



THIRTY-NINTH PARLIAMENT

REPORT 31
STANDING COMMITTEE ON LEGISLATION
MINING LEGISLATION AMENDMENT BILL 2015

Presented by Hon Robyn McSweeney MLC (Chair)

May 2016

STANDING COMMITTEE ON LEGISLATION

Date first appointed:

17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

“4. Legislation Committee

- 4.1 *A Legislation Committee* is established.
- 4.2 The Committee consists of 5 Members.
- 4.3 The functions of the Committee are to consider and report on any Bill referred by the Council.
- 4.4 Unless otherwise ordered, any amendment recommended by the Committee must be consistent with the policy of a Bill.”

Members as at the time of this inquiry:

Hon Robyn McSweeney MLC (Chair)

Hon Kate Doust MLC (Deputy Chair) (substituted in place of Hon Sally Talbot MLC)

Hon Donna Faragher MLC from 23 February 2016 to 6 April 2016 and Hon Ken Baston MLC from 6 April 2016 to 10 May 2016

Hon Robin Chapple MLC (substituted in place of Hon Lynn MacLaren MLC)

Hon Dave Grills MLC

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EXECUTIVE SUMMARY, FINDINGS AND RECOMMENDATIONS

EXECUTIVE SUMMARY

- 1 On 23 February 2016, the Legislative Council referred the Mining Legislation Amendment Bill 2015 (**Bill**) to the Standing Committee on Legislation (**Committee**) for inquiry, to report by Tuesday, 10 May 2016.
- 2 The Bill would introduce a new Part IVAA into the *Mining Act 1978* (**Mining Act**) and focus all environmental aspects of the Mining Act in the one place. The Bill places responsibility for certain clearing of native vegetation associated with mining activity with the Department of Mines and Petroleum (**DMP**), as opposed to the former process managed under the *Environmental Protection Act 1986* (**EP Act**). The Bill makes legislative provision for a simplified notification process for mining activity that is deemed to be ‘low-impact’. The Bill introduces a requirement for certain tenement holders to prepare environmental management systems.
- 3 A number of stakeholders were supportive of the changes that would be introduced by the Bill. Other stakeholders from whom the Committee received evidence were critical of a number of features of the Bill, in particular:
 - the quality of the stakeholder consultation process associated with the Bill
 - the cost and administrative burden that would be placed on small scale miners
 - the implication of new obligations and conditions on rights and tenements
 - the application of, and uncertainty surrounding, a low-impact notification system for certain activities
 - the requirement for certain tenement holders to prepare and maintain environmental management systems
 - the shift of governance of clearing of native vegetation related to mining activities from the EP Act to the Mining Act.
- 4 The Second Reading Speech outlines the Government’s reasons for the Bill.
- 5 The Committee’s conclusions are outlined in the following findings and recommendations.

FINDINGS AND RECOMMENDATIONS

- 6 The Committee made 26 findings and 18 recommendations. Findings and recommendations are grouped as they appear in the text at the page number indicated:

Page 15

Finding 1: The Committee finds that there has been a marked change in drafting as to the use of machinery, although the Department of Mines and Petroleum has not sufficiently clarified why this change was made. That is, the term ‘*ground disturbing equipment*’ could have been incorporated into proposed section 103AE. The language used in proposed section 103AE as to the use of machinery appears to have a broader application and consequently may affect whether a low-impact notification or programme of works will be required in certain circumstances.

Page 16

Finding 2: The Committee finds that the proposed amendment to section 40D has the potential to increase the remedial and administrative burden imposed on miners and prospectors by section 40D of the *Mining Act 1978*.

Page 18

Recommendation 1: The Committee recognises that the Department of Mines and Petroleum has made a commitment to address this matter, but recommends that, to avoid ambiguity as to the application of section 58 if amended as proposed by the Mining Legislation Amendment Bill 2015, it would be better clarified by including a three month time limit in the statute itself.

Page 19

Finding 3: The Committee finds that the matter of conversion of prospecting licences, exploration licences and retention licences, including the notion of priority of grant of lease, is already sufficiently provided for in the existing *Mining Act 1978*.

Page 28

Finding 4: The Committee finds that the terms ‘environment’ and ‘environmental harm’ serve a markedly different purpose in the *Mining Act 1978* to the equivalent terms in the *Environmental Protection Act 1986* and consequently, in practice, different definitions for those terms may give rise to inconsistency in limited circumstances.

Page 31

Finding 5: The Committee finds that there must be clarity, security and confidence for proponents as to what will constitute a low-impact activity for the purposes of proposed section 103AC of the *Mining Act 1978*.

Page 31

Recommendation 2: The Committee recommends that the definition of low-impact activities for the purposes of proposed section 103AC be incorporated as a schedule to the *Mining Act 1978*.

Page 32

Recommendation 3: The Committee recommends that all relevant stakeholders should be involved in the consultation process for the drafting of any guidelines, regulations and amendments to the *Mining Act 1978* as to the definition of low-impact activities. The Committee recommends that steps be taken to write to the postal addresses or email addresses of all relevant tenement holders in conjunction with working with industry representative bodies.

Page 36

Finding 6: The Committee finds that there are benefits in convenience, efficiency and cost from online lodgement and supports the availability of this as an option. In this instance, the Committee finds that the very nature of the primary operations of many proponents makes compliance with online systems extremely difficult. The Committee finds that to make paper lodgement wholly unavailable may be prohibitive for some participants.

Page 36

Recommendation 4: The Committee recommends that both paper and online options for lodgement remain available to proponents. Sufficient levels of training, workshops and assistance should still be provided for those opting to use the online option.

Page 37

Finding 7: The Committee finds that the fine of \$20 000 that may be imposed under proposed section 103AD operates as a maximum.

Page 38

Recommendation 5: The Committee recommends that the Department of Mines and Petroleum clarify with proponents that this fine is not a mandatory penalty of \$20 000 regardless of the nature of breach.

Page 40

Recommendation 6: The Committee recommends that the *Mining Act 1978* should itemise those mining activities that are considered minor enough to not require a low-impact notification or programme of works.

Page 43

Finding 8: The Committee finds that the Mining Legislation Amendment Bill 2015, as it is currently drafted, lacks clarity as to what is required to be lodged by a prospector when operating under a tribute agreement, or otherwise, on another party's mining lease.

Page 43

Recommendation 7: The Committee recommends that the current framework through which prospectors are able to operate on other party's mining leases, including by tribute arrangement, should be retained. The Committee recommends that the Mining Legislation Amendment Bill 2015 be amended to ensure that prospectors can continue to carry out prospecting activities in these circumstances on the lodgement of a programme of work. The Committee recommends that prospectors' access to mining leases, and the processes and documentation associated with such, should be clarified.

Page 44

Finding 9: The Committee finds that the Mining Legislation Amendment Bill 2015, as it is currently drafted, lacks clarity as to what is required to be lodged by a proponent when carrying out prospecting and exploration activities.

Page 44

Recommendation 8: The Committee recommends that the Mining Legislation Amendment Bill 2015 be amended to ensure that proponents can continue to carry out prospecting and exploration activities on the lodgement of a programme of work.

Page 45

Finding 10: The Committee finds that proposed sections 103AJ and 103AK do not place any new obligations on proponents to do with mine closure plans.

Page 50

Finding 11: The Committee finds that the legislative status of the guidelines incorporated by proposed section 103AM is uncertain and that guidelines issued under that proposed section may have binding legal effect.

Page 50

Recommendation 9: The Committee recommends that, for the avoidance of doubt and a best practice approach to the management of the legislative and guidance framework, proposed section 103AM should be removed and consequential amendments made. If it is intended that tenement holders must comply with all aspects of the 'guidelines', then those matters should be addressed as requirements in the *Mining Act 1978* itself or in regulations.

Page 51

Finding 12: The Committee finds that guidance material can be a useful tool, but notes that any guidelines must include the following aspects:

- be limited in scope and purpose and not purport to operate as quasi-legislation
- be clear to all participants which guidelines they need to use
- be easily locatable and accessible
- be clear and easy to understand and apply
- be concise and user-friendly
- be kept current
- involve notification to proponents where changes are made
- if it is intended that guidelines must be complied with by proponents, those matters should be incorporated into statute or regulations.

Page 54

Finding 13: The Committee finds that proposed new sections 103AO(6) and 103AP(6) are indeed subjective and leaves the decision as to what constitutes an unacceptable impact to the Director General's opinion. The language used in this provision may lack the requisite level of certainty to enable participants to adequately judge whether or not their proposal is likely to have an '*unacceptable impact on the environment*'.

Page 54

Recommendation 10: The Committee recommends that some clarification in the drafting of these provisions would be useful to allow best operation of the provisions.

Page 56

Finding 14: The Committee finds that the Mining Legislation Amendment Bill 2015 does not make provision for a 10 hectare exemption for clearing. It has not been established whether the list of clearing exemptions in regulation 5 of the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* will be incorporated into the low-impact activities framework in the same form, in an amended form, or at all.

Page 56

Recommendation 11: The Committee recommends that all of the existing exemptions from the *Environmental Protection Act 1986* and *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* should be expressly incorporated into the *Mining Act 1978*'s management of clearing activities.

Page 58

Finding 15: The Committee finds that while information may be provided by inspectors to the Director General, the Director General would be the decision-maker under proposed section 103AR.

Page 59

Finding 16: The Committee finds that conditions imposed under proposed section 103AW are a variant of the conditions that can currently be imposed on a tenement under the *Mining Act 1978*. It is noted that 'reasonable conditions' is the same qualifier currently used in relation to the imposition of conditions relating to the injury of land in the *Mining Act 1978*. Reference to environmental harm, as defined in section 103AA, is likely to result in broader application of conditions than the current references to injury to land as we have already noted in paragraphs 4.29 to 4.43.

Page 60

Recommendation 12: The Committee recommends that the Government move to amend the Mining Legislation Amendment Bill 2015 to include an avenue of appeal for proponents to the Minister for Mines and Petroleum against conditions imposed under proposed section 103AW of the *Mining Act 1978*.

Page 62

Finding 17: The Committee finds that the proposed new provision seeks to introduce conditions relating to offsetting similar to those included in the *Environmental Protection Act 1986* as outlined by the Department of Mines and Petroleum above. As discussed in paragraphs 4.29 to 4.43, the provisions in the *Environmental Protection Act 1986* and proposed section 103AY do differ in that the term 'environmental harm' will have a narrower meaning under the *Mining Act 1978* and consequently a narrower application. This has a differential application as to the size of the activity.

Page 63

Finding 18: The Committee finds this proposed provision relating to monitoring seeks to introduce conditions similar to those included in the *Environmental Protection Act 1986* as outlined by the Department of Mines and Petroleum above and consistent with the expressed policy of the Mining Legislation Amendment Bill 2015. Notably, as discussed in paragraphs 4.29 to 4.43, the provisions in the *Environmental Protection Act 1986* and proposed section 103AZA differ in that the term 'environmental harm' has a narrower meaning in the *Mining Act* and consequently a narrower application. This has a differential application as to the size of the activity.

Page 63

Recommendation 13: The Committee recommends that if conditions are applied to a tenement under proposed section 103AZA of the *Mining Act 1978*, the frequency of any reporting required by those conditions should be limited.

Page 68

Finding 19: The Committee finds that the introduction of additional environmental reporting requirements, particularly if these overlap with existing requirements, does not appear to align with the reported policy intention of the Mining Legislation Amendment Bill 2015 to reduce regulatory burden. To meet the intention of the Bill, the reporting obligations associated with the environmental management system must be streamlined and avoid overlap with other reporting obligations.

Page 68

Recommendation 14: The Committee recommends that a template environmental management system form be created for use by small scale miners.

Page 75

Finding 20: The Committee finds that it is important to adopt a best practice approach to drafting provisions relating to the grant of investigative powers and it is considered that some minor amendments might be made to better protect the interests of participants who may be affected by the operation of those provisions:

- proposed new powers exercised under an amended section 162(2) should be qualified to provide that an inspector is authorised to do those things listed for some defined purpose which encompasses the inspector's role, for example: *'for the purposes of the administration of Part IVAA of the Act'*
- provision should be made for the receipt and return of seized property

The Committee notes that the powers of compulsion that are proposed to be inserted into section 162(2)(aa) of the *Mining Act 1978* by clause 52 of the Mining Legislation Amendment Bill 2015 have a somewhat ambiguous connection to the expressed policy of the bill. It is only by reference to oblique statements in the Second Reading Speech and the Explanatory Memorandum dealing with general propositions interrelating the new statutory framework with the existing *Environmental Protection Act 1986* framework that one can determine a possible policy intention. Given the fundamental nature of the rights that stand to be abrogated under these proposed provisions of the *Mining Act 1978* proposed by the bill, the Parliament (and through it, the people of Western Australia) is entitled to a clear policy articulation as to why the proposed new powers are to be inserted into the Mining Act.

Page 75

Recommendation 15: The Committee recommends that, in their response to the Second Reading Debate on the Mining Legislation Amendment Bill 2015 in the Legislative Council, the Minister representing the Minister for Mines and Petroleum should provide a clear and unambiguous policy articulation as to why the powers of compulsion in relation to interviews, gathering of evidence, confiscation, seizure and taking of documents contained in clause 52 of the Bill have been included.

