- *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2022] FCA 1121
- Federal Court decided that the project be set aside
- NOPSEMA was not lawfully satisfied Santos consulted with each relevant person
- Mr Tipakalippa claimed that he and other traditional owners of the Tiwi Islands, have “sea country” in the Timor Sea
- The dealing with Relevant Persons was not documented or shown to NOPSEMA in line with the Regulations Even though Santo’s report showed such
- Santos was required to cease drilling or Appeal the decision

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