Page 77

Finding 21: The Committee finds that the operation of this transitional arrangement is not retrospective.

Page 77

Finding 22: The Committee finds that an option for extension would be a prudent inclusion should the need arise and could be addressed as needed by the Director General of Mines or Minister for Mines and Petroleum.

Page 78

Recommendation 16: The Committee recommends that the Mining Legislation Amendment Bill 2015 should be amended to include a provision allowing for a proponent to apply to the Minister for Mines and Petroleum or Director General of Mines for an extension of time under this item.

Page 90

Finding 23: The Committee acknowledges the role that the small scale mining sector plays in the State and the contributions it makes to industry, community and the economy and considers that it is important to protect the interests of those in the sector.

Page 97

Finding 24: The Committee finds that the Department of Mines and Petroleum made efforts to undertake consultation for the Mining Legislation Amendment Bill 2015. It appears, however, that a particular category of interested participants, being small scale miners, were either not consulted, or were engaged in very little consultation. The Committee finds that the Department of Mines and Petroleum should have taken steps to engage via email or post all tenement holders in relation to the progress of the bill and to invite comment. The Committee also finds that the Department of Mines and Petroleum should have taken constructive steps to engage the Aboriginal prospecting community in the process to address any issues that they may have had with the bill, for example, online lodgement.

Page 97

Finding 25: The Committee finds that it is inhibited in its ability to properly scrutinise legislation on behalf of the House where significant legislative detail is left to unseen regulations and departmental guidelines.

Page 97

Recommendation 17: The Committee recommends that the Legislative Council should adopt a resolution asserting its right to be fully informed about the legislative detail of Bills including, where relevant any contingent delegated legislation and guidelines that is expressly intended to provide absent legislative detail omitted from primary legislation.

Page 99

Finding 26: The Committee is supportive of the proposals put forward at paragraph 7.30 above by prospectors and small scale miners as to a tiered approach.

Page 99

Recommendation 18: The Committee recommends that the Government acknowledge the diversity of the sector by introducing a tiered approach to the mining industry.

MINORITY FINDINGS

- 7 Four minority findings were made by Hon Robin Chapple MLC. The minority findings are grouped as they appear in the text at the page number indicated:

Page 52

Minority Finding 1:

A minority of the Committee comprising Hon Robin Chapple MLC finds that:

I support in part the recommendations of the Chamber of Minerals and Energy WA in the notion that stakeholder consultation is integral and standard practice.

However, I am concerned that this stakeholder consultation is only relevant to industry and that as per the environmental protection process there should be the ability for public participation through a public notice process that is currently not available.

The current section 103AM(2)(c) requires that the holder of a mining tenement (or in this case prospector) to consult with persons likely to be affected by the proposed activity. This should be a legislative requirement especially for pastoralists and other stakeholders who may have interests.

The onus put on the applicant to demonstrate that they have consulted is not workable or indeed cost effective for the small mining sector.

Page 55

Minority Finding 2:

A minority of the Committee comprising Hon Robin Chapple MLC finds that:

It is unacceptable to provide the Director General of the Department of Mines and Petroleum the ability to determine the criteria for what is an unacceptable impact on the environment, as they may not have any training or competency in matters of the environment. Also, in doing so, it becomes an arbitrary decision-making process and is not the remit of the Director General nor the Department of Mines and Petroleum.

Issues of the environment have always been a matter for the Environmental Protection Authority and/or the Department of Environment Regulation and should remain so.

Minority Finding 3:

A minority of the Committee comprising Hon Robin Chapple MLC finds that:

I support the position put forward by the Environmental Defenders Office WA and the Wilderness Society WA that the remit of environmental protection should be the purview of the Environmental Protection Authority and the Department of Environment Regulation, and is not the remit of the Department of Mines and Petroleum.

It should also be noted that whereas there is currently no criteria for a lesser environmental assessment for small-scale miners under the *Mining Act 1978* or the Mining Legislation Amendment Bill 2015 that the Environmental Protection Authority in regulation 5 of the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* provides exemptions specifically for small-scale miners. With respect to this sector of the industry, administration of the small-scale mining sector would be better served under this regulation 5.

Pages 86

Minority Finding 4:

A minority of the Committee comprising Hon Robin Chapple MLC finds that:

In relation to the Bilateral Agreement established between the Commonwealth and the State of Western Australia in October 2014 and signed by the Minister for Environment, there has been no evidence provided of what effect the Mining Amendment Bill will have on land clearing currently delegated by this Bilateral Agreement to the Department of Environment Regulation (Environmental Protection Authority).

It has been stated that the transfer of powers would have no effect on the Bilateral Agreement. There is a lack of clarity about this statement and it is unclear as to whether the Commonwealth would allow the transfer of its powers, given to the Environmental Protection Authority, to be transferred to the Department of Mines and Petroleum. It also has the potential to re-involve the Commonwealth in land clearing matters should the Commonwealth not agree to the transfer of powers by the Environmental Protection Authority by the Department of Mines and Petroleum.

CHAPTER 1

INTRODUCTION

REFERENCE AND PROCEDURE

1.1 On 23 February 2016, the Legislative Council referred the Mining Legislation Amendment Bill 2015 (**Bill**) to the Standing Committee on Legislation (**Committee**) for inquiry. The Order of Reference states:

(1) The Order of the Day relating to the Mining Legislation Amendment Bill 2015, be discharged and the Bill be referred to the Standing Committee on Legislation for consideration and report by no later than Tuesday, 10 May 2016.

(2) The Committee has the power to inquire into and report on the policy of the Bill.¹

1.2 The Committee called for submissions by:

- inviting submissions from 20 stakeholders directly
- advertising the inquiry in *The West Australian* newspaper on Saturday, 12 March 2016
- advertising the inquiry in the *Kalgoorlie Miner* newspaper on Saturday, 12 March 2016
- advertising the inquiry in the *Port Hedland North West Telegraph* newspaper on Wednesday, 16 May 2016
- making media releases about the inquiry, the submissions process and hearings.

1.3 The Committee received 33 submissions.

1.4 The Committee held public hearings in Perth on 4 April 2016. On 11 April 2016, the Committee travelled to Kalgoorlie to hold public hearings.

1.5 Details of stakeholders invited to make a submission, submissions received and witnesses who appeared before the Committee are outlined in Appendix 1.

¹ Hon Peter Collier MLC, Minister for Education, Aboriginal Affairs and Electoral Affairs, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 23 February 2016, pp 554-5.

Submissions and transcripts of the hearings are available on the Committee's website at www.parliament.wa.gov.au/leg.

- 1.6 The Committee thanks all submitters, those who gave answers to questions and those who provided evidence to the Committee in writing or at a hearing.

COMMITTEE APPROACH

- 1.7 The Committee's approach during this inquiry was to focus on the following issues in its consideration of the Bill:
- whether the operational effect of any clause in the Bill is uncertain or has negative consequences
 - legal issues, including whether any clause in the Bill is invalid for constitutional or other reasons
 - policy considerations associated with the Bill.
- 1.8 The Committee's scrutiny of the Bill has included an assessment as to whether it is consistent with fundamental legislative scrutiny principles. While not mandated, this Committee has used fundamental legislative scrutiny principles as a framework for scrutinising bills since 2004. A list of the fundamental legislative scrutiny principles is set out in Appendix 2.

CHAPTER 2

OUTLINE OF THE BILL AND ITS CONTEXT

KEY SOURCES CONSULTED

2.1 In conjunction with material attained from submissions and hearings, a number of key background materials and sources were consulted in reviewing the Bill, including the:

- Second Reading Speech to the Bill²
- Explanatory Memorandum to the Bill³
- *Mining Act 1978* (**Mining Act**)
- *Environmental Protection Act 1986* (**EP Act**)
- *Mining Legislation Amendment Act 2014*
- *Mining Rehabilitation Fund Act 2012*
- *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**Commonwealth EPBCA**)
- *Mining Regulations 1981* (**Mining Regulations**)
- *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* (**EP Clearing Regulations**)
- draft Mining Amendment Regulations (No. 2) 2015
- *Bilateral agreement made under section 45 of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) relating to environmental assessment* between the Commonwealth of Australia and the State of Western Australia, 3 October 2014 (effective 1 January 2015) (**Bilateral Agreement**)⁴

² Hon Ken Baston MLC, Minister for Agriculture and Food, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 20 October 2015, pp 7518–20.

³ Mining Legislation Amendment Bill 2015, Explanatory Memorandum, pp 1–16.

⁴ Australian Government, Department of the Environment, *Bilateral Agreement*, Available at: <<http://www.environment.gov.au/system/files/pages/69324f7e-a815-485e-aafe-552a7b787a37/files/wa-bilateral-agreement-assessment.pdf>> Viewed 1 April 2016.

- Report of the Ministerial Advisory Panel on Reforming Environmental Regulation—*Reforming Environmental Regulation in the WA Resources Industry*, prepared for the Minister for Mines and Petroleum, December 2012⁵
- Draft Policy Position Paper of the Department of Mines and Petroleum—*Proposed Low Impact Activity Framework Prospecting and Exploration*, December 2015⁶
- Auditor General for Western Australia, *Auditor General's Report—Management of Native Vegetation Clearing*, Report 8, September 2007⁷
- Government of Western Australia, *Review of the Project Development Approvals System*, 2002.

BACKGROUND TO THE BILL

- 2.2 Previously, environmental management in relation to mining tenements was managed through the operation of both the Mining Act and the EP Act, with governance of those Acts being the responsibility of the DMP, the Department of Environment Regulation (the **DER**) and the Environmental Protection Authority (**EPA**). There are a number of existing administrative agreements and memoranda of understanding between those parties as to the management of environmental matters in relation to mining activities.
- 2.3 In 2009, an industry working group was established in response to feedback from industry, environmental non-government organisations and relevant agencies in respect of the effectiveness, efficiency and accountability of environmental regulation. The then Minister for Mines and Petroleum, Hon Norman Moore MLC implemented a consultative process to identify issues and drive reform within the DMP. Consultation was broad and included groups such as the Association of Mining and Exploration Companies (**AMEC**) and Chamber of Minerals and Energy WA (**CME**).
- 2.4 Minister Moore established the Ministerial Advisory Panel on Reforming Environmental Regulation (the **Panel**), with Hon Cheryl Edwardes as independent

⁵ Department of Mines and Petroleum, *Reforming Environmental Regulation in the WA Resources Industry*, December 2012. Available at http://www.dmp.wa.gov.au/Documents/Environment/Reforming_Environmental_Regulation_in_the_WA_Resources_Industry.pdf Viewed 25 March 2016.

⁶ Department of Mines and Petroleum, *Proposed Low Impact Activity Framework Prospecting and Exploration* December 2015. Available at: http://dmp.wa.gov.au/Documents/Environment/Draft_policy_position_paper-proposed_low_impact_activity_framework_prospecting_and_exploration.pdf Viewed 27 March 2016.

⁷ Office of the Auditor General, *Auditor General's Report – Management of Native Vegetation Clearing*, September 2007. Available at: https://audit.wa.gov.au/wp-content/uploads/2013/05/report2007_08.pdf Viewed 1 April 2016.

Chair. The Panel comprised four working groups and was asked to conduct detailed consultation and provide advice on reforms relating to environmental matters and the mining rehabilitation fund.

2.5 This Panel included representatives from the DMP, Department of Environment and Conservation, Department of State Development, Office of the Environmental Protection Authority, AMEC, CME, Amalgamated Prospectors and Leaseholders Association (**APLA**), Conservation Council of Western Australia and the Pastoralists and Graziers Association of WA.

2.6 The Panel provided its report in December 2012, *Reforming Environmental Regulation in the WA Resources Industry*. Key findings in the report are outlined below:

- DMP needed to implement clear, appropriate and measurable environmental objectives to define the purpose of its environmental regulatory role.
- Outcomes-based environmental regulation was needed.
- Environmental tenement conditions under the Mining Act needed to be reviewed to form a rationalised list which were necessary, outcomes-based, clear, concise and enforceable.
- Generic and common conditions should be moved into the legislation.
- Regulatory effort and resource allocation should be targeted and proportionate such that regulatory effort protects environmental values in an effective, efficient and timely manner.
- Assessments and decision making by DMP should be based upon a formalised risk assessment methodology recognising both approvals risk and operational risk.
- Duplicated processes between agencies/departments should be removed and inter-agency/department operations should be smooth.
- All obligations and powers should be clear and enforceable.
- Compliance tools, including administrative orders and civil penalties, should be available for promoting and enforcing compliance at each of the three stages of project development: approvals, operation and closure; and at all levels of non-compliance severity.

2.7 Hon Ken Baston MLC, then Minister for Agriculture and Food, spoke on the purpose of the Bill:

The Mining Act presently contains provisions to do with the environment that are scattered throughout the act. These provisions do not reflect contemporary approaches towards environmental management. The existence of different provisions and differing approaches reflects changes over time in industry, community and government expectations of the Department of Mines and Petroleum to achieve environmental objectives. The bill will bring all the environmental provisions into one part.

... environmental outcomes will be agreed between the proponent and regulator and the way in which each operator undertakes its activities can change over time to meet best practice standards. This will provide much better outcomes for the environment. However, restrictions will continue to be placed on mining operations to ensure the protection of environmental values.

... This represents a more flexible and risk-based approach to environmental regulation and will result in appropriate attention being paid to the key risks associated with a project, whilst reducing the need to assess compliance with inconsequential requirements and conditions. Operators will have the flexibility to determine the most efficient and effective way of meeting environmental objectives and the regulator will be able to focus on an operator's success in meeting agreed environmental outcomes.

... this bill brings about a major overhaul of the environmental provisions of the Mining Act that will significantly reduce the regulatory burden on tenement holders while at the same time strengthening and improving environmental management in the mineral exploration and mining industry.⁸

- 2.8 As stated in the long title of the Bill, it proposes to amend the Mining Act, the *Mining Legislation Amendment Act 2014*, the EP Act and the *Mining Rehabilitation Fund Act 2012*.

⁸ Hon Ken Baston MLC, Minister for Agriculture and Food, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 20 October 2015, pp 7518–20.

CHAPTER 3

CURRENT LEGISLATIVE FRAMEWORK—MINING AND ENVIRONMENT IN WA

THE MINING ACT

- 3.1 The Mining Act, the Mining Regulations and other associated legislation govern the operation of mining practices throughout Western Australia. Since the commencement of the Mining Act, there have been 70 Acts amending the Mining Act and 116 amendments to the Mining Regulations.⁹
- 3.2 The Mining Act is administered by the Minister for Mines and Petroleum (the **Minister**) with the assistance of the nominated department, at this time, the DMP. The Mining Act provides that the State is divided into mineral fields and districts, with registrars and responsible Warden's Courts nominated for each.
- 3.3 There are six different forms of mining interests granted under the Mining Act, collectively defined as 'mining tenements', namely - prospecting licences, exploration licences, mining leases, general purpose leases, miscellaneous licences and retention licences. The Mining Act provides comprehensive regulation in respect of rights, obligations and processes associated with each of the mining tenements.
- 3.4 The current Mining Act provides that for prospecting licences,¹⁰ exploration licences,¹¹ retention licences,¹² mining leases,¹³ general purpose leases¹⁴ and miscellaneous licences,¹⁵ environmental conditions apply such that on the granting of the lease or licence, or at any subsequent time, conditions for the prevention of injury to land or for its rehabilitation may be imposed by the mining registrar, the warden or the Minister, depending on the particular type of lease or licence. An environmental condition may be cancelled or varied by the Minister at any time. The conditions must be reasonable and, as set out in those provisions:

for the purpose of preventing, or reducing, or making good, injury to the land ... [in respect of which the licence or lease is granted]...or

⁹ M Hunt, T Kavenagh and J Hunt, *Hunt on Mining Law of Western Australia*, Fifth Edition, The Federation Press, Sydney, 2015, p 7.

¹⁰ Mining Act ss 46A(1) and (2).

¹¹ *ibid* s 63AA(1).

¹² *ibid* s 70I.

¹³ *ibid* s 84(1).

¹⁴ *ibid* s 90(4) provides that s 84 (which addresses mining leases) applies to a general purpose lease.

¹⁵ *ibid* s 92 provides that s 46A (which addresses prospecting licences) applies to miscellaneous licences.

injury to anything on or below the natural surface of that land or consequential damage to any other land.

- 3.5 The Mining Regulations provide that inspectors monitor and investigate environmental and other compliance¹⁶ and may issue directions¹⁷ and stop work orders.¹⁸

COMMONWEALTH LEGISLATION

- 3.6 The relevant Commonwealth statute is the Commonwealth EPBCA, which:
- provides for the protection of the environment, particularly matters of national environmental significance (NES)
 - enhances the protection and management of important natural and cultural places
 - promotes ecologically sustainable development through conservation and sustainable use of resources.
- 3.7 The Commonwealth EPBCA applies to matters of NES, which are listed in Part 3 and include world heritage properties, national heritage places, wetlands of international importance, listed threatened species and ecological communities and Commonwealth marine areas.
- 3.8 Section 67 of the Commonwealth EPBCA provides that an action that will have, or is likely to have, a significant impact on a matter of NES is deemed to be a ‘*controlled action*’. A proponent may refer a matter to the Commonwealth Minister for the Environment to decide whether it is a controlled action.¹⁹ The Commonwealth Minister will then determine how to assess the matter and will make decisions in relation to it, including whether to accept or declare it unacceptable.
- 3.9 As the result of the Bilateral Agreement, Western Australia is authorised to assess proposals in relation to NES matters on behalf of the Commonwealth. Among other things, the Bilateral Agreement accredits the clearing permit assessment process under Part V, Division 2 of the EP Act. Section 2.1(a) of the Bilateral Agreement also provides:

Note: This Item includes assessments under Part V Division 2 of the EP Act in relation to area permits and purpose permits, and includes

¹⁶ Mining Regulations reg 120F.

¹⁷ *ibid* reg 120H–K.

¹⁸ *ibid* reg 120L–O.

¹⁹ Commonwealth EPBCA s 68(1).

permits assessed by the Department of Mines and Petroleum under delegation under the EP Act.

- 3.10 The Bilateral Agreement allows Western Australia to assess the impacts of clearing on relevant matters of NES while undertaking an EP Act clearing permit assessment. The agreement applies only to clearing applications initially referred to the Commonwealth and which the Commonwealth has determined to be a ‘*controlled action*’.

ENVIRONMENTAL PROTECTION ACT 1986

What does the EP Act do currently?

- 3.11 The EP Act establishes the EPA and:

*... permits the EPA to approve environmental policies, establishes a framework for assessment of proposals, creates offences relating to pollution and environmental harm and establishes regimes for the authorisation of the clearing of native vegetation and financial assurances.*²⁰

- 3.12 The Mining Act is to be read subject to the EP Act. Where a provision of the Mining Act conflicts with the EP Act, the Mining Act provision is inoperative to the extent of the inconsistency.²¹

Approvals of proposals by the EPA

- 3.13 Under the Mining Act, an application for a mining lease must either be accompanied by a mining proposal or other specified supporting document.²² Among other things, a mining proposal is submitted to the DMP for the purpose of assessing the environmental impacts of a proposal. The DMP consults with other departments regarding the impacts of the proposal. The DMP may approve the mining proposal and use the details contained therein to determine the conditions for the mining lease.
- 3.14 Part IV of the EP Act provides scope for review by the EPA of certain activities, including a ‘*significant proposal*’, which is defined as a proposal likely, if implemented, to have a significant effect on the environment.²³ A proposal is a project, plan, programme, policy, operation, undertaking or development or change in

²⁰ M Hunt, T Kavenagh and J Hunt, *Hunt on Mining Law of Western Australia*, Fifth Edition, The Federation Press, Sydney, 2015, pp 356–7.

²¹ Mining Act s 6(1).

²² *ibid* s 74(1)(ca).

²³ EP Act s 37B.

land use, or amendment of any of the foregoing.²⁴ A mining proposal falls within the definition of ‘*proposal*’ and may constitute a ‘*significant proposal*’ for the purposes of the EP Act, depending on the environmental impact attached to it.

3.15 Any person can refer a significant proposal to the EPA for assessment.²⁵ In addition to this, a Memorandum of Understanding (**MOU**) between the DMP and the EPA requires the DMP to refer a mining proposal to the EPA if the mine is in an environmentally sensitive area. Other proposals which do not trigger an MOU referral may still require assessment under Part IV of the EP Act if considered to be a ‘*significant proposal*’.

3.16 Part IV of the EP Act outlines the process for the EPA to assess a significant proposal. The EPA may elect not to assess the proposal, in which case the DMP can allow the mining activity to proceed.²⁶ The EPA may elect to assess the proposal, including obtaining further information if necessary, and then will prepare a report on the outcome of the assessment.²⁷ The report sets out its recommendation on whether the proposal should proceed, and if so, if any conditions should be imposed.²⁸ The Minister for the Environment then considers the report and makes a decision on whether the proposal may be implemented.²⁹ The Minister’s approval will usually be subject to conditions designed to minimise the environmental impact of the proposal. The involved parties are then advised of the decision.³⁰

Clearing of vegetation

3.17 Clearing means the killing or destruction, removal, severing, ringbarking of trunks or stems or the doing of substantial damage to native vegetation.³¹ Section 51C of the EP Act provides that it is an offence to clear native vegetation unless the clearing:

- a) *is done in accordance with a clearing permit; or*
- b) *is of a kind set out in Schedule 6; or*
- c) *is of a kind prescribed for the purposes of this section and is not done in an environmentally sensitive area.*

²⁴ *ibid* s 3.

²⁵ *ibid* s 38(1).

²⁶ *ibid* s 39A(1).

²⁷ *ibid* s 44(1).

²⁸ *ibid* s 44(2).

²⁹ *ibid* s 45.

³⁰ *ibid* s 45(8) and 45(5).

³¹ *ibid* s 51A.

51C(a)—Clearing permit

- 3.18 When considering an application for a clearing permit or an amendment to a clearing permit, the CEO, as defined in the EP Act, shall have regard to the ‘*clearing principles*’.³² The clearing principles are the principles set out in Schedule 5 to the EP Act and address matters such as the significance of certain environmental factors and the impact of proposed clearing activity. A clearing permit may be granted subject to conditions that the CEO considers necessary or convenient ‘*for the purposes of preventing, controlling, abating or mitigating environmental harm or offsetting the loss of the cleared vegetation*’.³³

51C(b)—Schedule 6 of the EP Act

- 3.19 Schedule 6 of the EP Act lists types of clearing that are automatically exempt from the clearing offence under section 51C of the EP Act. Schedule 6 refers for the most part to clearing done in accordance with other legislation.

51C(c)—Matter prescribed in the EP Clearing Regulations

- 3.20 Prescribed clearing for the purposes of section 51C(c) is listed in the table appearing in regulation 5 of the EP Clearing Regulations and must be ‘*done in such a way as to limit damage to neighbouring native vegetation*’. The table in regulation 5 includes matters such as clearing to construct a building, clearing for fire hazard reduction and clearing to provide fencing and farm materials. Item 20 in regulation 5 provides as follows:

Item	Description of clearing	Person
20	<p>Clearing: low impact or other mineral or petroleum activities</p> <p>Clearing that is, or is the result of carrying out, a low impact or other mineral or petroleum activity described in Schedule 1 if the activity is carried out —</p> <p>(a) in accordance with Schedule 1; and</p> <p>(b) in an area of the State other than a non-permitted area specified in Schedule 1.</p>	The person granted the authority to carry out the activity.

- 3.21 Schedule 1 to the EP Clearing Regulations provides which mineral and petroleum activities will be considered low impact for the purposes of regulation 5 (and consequently section 51C(c) of the EP Act). Item 25 in regulation 5 provides as follows:

³² *ibid* s 51O.

³³ *ibid* s 51H.

Item	Description of clearing	Person
25	Clearing under the <i>Mining Act 1978</i> Clearing that is the result of carrying out prospecting or exploration under an authority granted under the <i>Mining Act 1978</i> .	The person granted the authority to carry out the prospecting or exploration.

- 3.22 Section 74B(1) of the EP Act provides that it is a defence under Part V to causing serious environmental harm or material environmental harm if such harm resulted from an authorised act. Section 74B(2) provides that for the purposes of subsection (1), an act was authorised if it was, among other things, ‘*clearing of a kind set out in Schedule 6*’ or clearing ‘*of a kind prescribed for the purposes of section 51C that was not done in an environmentally sensitive area*’.

Responsible agency or department

- 3.23 The DER is responsible for administering the clearing provisions in the EP Act. In accordance with section 20 of the EP Act, the DMP has been delegated authority, in cooperation with the DER, for the administration of applications to clear native vegetation for mineral and petroleum activities. The DMP applies the provisions of the EP Act to clearing relating to mining activities and works in conjunction with the DER and the EPA to facilitate this.

CHAPTER 4

PROPOSED AMENDMENTS TO THE MINING ACT

OVERVIEW OF THE AMENDMENTS

- 4.1 The amendments to the Mining Act arising from the Bill include:
- broad changes to the environmental approvals and management process for mineral exploration and the mining industry
 - amendments relating to inspector powers
 - restrictions on submitting successive tenement applications over the same area of land.
- 4.2 A number of respondents who made submissions or gave evidence in relation to the Bill considered that the Bill should be abandoned in its entirety, saying either ‘*chuck it all in the bin and we will start again. The old bill was workable*’³⁴ or that the existing Mining Act, associated legislation and associated processes should be retained in their current form. The DMP expressed the view that many of the concerns raised in opposition to the Bill were based on incorrect assumptions and misinformation.³⁵
- 4.3 This Chapter addresses individual sections of the Mining Act to be amended or inserted by the Bill and explores the relevant issues identified through submissions, witness evidence and the Committee’s own investigation. In this Chapter, headings reference firstly the relevant clause of the Bill, followed by the section of the Mining Act that is amended or inserted by the clause.

CLAUSE 5–SECTION 8–GROUND DISTURBING EQUIPMENT

- 4.4 In the current Mining Act, section 8 defines ‘*ground disturbing equipment*’ as:

- (a) *mechanical drilling equipment; or*
- (b) *a backhoe, bulldozer, grader or scraper; or*
- (c) *any other machinery of a kind prescribed for the purposes of this definition;*

³⁴ Nicholas Cukela, *Transcript of Evidence*, 11 April 2016, p 4.

³⁵ Submission 11 from the Department of Mines and Petroleum, 18 March 2016, p 3.

- 4.5 Clause 5 of the Bill proposes to delete the term ‘ground disturbing equipment’ from section 8 of the Mining Act. This definition was previously used to prohibit certain use of ground disturbing equipment in a number of sections.³⁶ Each of these sections will be removed under the Bill as a consequence of the proposed inclusion of Part IVAA.
- 4.6 Under section 46(aa) of the current Mining Act, the use of ground disturbing equipment triggers a requirement of prior lodgement and approval of a programme of works. Under proposed section 103AE, the requirement to lodge a programme of works for approval will arise on, among other things, ‘*using machinery to disturb the surface of the land for the purposes of, or in preparation for, prospecting or exploring for minerals*’. An exception will apply if the activity is a low-impact activity, in which case an online notification is required.
- 4.7 It was submitted that the change would prevent the use of ground disturbing equipment by prospectors. Mr Michael Charlton from Goldfields First said:

If they start specifying machinery, it is a way of restricting your operations by the limited size of the machinery and this is coming out I suppose, in the latest [programme of work]. There are sort of monthly amendments to our working model and they state there in going into the environmental area that you are operating in, if you can use a smaller machine, it would be more beneficial, as far as they are concerned, than using a larger machine. If the smallest machine can do the job, you do not use a tracked machine if you have a rubber-tyred machine. They are starting to be prescriptive on the mining. They are telling you how to do your job, and that is where we see the threat that if you start describing what sort of machinery, it is going to have limitations.

*... We want to stay with the flexibility of the machinery that we are using and not be prescriptive.*³⁷

- 4.8 Mr Andrew Pumphrey from Goldfields First added that:

*Any significant ground disturbing will require a mining proposal to be submitted is the way that we read the changes in the act. Also, requiring a mining proposal triggers a mine closure plan that must be submitted, which is even more increased paperwork and cost.*³⁸

³⁶ See Mining Act ss 46(aa), 63(aa), 70H(1)(aa) and 82(1)(ca).

³⁷ Michael Charlton, Goldfields First, *Transcript of Evidence*, 11 April 2016, p 10.

³⁸ Andrew Pumphrey, Goldfields First, *Transcript of Evidence*, 11 April 2016, p 5.

4.9 The DMP noted that ‘*Section 48 of the Mining Act sets out the rights of prospecting licence holders ... None of the rights set out in section 48 are limited in any way by the amendments in the Bill.*’³⁹

4.10 Further criticism of this amendment, suggested that it would significantly increase direct costs,⁴⁰ decrease flexibility,⁴¹ and would be problematic for prospectors.⁴² The DMP stated that “‘*Machinery*’ would take its ordinary meaning’⁴³ and that:

*The change in wording means that the requirement encompasses a broader range of types of machinery that may be used than the current narrowly defined term “ground disturbing equipment”. The change does not affect the right of a prospector to use equipment of any type on a prospecting licence.*⁴⁴

4.11 The proposed amendment to section 8 of the Mining Act does not prevent the use of certain types of machinery by a prospector.

Finding 1: The Committee finds that there has been a marked change in drafting as to the use of machinery, although the Department of Mines and Petroleum has not sufficiently clarified why this change was made. That is, the term ‘ground disturbing equipment’ could have been incorporated into proposed section 103AE. The language used in proposed section 103AE as to the use of machinery appears to have a broader application and consequently may affect whether a low-impact notification or programme of works will be required in certain circumstances.

CLAUSE 9—SECTION 40D—MINER’S RIGHT

4.12 Clause 9 of the Bill relates to section 40D(2) of the Mining Act, which provides conditions that may be placed on the miner’s right. Section 40D(2)(c)(i) of the Mining Act requires the filling or making safe of holes, trenches and land disturbances made. Presently, this obligation exists where those land disturbances ‘*are likely to endanger the safety of any person or animal*’. The Bill, at clause 9, would amend that provision so that the obligation arises if those land disturbances ‘*may endanger the safety of any person or animal.*’ (underlining added for emphasis)

³⁹ Richard Sellers, Director General, Department of Mines and Petroleum, Letter, 13 April 2016, p 7.

⁴⁰ Submission 4 from Focus Metals Pty Ltd, 23 March 2016, p 4.

⁴¹ Submission 9 from Goldfields First, 22 March 2016, p 10.

⁴² Submission 13 from Amalgamated Prospectors and Leaseholders Association of WA Inc, 22 March 2016, p 13.

⁴³ Jane Hammond, Legal Manager—Reform, Department of Mines and Petroleum, *Transcript of Evidence*, 4 April 2016, p 12.

⁴⁴ Richard Sellers, Director General, Department of Mines and Petroleum, Letter, 13 April 2016, p 7.

- 4.13 It was submitted to the Committee that this change in language would place ‘*More stringent control on Miners Right holders re permits.*’⁴⁵ It was argued that the new language was far too broad, that technically any hole may endanger and that this would ‘*create the opportunity for frivolous objection to miner’s right holders.*’⁴⁶
- 4.14 Where a word or phrase is not defined in an Act, a dictionary may assist in ascertaining its popular meaning.⁴⁷ *The Macquarie Dictionary* defines may as ‘*to be possible*’.⁴⁸ The word likely is defined as ‘*probably or apparently going or destined (to do, be, etc.)*’.⁴⁹ Reviewing these plain English meanings of the words does suggest a difference in their meanings.
- 4.15 When questioned as to why these words were being changed, the DMP responded as follows ‘*The intention of the change is to limit safety risks to people or animals by replacing a subjective standard, which may be judged differently by different people, with an objective one.*’⁵⁰
- 4.16 The DMP’s response suggests that the intention of the redrafting was to clarify the provision and to make the determination objective rather than subjective. It is not clear that the use of ‘*may*’ as used in the amended form of section 40D of the Mining Act would achieve the expressed legislative intention. There is no inclusion of any factor to make the test objective, such as reasonableness. The determination as to whether something ‘*may*’ endanger is subjectively up to the individual determining the matter. What is clear, however, is that changing the modal verb in the obligation—from connoting ‘*probable*’ (as is currently phrased) to connoting ‘*possible*’ (as the proposed amendment would phrase it)—does change its plain meaning.

Finding 2: The Committee finds that the proposed amendment to section 40D has the potential to increase the remedial and administrative burden imposed on miners and prospectors by section 40D of the *Mining Act 1978*.

CLAUSE 10— SECTION 46—GROUND DISTURBING EQUIPMENT

- 4.17 Concerns were raised as to the intention to remove the term ‘*ground disturbing equipment*’ from section 46(aa) of the Mining Act. See paragraphs 4.4 to 4.11 above which discuss this matter in relation to the definition of that term in section 8 of the Mining Act.

⁴⁵ Submission 9 from Goldfields First, 22 March 2016, p 11.

⁴⁶ Submission 13 from Amalgamated Prospectors and Leaseholders Association of WA Inc, 22 March 2016, p 14.

⁴⁷ Pearce, DC and Geddes, RS, *Statutory Interpretation in Australia*, Eighth Edition, LexisNexis Butterworths, Chatswood, 2014, p 118.

⁴⁸ *The Macquarie Dictionary*, Macmillan Publishers Group Australia, 2015, online edition, entry for ‘may’.

⁴⁹ *ibid*, entry for ‘likely’.

⁵⁰ Richard Sellers, Director General, Department of Mines and Petroleum, Letter, 13 April 2016, p 6.

- 4.18 Issues relating to the use of ‘*may*’ instead of ‘*likely to*’ apply equally here in respect of making safe holes, trenches, and other land disturbances made while prospecting where they may endanger the safety of any person or animal.⁵¹ See paragraphs 4.12 to 4.16 above.

CLAUSE 17—SECTION 58—EXCLUSION OF APPLICATION

- 4.19 Section 58 of the Mining Act currently provides for an application to be made for an exploration licence. Clause 17 of the Bill would introduce new subsections (1A) to (1C) into section 58. According to the Explanatory Memorandum to the Bill the proposed amendments:

address an anomaly that has arisen with processing exploration licence applications. Some applicants have been applying for more than one application over the same or substantially the same ground, then withdrawing the initial application. This has the effect of tying up the ground to the detriment of other applicants.

*The new subsections clarify that this cannot occur unless the Minister agrees there are special circumstances for doing so.*⁵²

- 4.20 The Committee notes that proposed section 58(1B) (the new operative provision) suggests that it has particular application to multiple exploration applications under section 58 of the Mining Act. The opening proposition of section 58(1B) would, as printed, read: ‘*If this subsection applies, **an** application referred to ...*’ (text made bold for emphasis). In order to clearly achieve the policy objective that is articulated above in the relevant Explanatory Memorandum extract, proposed section 58(1B) should be expressed in terms similar to the following:

*If this subsection applies, **any subsequent application made under subsection (1) lodged by the original applicant, or by a person related to the original applicant, in respect of**—*

- 4.21 The express policy intention and the text of proposed sections 58(1A) to (1C) also appear to introduce some ambiguity into the relevant administrative processes relating to exploration applications made under section 58 of the Mining Act. Proposed section 58(1B) seeks to introduce an automatic bar to subsequent applications being determined under section 59 of the Mining Act in the absence of express Ministerial advice to resume the process as follows:

⁵¹ Submission 13 from Amalgamated Prospectors and Leaseholders Association of WA Inc, 22 March 2016, p 14; Submission 9 from Goldfields First, 22 March 2016, p 11.

⁵² Mining Legislation Amendment Bill 2015, Explanatory Memorandum, Legislative Council, pp 3-4.

cannot be dealt with under section 59 unless the Minister advises the mining registrar and the warden in writing that the Minister considers that there are special circumstances justifying it being so dealt with.

4.22 The bar to further consideration of subsequent exploration applications would not be restricted under the proposed amendment by a time limitation.⁵³ The ambiguity arises where a Minister fails, or refuses to advise that they are satisfied that the relevant ‘*special circumstance*’ exist with respect to a subsequent application for a long period of time or indefinitely. In such a situation, the original applicant and their related parties are effectively barred from having a lawful application for an exploration licence on the relevant area determined unless and until the Minister believes there are such special circumstances.

4.23 The DMP addressed this matter and stated that it was ‘*proposing to address any ambiguity through policy, which would stipulate a three-month time limit in line with section 69 of the Mining Act.*’⁵⁴

Recommendation 1: The Committee recognises that the Department of Mines and Petroleum has made a commitment to address this matter, but recommends that, to avoid ambiguity as to the application of section 58 if amended as proposed by the Mining Legislation Amendment Bill 2015, it would be better clarified by including a three month time limit in the statute itself.

CLAUSE 34–SECTION 74–APPLICATION FOR MINING LEASE–MINING PROPOSAL

4.24 Presently, section 74(1)(ca)(i) of the Mining Act requires that, among other things, an application for a mining lease be accompanied by a mining proposal (or one of two alternative statements). Clause 34 of the Bill proposes to amend this provision by requiring that the application be accompanied by ‘*a mining proposal in accordance with Part IVAA Division 4*’ (or one of two alternative statements). A mining proposal lodged under Part IVAA must be lodged in accordance with proposed section 103AP of the Mining Act. The new procedures provided for under clause 34 of the Bill have been the subject of a number of concerns raised with the Committee in submissions received.

Increased costs

4.25 Focus Metals Pty Ltd submitted that as the result of this amendment ‘*Direct costs will be increased significantly.*’⁵⁵ Some submissions objected to the fact that a mining proposal was needed for every mining lease application and that this would attract a

⁵³ Submission 32 from MKII Consulting Pty Ltd, 24 March 2016, pp 1–2.

⁵⁴ Richard Sellers, Director General, Department of Mines and Petroleum, Letter, 13 April 2016, p 8.

⁵⁵ Submission 4 from Focus Metals Pty Ltd, 23 March 2016, p 4.

fee of \$6 950.⁵⁶ A mining proposal (or one of two alternative statements) is presently a compulsory obligation for a mining lease application under section 74(1)(ca)(i) of the current Mining Act. The only variation to that provision is that the proposal must be in accordance with proposed Part IVAA, Division 4 of the Mining Act. The power to charge an application fee for an application for a mining lease exists in section 74(1)(c) of the current Mining Act. No fees have been implemented by the DMP for a mining lease application as yet.

- 4.26 It is noted that the DMP announced that it would be introducing assessment fees for a programme of works and mining proposal in 2015. Appendix 3 attaches the draft Mining Amendment Regulations (No. 2) 2015. On 29 June 2015, the Minister announced that the assessment fees for processing mining, exploration and prospecting applications would be deferred.⁵⁷ The Minister stated that he had listened to constructive industry input on the matter and that the decision would complement the passage of major legislative reform.⁵⁸ The matter of fees is addressed further in paragraphs 4.109 to 4.112 and 7.48 to 7.53 below.

Conversion of tenements

- 4.27 It was submitted that the application requirement under proposed section 103AP of the Mining Act should not be necessary if a miner already has an active low impact or programme of works in place.⁵⁹ It was recommended that a new provision be inserted allowing for an existing prospecting licence with an approved low-impact or programme of works in place to be converted into a mining lease pursuant to section 49 without the requirement to lodge a new mining proposal.⁶⁰ On this point, the DMP stated that *‘There are existing provisions in the Mining Act for the conversion of a prospecting licence into a mining lease. There is no proposal to change the requirements for mining lease applications.’*⁶¹

Finding 3: The Committee finds that the matter of conversion of prospecting licences, exploration licences and retention licences, including the notion of priority of grant of lease, is already sufficiently provided for in the existing *Mining Act 1978*.

⁵⁶ Submission 15 from North Eastern Goldfields Exploration Pty Ltd, 24 March 2016, p 3 and Submission 9 from Goldfields First, 22 March 2016, p 11.

⁵⁷ Department of Mines and Petroleum, *New assessment fees on hold ahead of new WA mining reforms*, 29 June 2015, p 1. Available at: <<http://www.dmp.wa.gov.au/News/New-assessment-fees-on-hold-10359.aspx>> Viewed 28 April 2016.

⁵⁸ *ibid.*

⁵⁹ Submission 9 from Goldfields First, 22 March 2016, p 11; Submission 13 from Amalgamated Prospectors and Leaseholders Association of WA Inc, 22 March 2016, p 14.

⁶⁰ Submission 13 from Amalgamated Prospectors and Leaseholders Association of WA Inc, 22 March 2016, p 14.

⁶¹ Richard Sellers, Director General, Department of Mines and Petroleum, Letter, 13 April 2016, p 8. See Mining Act ss 75(7)–(10) (as to conversion of tenement generally), s 49 (in respect of a prospecting licence), s 67 (in respect of an exploration licence) and s 70L (in respect of a retention licence).

CLAUSE 46—PART IVAA—ENVIRONMENTAL AMENDMENTS

- 4.28 Clause 46 of the Bill proposes to insert Part IVAA into the Mining Act, introducing the new environmental management regime for mining tenements in Western Australia. Proposed section 103AB provides that the object of the new Part is *‘to support the responsible environmental management of mining, including land rehabilitation and mine closure.’*

CLAUSE 46—SECTION 103AA—‘ENVIRONMENT’ AND ‘ENVIRONMENTAL HARM’

- 4.29 Section 103AA inserts definitions for ‘environment’ and ‘environmental harm’. The EP Act also contains definitions of these terms and a number of the submissions make criticism that the definitions are significantly different.⁶²

- 4.30 If adopted, proposed section 103AA of the Mining Act will define ‘environment’ as:

(a) ecosystems and their constituent parts; and

(b) natural physical and biological attributes of land,

but does not include –

(c) man-made structures or works on land; or

(d) social, economic, heritage and cultural features of land

- 4.31 Section 3(1) of the EP Act provides that ‘environment’, subject to subsection (2), means *‘living things, their physical, biological and social surroundings, and interactions between all of these’*.

- 4.32 Subsection (2) provides that:

For the purposes of the definition of environment in subsection (1), the social surroundings of man are his aesthetic, cultural, economic and social surroundings to the extent that those surroundings directly affect or are affected by his physical or biological surroundings.

- 4.33 There is significant difference between the two definitions of ‘environment’, with the EP Act being much broader. It is relevant to consider how the word “environment” is used in the Mining Act:

⁶² Sarah McEvoy, Executive Director, Strategic Policy and Programs, Department of Environment Regulation, *Transcript of Evidence*, 4 April 2016, p 8; Submission 29 from Chamber of Minerals and Energy of Western Australia, 24 March 2016, pp 3-4 and Patrick Pearlman, Principal Solicitor, Environmental Defender’s Office of WA, *Transcript of Evidence*, 4 April 2016, p 2.

Proposed section/s	Use of ‘environment’ (Underlining added for emphasis)	Comment
103AM	This section provides that guidelines can be developed by the Director General for the purposes of proposed Part IVAA of the Mining Act. This includes guidelines as to the ‘likely <u>environmental</u> impacts resulting from the proposed clearing’. ⁶³	This would be a new addition to the Mining Act. Under the amendments purported by the Bill, clearing will be assessed by the DMP under the terms of the Mining Act rather than under the EP Act. The purported amendments to the EP Act pertaining to clearing are addressed in paragraphs 5.1 to 5.24 below.
103AO(6) and 103AP(6)	These sections provide that the Director General must not approve a proposed activity in a programme of work or mining proposal ‘if, in his or her opinion, carrying out the activity in the manner proposed will have an unacceptable impact on the <u>environment</u> .’	This is a new obligation. As there is no equivalent requirement or obligation in the EP Act, this use of the proposed definition of ‘environment’ is unlikely to conflict with the definition in the EP Act.
103AO(7), 103(AO7) and 103AQ	These sections provide that in deciding whether or not to approve a proposed activity in a programme of works or mining proposal, the Director General must have regard to ‘the effect the proposed activity may have on the <u>environment</u> .’	This is a new obligation. As there is no equivalent requirement or obligation in the EP Act, this use of the proposed definition of ‘environment’ is unlikely to conflict with the definition in the EP Act.

4.34 Proposed section 103AA defines ‘environmental harm’ to mean ‘*adverse ecological effects on the environment*’. Section 3 of the EP Act, however, provides that ‘environmental harm’ is defined in section 3A to mean direct or indirect:

(a) harm to the environment involving removal or destruction of, or damage to —

(i) native vegetation; or

⁶³

Mining Act proposed s 103AM(2)(a)(v).

(ii) *the habitat of native vegetation or indigenous aquatic or terrestrial animals;*

or

(b) *alteration of the environment to its detriment or degradation or potential detriment or degradation; or*

(c) *alteration of the environment to the detriment or potential detriment of an environmental value; or*

(d) *alteration of the environment of a prescribed kind*

4.35 Section 3A of the EP Act also includes definitions of ‘material environmental harm’ and ‘serious environmental harm’. Again, the relevant EP Act definitions are much broader, but also encompass different levels of materiality. Also, the definition of ‘environmental harm’ in the Mining Act and the EP Act each incorporate the term ‘environment’ and its meaning, as defined in each of the respective Acts. As the different definitions of ‘environment’ also have a different scope, this amplifies the difference in scope of the definitions of ‘environmental harm’.

4.36 It is also relevant here to consider how the phrase ‘environmental harm’ is used in the Mining Act should clause 46 of the Bill be adopted:

Proposed section/s	Use of ‘environmental harm’ (Underlining added for emphasis)	Comment
103AM	Incorporates guidelines as to the identification of ‘ <i>the foreseeable risk of <u>environmental harm</u> resulting from a proposed activity</i> ’ and ‘ <i>practicable measures proposed to be undertaken to avoid or minimise the risk of <u>environmental harm</u> resulting from a proposed activity.</i> ’ ⁶⁴	This is a new obligation. As there is no equivalent requirement or obligation in the EP Act, this use of the proposed definition of ‘environmental harm’ is unlikely to conflict with the definition in the EP Act.

⁶⁴ Mining Act proposed s 103AM(2)(b).

Proposed section/s	Use of ‘ <u>environmental harm</u> ’ (Underlining added for emphasis)	Comment
103AO(7), 103(AO7) and 103AQ	These sections each provide that in deciding whether or not to approve a proposed activity in a programme of works or mining proposal, the Director General must have regard to <i>‘whether the programme of work adequately identifies the foreseeable risk of <u>environmental harm</u> resulting from the proposed activity.’</i>	This is a new obligation. As there is no equivalent requirement or obligation in the EP Act, this use of the proposed definition of ‘environmental harm’ is unlikely to conflict with the definition in the EP Act.
103AR	This section provides that if the Director General <i>‘is of the opinion that the risk of <u>environmental harm</u> from carrying out the activity in the manner proposed’</i> in the programme of work or mining proposal is significantly different to any previous assessment of that risk, the Director General may require a revised programme of work or mining proposal.	This is a new obligation. As there is no equivalent requirement or obligation in the EP Act, this use of the proposed definition of ‘environmental harm’ is unlikely to conflict with the definition in the EP Act.
103AW(1)(a)	This section provides that reasonable conditions may be imposed on a mining tenement for the purposes of <i>‘preventing, reducing or remediating <u>environmental harm</u> on land the subject of the mining tenement or other land.’</i>	Under the current Mining Act, environmental conditions can be imposed in respect of ‘injury to land’ (see, for example, section 46A of the Mining Act). The new language incorporated in proposed section 103AW(1), in conjunction with the definition of ‘environmental harm’, appears to create a more onerous obligation as to environmental conditions. The imposition of conditions on a mining tenement under proposed section 103AW(1) is not comparable to any EP Act provision.

Proposed section/s	Use of ‘environmental harm’ (Underlining added for emphasis)	Comment
103AY(1)(a)	This section provides that a condition may be imposed on a mining tenement for offsetting in relation to ‘ <i>environmental harm</i> ’	This provision purports to replicate, to some extent, similar obligations in the EP Act. ⁶⁵ This is outlined in more detail in paragraphs 4.135 to 4.136 below. As ‘environmental harm’ defined under the Mining Act is materially different to the way the same term is defined under the EP Act, the statutory scheme proposed by the Bill is also materially different to the current scheme applicable under the EP Act.
103AZA	This section provides for a condition to be imposed in relation to monitoring operations, including as to ‘ <i>environmental harm</i> ’.	This provision purports to replicate, to some extent, similar obligations in the EP Act. ⁶⁶ This is outlined in more detail in paragraphs 4.137 to 4.138 below. As ‘environmental harm’ defined under the Mining Act is materially different to the way the same term is defined under the EP Act, the statutory scheme proposed by the Bill is also materially different to the current scheme applicable under the EP Act.
103AZC	This section provides that an environmental management system means a system of procedures and practices which, among other things, relate to ‘ <i>environmental harm</i> ’.	This is a new obligation. As there is no equivalent requirement or obligation in the EP Act, this use of the proposed definition of ‘environmental harm’ is unlikely to conflict with the definition in the EP Act.

⁶⁵ EP Act ss 51H and 51I(2)(b).

⁶⁶ *ibid* s 51I(2)(d).

Proposed section/s	Use of ‘ <u>environmental harm</u> ’ (Underlining added for emphasis)	Comment
103AZD	This section provides for a condition on every mining lease and miscellaneous licence to ‘ <i>take all reasonable and practicable measures to avoid or minimise the risk of environmental harm</i> ’.	This is a new obligation. As there is no equivalent requirement or obligation in the EP Act, this use of the proposed definition of ‘environmental harm’ is unlikely to conflict with the definition in the EP Act.
162(2)(oa)	This section provides that regulations can be made to ‘ <i>provide for recording and reporting ... incidents that pose, or are likely to pose, a risk of environmental harm</i> ’.	This is a new obligation. As there is no equivalent requirement or obligation in the EP Act, this use of the proposed definition of ‘environmental harm’ is unlikely to conflict with the definition in the EP Act.

4.37 DER expressed a preference for there to be more consistency between the definitions of ‘environment’ and ‘environmental harm’ as used in the Mining Act and EP Act.⁶⁷

4.38 The Environmental Defender’s Office of WA (EDO) expressed concern about the differences in the definitions, considering that this constituted a ‘*watering down ... [of] ... the protections that the Environmental Protection Act would otherwise extend to clearing activities.*’⁶⁸ The EDO noted that provisions of the Bill sought to impose an obligation on the holders of mining tenements to ‘*take all reasonable and practicable measures to avoid or minimise the risk of environmental harms*’, but was concerned that this was linked to a narrower definition of ‘environmental harm’ than in the EP Act.⁶⁹ The EDO submitted that ‘environmental harm’ seemed to be defined as impacts to land, and that land is defined in a limited manner.⁷⁰ In addressing ways to remedy its perceived issues with the Bill, the EDO recommended that the terms

⁶⁷ Sarah McEvoy, Executive Director, Strategic Policy and Programs, Department of Environment Regulation, *Transcript of Evidence*, 4 April 2016, p 8.

⁶⁸ Patrick Pearlman, Principal Solicitor, Environmental Defender’s Office of WA, *Transcript of Evidence*, 4 April 2016, p 2.

⁶⁹ Submission 31 from Environmental Defender’s Office WA Inc, 24 March 2016, p 5.

⁷⁰ Patrick Pearlman, Principal Solicitor, Environmental Defender’s Office of WA, *Transcript of Evidence*, 4 April 2016, p 6.

‘environment’ and ‘environmental harm’ in the Bill be a direct replication of the definitions of those terms in the EP Act.⁷¹

- 4.39 The CME submission indicated that industry supported a narrow definition of ‘environment’ which excluded social, economic, heritage and cultural features to prevent duplication with other regimes (such as the *Aboriginal Heritage Act 1972*).⁷² CME specifically addressed the definition of ‘environmental harm’ and the markedly different materiality aspect in the EP Act in which definitions of ‘material environmental harm’ and ‘serious environmental harm’ are incorporated. CME submits that using different definitions in the different legislation creates uncertainty over something already well understood by industry and that the definition in proposed section 103AA may result in something being treated as harmful even if there was only a negligible adverse impact.⁷³ CME provided evidence that:

*what constitutes environmental harm is a key aspect, because that is where operations would potentially be liable for any penalty. The definition for “environmental harm” in the Mining Act Amendment Bill does not contain any materiality around it. Now the EP Act has a materiality definition based around serious environmental harm and also material environmental harm, so they are two levels. In the Mining Act it is just environmental harm that is defined and we have some concern that an operation that may have had an incident could be liable for what is a fairly minor environmental harm provision that would not otherwise have triggered the EP Act.*⁷⁴

- 4.40 The DMP addressed the definitions of ‘environment’ and ‘environmental harm’ and stated:

the Bill is not aiming to replicate the EP Act, or any other approval Act, in terms of environmental assessment or the environmental duty on mining lease holders.

The Bill clarifies DMP’s role as an environmental assessment agency for proposed prospecting, exploring and mining operations. In the main, that assessment will focus on the ecological effects of the proposed activity on the environment.

Proposed activities on a mining tenement can still be referred to the Environmental Protection Authority (EPA) if they are significant for

⁷¹ ibid p 7.

⁷² Submission 29 from Chamber of Minerals and Energy of Western Australia, 24 March 2016, p 3.

⁷³ ibid pp 3–4.

⁷⁴ Kane Moyle, Manager, Environment and Land Access, Chamber of Minerals and Energy of Western Australia, *Transcript of Evidence*, 4 April 2016, pp 2–3.

assessment under Part IV of the EP Act—an assessment that will take in a wider range of factors, based on the definition of “environment” and in the EP Act. Mining tenement holders will also remain subject to EP Act offences relating to causing environmental harm, whether or not their operations have been assessed under Part IV of the EP Act.

The Bill does refer to the EP Act definitions and provisions in relation to the assessment of native vegetation clearing to ensure consistency. These provisions are not related to the definitions of “environment” or “environmental harm”.⁷⁵

- 4.41 Different legislation may define the same words and phrases in a different way and this is not problematic. It is noted that section 6 of the Mining Act provides that:

This Act shall be read and construed subject to the Environmental Protection Act 1986, to the intent that if a provision of this Act is inconsistent with a provision of that Act, the first-mentioned provision shall, to the extent of the inconsistency, be deemed to be inoperative.

- 4.42 Under this provision, where there is any inconsistency in application arising from these terms, the relevant provision of the EP Act operates in precedence. A difference in definitions does not itself necessitate inconsistency. As outlined above, there does not appear to be a use of the terms ‘environment’ or ‘environmental harm’ in the Mining Act which is inconsistent with provisions of the EP Act that would trigger the application of section 6 of the Mining Act. If there were such an inconsistency, given that the definition of ‘environmental harm’ under the EP Act appears to be more exhaustive than under the Mining Act, the effect of section 6 of the Mining Act as it currently stands, would be to import the EP Act standard into the administration of the Mining Act in relevant circumstances.

- 4.43 As to the suggestion by the EDO that there is some ‘watering down’ of the definition, the definition does not currently exist in the Mining Act and has therefore added an obligation. As to the obligations in respect of offsetting and monitoring under proposed sections 103AY and 103AZA, it is noted that the application of the proposed Mining Act definition of ‘environmental harm’ in these cases may result in an obligation that is less onerous than that under the equivalent sections of the EP Act. The Committee notes that, under the Bill, assessments of clearing applications will still require the application of the clearing principles of Schedule 5 of the EP Act, and when those are applied, the word ‘environment’ will have the meaning as defined in that Act.

⁷⁵

Richard Sellers, Director General, Department of Mines and Petroleum, Letter, 13 April 2016, p 9.

Finding 4: The Committee finds that the terms ‘environment’ and ‘environmental harm’ serve a markedly different purpose in the *Mining Act 1978* to the equivalent terms in the *Environmental Protection Act 1986* and consequently, in practice, different definitions for those terms may give rise to inconsistency in limited circumstances.

CLAUSE 46–SECTION 103AC–LOW-IMPACT ACTIVITIES

- 4.44 Proposed section 103AC provides that certain activities may be low-impact activities for the purposes of the environmental management provisions. Low-impact activities are to be prescribed in regulations (and without limitation, regulations may include clearing activities). Regulations prescribing low-impact activities have not yet been made, however, a draft policy position paper published by the DMP, ‘*Proposed Low Impact Activity Framework Prospecting and Exploration*’ dated December 2015 gives some indication as to what may be included.
- 4.45 Under proposed section 103AC, a party must give notice of a low-impact activity to the Director General within the time and in the manner and form prescribed and must specify the nature and extent of the proposed low-impact activity.⁷⁶ The holder of the mining tenement must then give the Director General notice of completion of the low-impact activity.⁷⁷
- 4.46 The DMP submits that ‘*The Bill will enable the implementation of a significant reform to approval processes by way of a Low Impact Notification process, whereby approvals are no longer required for low impact exploration and mining activities, provided online notification is given.*’⁷⁸
- 4.47 CME expressed its support for the low-impact notification process which the Bill proposes to introduce, considering that it will result in a significant reduction in the need for many programme of works applications and reduce the time and cost for mining and exploration companies.⁷⁹
- 4.48 The absence of amended or new regulations to accompany the Bill was the subject of concern in a number of submissions, as individuals are unable to establish the ultimate legislative position as to the definition of low-impact activities.⁸⁰ The Shire of Laverton’s submission makes the following comments in this respect:

⁷⁶ Mining Act proposed s 103AU(1).

⁷⁷ *ibid* proposed ss 103AU(2) and (3).

⁷⁸ Submission 11 from the Department of Mines and Petroleum, 18 March 2016, p 3.

⁷⁹ Submission 29 from Chamber of Minerals and Energy of Western Australia, 24 March 2016, p 1.

⁸⁰ Submission 6 from Shire of Laverton, 23 March 2016, pp 2–4; Submission 8G from David Woodiwiss, 21 March 2016, pp 1–2 and Submission 13 from Amalgamated Prospectors and Leaseholders Association of WA Inc, 22 March 2016, p 15.

*what, when, who, why and how (the essential criteria of clear communications), is incomplete at this juncture. Consequently there will be little chance of APLA being a satisfied body until there is a clear communication of what the “bottom line” means to them and their members.*⁸¹

- 4.49 A number of submissions even suggested that the DMP’s interpretation of ‘low-impact’ was ‘no impact.’⁸² It was further submitted that the:

rehabilitated end-product should be the sole arbiter of successful implementation and completion, with no intermediate review or reporting hurdles to frustrate and inhibit progress (ie an outcomes-based result)

and that the:

*area disturbed rather than tonnage should be the main criteria and in the case of small miners the areas disturbed and the time frame of disturbance is minimal.*⁸³

- 4.50 A number of submissions expressed concern that the definition of low-impact activities would be left to regulations and not the Mining Act itself. These concerns centred around issues of certainty and stability, with a belief that definition in regulations may lead to frequent amendment which could be disruptive to prospectors carrying out their activities.⁸⁴ APLA submitted:

*It is very significant that ‘Low Impact’ is being wholly dealt with within the Mining Regulations rather than treating such activities here within the Act as is the case with programme of works and mining proposals. Removing such activities to the Regulations could take away the stability that would otherwise be given within the Act. It gives the potential for easier and continual future amendment – possibly causing disruption to ‘the norm’ for prospectors.*⁸⁵

- 4.51 Michael Photios submitted that the industry needed and deserved clarity on these matters in order to properly manage and plan business operations, saying:

⁸¹ Submission 6 from Shire of Laverton, 23 March 2016 p 4.

⁸² Submission 9 from Goldfields First, 22 March 2016, p 4; Submission 17 from Dr Robert Fagan, 20 March 2016, p 21.

⁸³ Submission 17 from Dr Robert Fagan, 20 March 2016, p 21.

⁸⁴ Submission 13 from Amalgamated Prospectors and Leaseholders Association of WA Inc, 22 March 2016, p 14; Submission 16 from Mick Photios, 24 March 2016, p 3 and Submission 17 from Dr Robert Fagan, 20 March 2016, p 21.

⁸⁵ Submission 13 from Amalgamated Prospectors and Leaseholders Association of WA Inc, 22 March 2016, p 14.

*I [believe] these definitions must be Included in the Mining Act, which is not so easily altered and tampered with. The mining Industry needs and deserves clarity and certainty when it comes to business models and planning. Enshrining the definitions for low and high (and ideally, medium) impact mining would serve this purpose.*⁸⁶

4.52 Dr Robert Fagan added that:

*all conditions should be protected, defined and enshrined in the Mining Act legislation itself and not consigned to the less secure Mining Regulation, where they can more readily be altered rather arbitrarily, without consultation, negotiation or even public notice.*⁸⁷

4.53 Neither CME or AMEC took issue with the definition of low-impact activities being placed in regulations. AMEC indicated a preference for a 10 hectare limit for low-impact activities to be incorporated into the Mining Act. AMEC 's CEO also asked:

*Why not be able to do it much quicker and faster under regulation? It appears to be a vexing question – you like things enshrined in legislation in certain circumstances, but you must be smart enough to say that there are reasons why you would not.*⁸⁸

4.54 The DMP evidence to the Committee is that it was, and would be, consulting on what would constitute low-impact activities and that it considered that the thresholds would 'be to some extent a movable thing', with regulations being 'a more responsive tool to be able to manage those sorts of outcomes'.⁸⁹ The DMP further states that:

*The definition of "low-impact activities" is proposed to be set in regulations because it will contain a level of detail around categories of land and activity footprints that may be subject to review and change from time to time to ensure the system achieves optimal outcomes for the environment and for mining tenement holders. Any changes to regulations will always be made in close consultation with stakeholders and will be subject to Parliamentary scrutiny.*⁹⁰

⁸⁶ Submission 16 from Mick Photios, 24 March 2016, p 3.

⁸⁷ Submission 17 from Dr Robert Fagan, 20 March 2016, p 21.

⁸⁸ Simon Bennison, Chief Executive Officer, Association of Mining and Exploration Companies, *Transcript of Evidence*, 4 April 2016, p 4.

⁸⁹ Jane Hammond, Legal Manager–Reform, Department of Mines and Petroleum, *Transcript of Evidence*, 4 April 2016, p 5.

⁹⁰ Richard Sellers, Director General, Department of Mines and Petroleum, Letter, 13 April 2016, p 9.

4.55 As regards legislation, both acts and regulations serve their various purposes. There are a number of reasons for the use of delegated legislation, in this case regulations. These reasons include:

- relieving pressure on Parliamentary time
- avoiding inclusion in legislation of matters that are too technical or detailed
- where the legislation in question deals with changing or uncertain situations or is expected to face unforeseen contingencies
- to incorporate an element of flexibility into the legislation.⁹¹

4.56 The Committee notes the complex, detailed nature and length of the definitions (as foreshadowed in the draft policy position paper referred to in paragraph 4.44 above) in addition to the position advanced by the DMP that an element of flexibility needs to be incorporated into the legislation.

4.57 The DMP may be of the view that the inclusion of the definition of low-impact activities in regulations is an appropriate legislative approach. Despite this, concerns remain for those working within the low-impact activity framework due to the possibility of regulatory parameters being subject to change. A foreshadowed practice which involves frequent adjustment and amendment should be reconsidered due to the impact it will have on participants. If inclusion in regulations is pursued, there should be clear protocols in place for limiting the frequency of amendments, consulting and notifying all interested parties in relation to proposed changes to facilitate consultation and for notifying of completed amendments to the regulations. A statutory mechanism could be incorporated into the Mining Act to provide for public and stakeholder consultation requirements, requirements as to the publication of draft regulations and transitional provisions.

Finding 5: The Committee finds that there must be clarity, security and confidence for proponents as to what will constitute a low-impact activity for the purposes of proposed section 103AC of the *Mining Act 1978*.

Recommendation 2: The Committee recommends that the definition of low-impact activities for the purposes of proposed section 103AC be incorporated as a schedule to the *Mining Act 1978*.

4.58 A number of submissions requested participation in the preparation of the regulations when the time comes.⁹² CME indicated that it had already had some consultation with

⁹¹ Pearce, D and Argument, S, *Delegated Legislation in Australia*, Fourth Edition, LexisNexis Butterworths, Chatswood, 2012, pp 6–7.

the DMP in this regard and expected ongoing consultation as the regulations are drafted.⁹³ AMEC suggested that all stakeholders directly affected should be consulted and said:

*We have rarely had a problem with the consultation process with the Department of Mines and Petroleum. We are quite comfortable with our working relationship and look forward to the development of the regs and being able to sit down and work through them. We did it in great detail with the mining rehabilitation fund, which is something we are very proud of. We believe that the agency really appreciates the input that we are able to provide. We have lived it, we have experienced it, and we do pick it up from other states from an AMEC point of view. So they get the opportunity for us to lift all the good stuff and try to avoid all the bad stuff and help them put it into regs where it is necessary.*⁹⁴

Recommendation 3: The Committee recommends that all relevant stakeholders should be involved in the consultation process for the drafting of any guidelines, regulations and amendments to the *Mining Act 1978* as to the definition of low-impact activities. The Committee recommends that steps be taken to write to the postal addresses or email addresses of all relevant tenement holders in conjunction with working with industry representative bodies.

Online lodgement for low-impact notifications

- 4.59 The DMP has published a table, listing the forms and notifications for which only online lodgement is acceptable from 1 July 2015.⁹⁵ This list includes a mining proposal (except for a mining proposal submitted with a mining lease application), a mining proposal with mine closure plan and a large number of petroleum and geothermal documentation.
- 4.60 The Bill proposes introducing notification for low-impact activities, both at commencement and completion of the activity.⁹⁶ The DMP confirmed that notification

⁹² Submission 12 from Association of Mining and Exploration Companies, 24 March 2016, p 2; Kane Moyle, Manager, Environment and Land Access, Chamber of Minerals and Energy of Western Australia, *Transcript of Evidence*, 4 April 2016, p 5 and Simon Bennison, Chief Executive Officer, Association of Mining and Exploration Companies, *Transcript of Evidence*, 4 April 2016, p 8.

⁹³ Kane Moyle, Manager, Environment and Land Access, Chamber of Minerals and Energy of Western Australia, *Transcript of Evidence*, 4 April 2016, p 5.

⁹⁴ Simon Bennison, Chief Executive Officer, Association of Mining and Exploration Companies, *Transcript of Evidence*, 4 April 2016, p 8.

⁹⁵ Department of Mines and Petroleum, *Lodgements Where Paper is Being Phased Out by 1st July 2015*, p 1. Available at: <http://www.dmp.wa.gov.au/Documents/paper_lodgement_phaseout_table.pdf> Viewed 24 March 2016.

⁹⁶ Mining Act proposed s 103AU.

for low-impact activities will be online.⁹⁷ There will not be an option for paper lodgement. It was raised in submissions that a requirement for lodgement to be made only online was prohibitive for some miners who may lack the access, resources, knowledge and skills to do so.⁹⁸ It was also noted that miners may regularly be in regional areas without access to phones, computers and internet access.⁹⁹ It was recommended that the DMP incorporate this understanding into its planning and programming, to realise that correspondence may not be received, or replied to, for months at a time.¹⁰⁰ Mr Leslie Lowe from APLA said:

I do not have a problem with computers, digitisation and electronics. I do all my submissions by computer. There are people out there who just do not even know what a computer is, and we have got to accept that they never will; it is as simple as that. But it is a bigger problem than just their knowledge and their education levels. I spend six months a year out in the bush and sometimes I cannot even get a phone signal, never mind an internet signal ... I am 200 or 300 kilometres the other side of Laverton, out in the desert ... You are out there and you are living on your wits, more or less. There is no phone signal. The only way you are ever going to get on the internet on a phone is with a satellite phone. It is totally impractical to run a satellite phone for the internet. First of all, it is too expensive, and, secondly, it just is not a practical communications interface. It cannot be done. You can be out there for two or three months, and part of the mines department legislation, as an example, is that they issue notes when there has been a little bit of a problem with a program of works, and they say, "If you don't reply within 10 days, this gets binned." So I am out there for three months, right, and I am going back into Laverton occasionally for diesel and fuel, or someone is bringing it out; I have not even seen a television for three months—sometimes that is refreshing, but anyway. It cannot be done. In terms of will you ever get 100 per cent compliance, member, it will never be achieved. I

⁹⁷ Submission 11 from Department of Mines and Petroleum, 18 March 2016, p 3 and Dr Phil Gorey, Executive Director Environment, Department of Mines and Petroleum, *Transcript of Evidence*, 4 April 2016, pp 13–14.

⁹⁸ Submission 2 from Nicholas Cukela, 21 March 2016, pp 1, 3–4; Submission 15 from North Eastern Goldfields Exploration Pty Ltd, 24 March 2016, p 3 and Submission 19 from Mr Lynch, 24 March 2016, pp 3–4.

⁹⁹ Leslie Lowe, President, Amalgamated Prospectors and Leaseholders Association of WA, *Transcript of Evidence*, 4 April 2016, pp 5–6.

¹⁰⁰ Leslie Lowe, President, Amalgamated Prospectors and Leaseholders Association of WA, *Transcript of Evidence*, 4 April 2016, pp 5–6.

*admire the DMP for going down that path and I hope they are successful, but it will never be achieved.*¹⁰¹

4.61 Mr Nicholas Cukela said:

This insistence of only online lodgement is absolutely ridiculous and adopts a position that the DMP is primarily solely focused on looking after the big end of town where the small miner despite being a bona fide miner and contributor to the WA economy is put into a position of being unable to comply with statutory and policy requirements and therefore will be out of work and effectively over time put us out of business.

*The WA government DMP can encourage online lodgement of forms but importantly should always provide and allow that a proportion of the industry can still lodge forms and various other documents manually just as currently is allowed so that people who do not have compute skills or even when computer systems fail because of computer hacking or are even down people can still lodge forms manually and also receive customer service face to face, not over the phone to complete and lodge documentation manually.*¹⁰²

4.62 It was submitted that computer systems were extremely difficult to operate, that there is no transitional phase for online reporting, not enough training and not enough ongoing support from the DMP.¹⁰³ It was further suggested that in this regard, the DMP are out of touch with the realities of who tenement holders are, what their capabilities are and what resources were available to them when operating in the bush.¹⁰⁴

4.63 Prospector, Mr Lynch gave evidence that it was of particular concern that the Aboriginal community had not been consulted in relation to online lodgement of documents to the DMP, saying:

*You cannot expect us as Aboriginal people to get on the laptop and start getting all our information across to the mines department. It cannot work. Some of us do not have those skills.*¹⁰⁵

¹⁰¹ Leslie Lowe, President, Amalgamated Prospectors and Leaseholders Association of WA, *Transcript of Evidence*, 4 April 2016, pp 5–6.

¹⁰² Submission 2 from Nicholas Cukela, 21 March 2016 p 4 (emphasis from original submission).

¹⁰³ Jeremy Samuel, Business Development Executive, Focus Metals Pty Ltd, *Transcript of Evidence*, 11 April 2016, p 5.

¹⁰⁴ Jeremy Samuel, Business Development Executive, Focus Metals Pty Ltd, *Transcript of Evidence*, 11 April 2016, p 5.

¹⁰⁵ Mr Lynch, *Transcript of Evidence*, 11 April 2016, p 2.

- 4.64 The DMP stated that it was confident in the fully online lodgement process and referred the *Mining Rehabilitation Fund Act 2012* which requires holders of approximately 20,000 tenements to lodge material online. It was stated that 97 per cent of participants submitted on time and that holders of prospecting licences were the highest proportion of compliance with online submissions.¹⁰⁶ The DMP added the following comments as to the provision of support to participants:

Over the implementation period, with the support that we provided—that includes setting up computer kiosks in our regional offices, supporting and doing travelling roadshows to assist people, organising help and so forth—we received a very high percentage of compliance with lodgement. As I recall, for those mining tenement holders who hold prospecting licences, approximately 97 per cent in the last year submitted their applications on time.

... We feel reasonably comfortable that, with support, we will be able to support people to use this online.

The other reason for looking to an online system is, in order to protect and maintain the same level of environmental management, there are a number of checks that will need to happen when these applications occur and, because we want it to be reasonably automated and instantaneous—somebody will be able to log in, do their work and get an instant notification—that information needs to be online. If we do not do it online, we cannot run the automatic spatial overlay checks. We would require somebody essentially at the back house of the department to enter that data, which would simply maintain the delay. In order to get that instantaneous and to maintain the same level of environmental management, we need to have an online system.

... It is maybe the odd one that needed some support, and we are able to offer that. I think that is the challenge—when we go online with these systems, providing a high level of support for people so that if they are having difficulty, we can actually help them through the process very quickly.¹⁰⁷

- 4.65 APLA referred to the DMP's comments as to compliance with the Mining Rehabilitation Fund lodgement requirements at 97 per cent and said that:

¹⁰⁶ Dr Phil Gorey, Executive Director Environment, Department of Mines and Petroleum, *Transcript of Evidence*, 4 April 2016, pp 13–14.

¹⁰⁷ *ibid.*

They use an example of the [mining rehabilitation fund] being 97 per cent compliant. The important thing to remember is the [mining rehabilitation fund] is a once-a-year event on a fixed date. [programmes of work, mining proposals], all these things, 10-day rejection periods—they are all done at different times of the year, so if anybody goes into the mines office on 30 June every year and gets someone behind their desk to help them through the computer program, it is great compliance. You cannot apply the same rule to guys out the bush, 300 miles the other side of Laverton, who cannot get to a computer or a phone line. There is a world of difference between these two.¹⁰⁸

Finding 6: The Committee finds that there are benefits in convenience, efficiency and cost from online lodgement and supports the availability of this as an option. In this instance, the Committee finds that the very nature of the primary operations of many proponents makes compliance with online systems extremely difficult. The Committee finds that to make paper lodgement wholly unavailable may be prohibitive for some participants.

Recommendation 4: The Committee recommends that both paper and online options for lodgement remain available to proponents. Sufficient levels of training, workshops and assistance should still be provided for those opting to use the online option.

CLAUSE 46—SECTION 103AD—FALSE OR MISLEADING INFORMATION

- 4.66 Proposed section 103AD provides that a person must not engage in false or misleading behaviours in relation to documents lodged or notices given under proposed Part IVAA of the Mining Act. A penalty of a fine of \$20 000 is listed. The provision applies to knowingly made false or misleading statements, provisions of information or omissions, and false or misleading statements or provisions of information which are made with reckless disregard as to whether the information is false or misleading.
- 4.67 Concerns were raised that proposed section 103AD would apply to an honest mistake.¹⁰⁹ The Committee is satisfied that the provision expressly applies only to knowingly made false or misleading behaviour or behaviour which is done with a reckless disregard as to whether the behaviour is false or misleading.

¹⁰⁸ Leslie Lowe, President, Amalgamated Prospectors and Leaseholders Association of WA, *Transcript of Evidence*, 4 April 2016, p 11.

¹⁰⁹ Submission 9 from Goldfields First, 22 March 2016, p 11; Submission 21 from Cranston Edwards, 24 March 2016, p 5.

- 4.68 The amount of the fine was questioned, with some submissions to the effect that it was too high and could bankrupt a small operator.¹¹⁰ The Committee notes that Courts have observed that a significant penalty may be ‘*recognised as operating as a deterrent to wilful disregard of statutory obligations.*’¹¹¹ It is not considered that a maximum penalty of \$20 000 for this offence is excessive. See, for example, the penalty of 200 penalty units (currently being \$22 000)¹¹² or imprisonment for five years or both, for a false or misleading statement or omission in a document lodged with the Australian Securities and Investments Commission pursuant to section 225 of the *National Consumer Credit Protection Act 2009* (Cth).
- 4.69 A number of submissions raised the issue that the fine was not a ‘maximum’ penalty, but simply prescribed at \$20 000 with no option for variation depending on the severity of the breach of the provision.¹¹³ The Committee notes that section 9(2) of the *Sentencing Act 1995* provides that:

If the statutory penalty for an offence is a fine of a particular amount or a particular term of imprisonment, then that penalty is the maximum penalty that may be imposed for that offence and, unless the statutory penalty —

(a) is a mandatory penalty; or

(b) includes a minimum penalty,

a lesser penalty of the same kind may be imposed.

- 4.70 As provided for in the above provision, the fine listed in section 103AD is, in effect, a maximum, and a lesser fine may be imposed.

Finding 7: The Committee finds that the fine of \$20 000 that may be imposed under proposed section 103AD operates as a maximum.

¹¹⁰ Submission 9 from Goldfields First, 22 March 2016, p 11; Submission 13 from Amalgamated Prospectors and Leaseholders Association of WA Inc, 22 March 2016, p 15 and Submission 21 from Cranston Edwards, 24 March 2016, p 5.

¹¹¹ *Cabonne Shire Council v Environment Protection Authority* [2001] NSWCCA 280 per Giles JA at paragraph 37.

¹¹² *Crimes Act 1914* (Cth) s 4AA (definition of ‘penalty unit’ as \$110).

¹¹³ Submission 9 from Goldfields First, 22 March 2016, p 11; Submission 4 from Focus Metals Pty Ltd, 23 March 2016, p 4; Submission 13 from Amalgamated Prospectors and Leaseholders Association of WA Inc, 22 March 2016, p 15 and Submission 15 from North Eastern Goldfields Exploration Pty Ltd, 24 March 2016, p 4.

Recommendation 5: The Committee recommends that the Department of Mines and Petroleum clarify with proponents that this fine is not a mandatory penalty of \$20 000 regardless of the nature of breach.

CLAUSE 46—SECTION 103AE, 103AF, 103AG—PROGRAMMES OF WORK

4.71 Clause 46 of the Bill includes a new proposed Division 2 of Part IVAA to the Mining Act. This Part relates to the environmental aspects of programmes of work. Relevant activity is defined in proposed sections 103AE (in respect of prospecting licences, exploration licences and retention licences), 103AF(1) (in respect of mining leases) and 103AG (in respect of miscellaneous licences) as:

- clearing on the land for the purposes of, or in preparation for, prospecting or exploring for minerals
- using machinery to disturb the surface of the land for the purposes of, or in preparation for, prospecting or exploring for minerals
- prospecting¹¹⁴
- exploring for minerals¹¹⁵
- licensed activity.¹¹⁶

4.72 Under the proposed new provision, for a relevant activity that is a low-impact activity, the activity must not be done until:

- the lessee/licensor has given a notice of low-impact activity in respect of the relevant activity; or
- the lessee/licensor has lodged a programme of work in respect of the relevant activity in accordance with the Mining Act and the relevant activity is approved.¹¹⁷

4.73 Under the proposed new provisions, for a relevant activity that is not a low-impact activity, activity must not be done until the lessee/licensor has lodged a programme of

¹¹⁴ Prospecting only appears in Mining Act s 103AE(c), the section applying to prospecting licences, exploration licences and retention licences.

¹¹⁵ Exploring for minerals only appears in Mining Act ss 103AE(d) and 103AF(c), the sections applying to prospecting licences, exploration licences, retention licences and mining leases.

¹¹⁶ Exploring for minerals only appears in Mining Act s 103AG(c), the section applying to miscellaneous licences.

¹¹⁷ Mining Act proposed ss 103AE(2), 103AF(2) and 103AG(2).

work in respect of the relevant activity in accordance with the Act and the relevant activity has been approved.¹¹⁸

4.74 If the relevant activity is approved under proposed Part IVAA of the Mining Act, the lessee/licensee must not do the relevant activity on the land otherwise than in accordance with the approval.¹¹⁹

4.75 Focus Metals Pty Ltd submitted that section 103AE involved an increased regulatory burden and provided powers to the DMP ‘*that seem draconian and with minimal viable recourse by business operators.*’¹²⁰

4.76 A number of submissions expressed concern that all prospecting activity will fall under the definition of relevant activity. This would mean that the activity requires either a programme of work or a low-impact notification. It was suggested that there are many ‘low-level’ activities that prospectors engage in that are too insignificant to require lodgement of a low-impact activity notice.¹²¹

4.77 Dr Robert Fagan stated that:

*Low level versions of virtually all these activities are allowed to be conducted at the present time without any specific application process or written authority. If the yet to be produced mining regulations do not tidy this up, technically all types of general low level prospecting activity, including digging nuggets with a detector, loaming, two-stroke hang held post-hole augering, and other forms and surface sampling, would require a notice of [low-impact notification] or a [programme of work].*¹²²

4.78 Other submissions reiterated these matters.¹²³ ‘Prospecting’ and ‘exploring for minerals’ are not defined in the Mining Act. It is unclear whether these activities will constitute relevant activity for the purposes of these provisions. It was suggested that this would interfere with the miner’s right and impact recreationalists, prospectors and

¹¹⁸ ibid ss 103AE(3), 103AF(3) and 103AG(3).

¹¹⁹ ibid proposed ss 103AE(4), 103AF(5) and 103AG(5).

¹²⁰ Submission 4 from Focus Metals Pty Ltd, 23 March 2016, p 4.

¹²¹ Submission 9 from Goldfields First, 22 March 2016, p 11; Submission 17 from Dr Robert Fagan, 20 March 2016, pp 29–30 and Submission 21C from Cranston Edwards, 24 March 2016, pp 2–3.

¹²² Submission 17 from Dr Robert Fagan, 20 March 2016, p 29.

¹²³ Submission 9 from Goldfields First, 22 March 2016, p 11; Submission 17 from Dr Robert Fagan, 20 March 2016, pp 29–30 and Submission 21C from Cranston Edwards, 24 March 2016, pp 2–3.

fossickers.¹²⁴ APLA recommended that this provision be amended to remove prospecting and exploring for minerals from the definition of relevant activity.¹²⁵

4.79 The DMP addressed this matter and said:

Proposed section 103AE applies to prospecting licences, exploration licences and retention licences. It does not extend to miners' rights or affect fossicking activities.

*There is no intention to change the existing thresholds for the requirement for a Programme of Work, other than where the activity meets the eligibility criteria for a Low Impact Authorisation. DMP notes the comments provided by the Submitters and will ensure the Programme of Work guidelines clearly identify those low level prospecting activities that will not require the submission of a Programme of Work.*¹²⁶

4.80 Under proposed section 103AE, unless the activity is a low-impact activity, prospecting activity, clearing and the use of machinery to disturb the surface of the land on a prospecting licence will require lodgement and approval of a programme of work. Under the current Mining Act, section 46(aa) triggers the requirement for a programme of work when ground disturbing equipment is to be used.

4.81 The amendments introduce new criteria which prompt when a programme of work is required. As to what effect the low-impact activity framework will have in this regard is difficult to judge without more clarity. It is unclear whether it is intended that activities such as those identified will require a low-impact notification and, if so, whether this is necessary to achieve the stated policy of the Bill. If the DMP does not intend to require a programme of work or low-impact notification for such activities, it is not clear where in the Bill provision is made for this. It is also worth noting that this proposed new section does not refer to the power for any exclusions being made in regulations.

Recommendation 6: The Committee recommends that the *Mining Act 1978* should itemise those mining activities that are considered minor enough to not require a low-impact notification or programme of works.

¹²⁴ Submission 17 from Dr Robert Fagan, 20 March 2016, p 29-30 and Submission 21C from Cranston Edwards, 24 March 2016, pp 2-3.

¹²⁵ Submission 13 from Amalgamated Prospectors and Leaseholders Association of WA Inc, 22 March 2016, pp 15-16.

¹²⁶ Richard Sellers, Director General, Department of Mines and Petroleum, Letter, 13 April 2016, p 10.

CLAUSE 46—SECTION 103AF—CONDITIONS ATTACHED TO MINING LEASES

4.82 Clause 46 of the Bill proposes to introduce Part IVAA, Division 2 which sets out when programmes of work are required. Proposed section 103AF(1) defines relevant activity, for a mining lease, as:

- (a) *clearing on the land for the purposes of, or in preparation for, exploring for minerals;*
- (b) *using machinery to disturb the surface of the land for the purposes of, or in preparation for, exploring for minerals;*
- (c) *exploring for minerals.*

4.83 As to the requirements related to a relevant activity under section 103AF, see paragraphs 4.71 to 4.74 above.

4.84 Some submissions questioned why ‘prospecting’ was not included in the definition of relevant activity for a mining lease. These submissions suggested that this made the provisions in this Division unclear. It was further suggested that this meant that prospecting may not be allowed by persons operating by tribute on a mining lease, or would require more than a programme of work.¹²⁷ Mr Andrew Pumphrey of Goldfields First quoted from the DMP’s submission to the Committee and said:

Programmes of work to be submitted and approved for disturbing activities on prospecting licences, exploration licences and retention leases, native vegetation clearing preparation.

*You will note the wording specifically excludes a mining lease. The wording of this means to me that a [programme of work] for scrape and detect operation cannot be submitted and approved on a mining lease which is currently committed under the existing policy. So we actually have a number of prospectors working on our mining leases at MacPhersons, which simply can put in a very simple [programme of work] push and scrape and we can allow them to get to work and go and do what they do. They rehabilitate the area afterwards and move on. Any significant ground disturbing will require a mining proposal to be submitted is the way that we read the changes in the act. Also, requiring a mining proposal triggers a mine closure plan that must be submitted, which is even more increased paperwork and cost.*¹²⁸

¹²⁷ Submission 13 from Amalgamated Prospectors and Leaseholders Association of WA Inc, 22 March 2016, p 16 and Andrew Pumphrey, Goldfields First, *Transcript of Evidence*, 11 April 2016, p 5.

¹²⁸ Andrew Pumphrey, Goldfields First, *Transcript of Evidence*, 11 April 2016, pp 4–5.

- 4.85 Currently, section 82(1)(ca) of the Mining Act applies to any situation requiring the use of ground disturbing equipment. The section, as currently worded, only permits the use of such equipment after the lessee has lodged, and obtained approval for, an acceptable programme of work.
- 4.86 The DMP noted the nature of the different types of tenure under the Mining Act and stated that *‘Prospecting itself is not considered to be associated with an operating mine and is therefore not a relevant activity on a mining lease.’*¹²⁹
- 4.87 Many submissions and witnesses advised that they operate prospecting operations through tribute agreements. The High Court considers that *‘a tribute may be a bare licence or a licence coupled with a grant or arrangements where the share of the mineral lessee is a ‘royalty’.*¹³⁰ In relation to mining, a tribute can be defined as:
- (a) *The proportion of the value of the ore raised, paid by the miners to the owners or lessors of the land or their representatives.*
- (b) *The proportion of ore raised or its value paid to the miners by the owners of the mine or land, in payment of their labour.*¹³¹
- 4.88 Witnesses before the Committee indicated that those with mining leases and tribute arrangements often assisted prospectors to submit their programmes of work as they sometimes struggled to produce such proposals.¹³² It was stated that the company does this *‘for the prospectors at our own expense because we see a win-win situation there.’*¹³³ It was submitted that the changes to the system proposed in the Bill on this point would be problematic:

I can tell you right now that if we cannot put a [programme of work] for a push and scrape on a mining lease, that will be the end of prospectors on our tenements.

*... There are some benefits in having prospectors working on our tenements...but it comes for us at a certain cost. We are happy to help them. But if we have to do an [environmental management] system and we cannot use a [programme of work] push and scrape on a mining lease, we would not be doing it.*¹³⁴

¹²⁹ Richard Sellers, Director General, Department of Mines and Petroleum, Letter, 13 April 2016, p 11.

¹³⁰ *Grundt v The Great Boulder Proprietary Gold Mines Limited* (1938) 59 CLR 641 at 670 and WD Leslie and AJ Holland, ‘Tribute Agreements’, *AMPLA Bulletin*, 1982, vol. 1(1), p 10.

¹³¹ WD Leslie and AJ Holland, ‘Tribute Agreements’, *AMPLA Bulletin*, 1982, vol. 1(1), p 10.

¹³² Andrew Pumphrey, Goldfields First, *Transcript of Evidence*, 11 April 2016, p 11.

¹³³ *ibid.*

¹³⁴ *ibid.*

- 4.89 It was further noted that ‘*We have prospectors working on our tenements who do not hold any leases. They are mining leases and they are operating with large machinery on there and they do not hold any mining leases themselves ... [So they are just operating under] ... On a tribute.*’¹³⁵

Finding 8: The Committee finds that the Mining Legislation Amendment Bill 2015, as it is currently drafted, lacks clarity as to what is required to be lodged by a prospector when operating under a tribute agreement, or otherwise, on another party’s mining lease.

Recommendation 7: The Committee recommends that the current framework through which prospectors are able to operate on other party’s mining leases, including by tribute arrangement, should be retained. The Committee recommends that the Mining Legislation Amendment Bill 2015 be amended to ensure that prospectors can continue to carry out prospecting activities in these circumstances on the lodgement of a programme of work. The Committee recommends that prospectors’ access to mining leases, and the processes and documentation associated with such, should be clarified.

CLAUSE 46–SECTION 103AH–MINING PROPOSALS

- 4.90 Under the current Mining Act, section 82(1)(ca)(i) requires that ground disturbing equipment cannot be used by the holder of a mining lease unless a programme of work has been lodged and approved or the use is dealt with in a relevant mining proposal. Section 82A(2) of the current Mining Act provides that a lessee must not carry out mining operations until a mining proposal has been lodged and approved.
- 4.91 Proposed section 103AH provides that relevant activity means:
- clearing on the land for the purposes of, or in preparation for, prescribed mining operations
 - using machinery to disturb the surface of the land for the purposes of, or in preparation for, prescribed mining operations
 - prescribed mining operations.
- 4.92 Proposed section 103AH(2) provides that relevant activity that *is* classified as low-impact activity, must not occur until the lessee gives notification of the low-impact activity or lodges (and has approved) a mining proposal in accordance with Division 4 of proposed Part IVAA of the Mining Act. Proposed section 103AH(3) provides that relevant activity which *is not* classified as low-impact activity, must not be done by

¹³⁵ *ibid*, p 13.

the lessee until the lessee lodges (and has approved) a mining proposal in accordance with Division 4.

- 4.93 A number of witnesses before the Committee gave evidence that the effect of the Bill will be to require small miners working on their lease, carrying out prospecting and exploration activities instead of ‘mining operations’, to apply with a mining proposal rather than with a programme of work as is presently the case.

Finding 9: The Committee finds that the Mining Legislation Amendment Bill 2015, as it is currently drafted, lacks clarity as to what is required to be lodged by a proponent when carrying out prospecting and exploration activities.

Recommendation 8: The Committee recommends that the Mining Legislation Amendment Bill 2015 be amended to ensure that proponents can continue to carry out prospecting and exploration activities on the lodgement of a programme of work.

CLAUSE 46—SECTION 103AJ & 103AK—REVIEW OF MINE CLOSURE PLANS

- 4.94 Proposed sections 103AJ and 103AK of the Mining Act will require that, for mining leases and miscellaneous licences respectively, a reviewed mine closure plan must be lodged and approved within prescribed times (within three years of the relevant date).
- 4.95 It was submitted that this provision would increase cost and regulatory burden for small miners and that this constitutes an unnecessary duplication of processes.¹³⁶ APLA stated that:

This clause appears in a similar to that existing in the current 1978 Mining Act. However, APLA has never accepted the point made here that when a mine can have life of 50 to 60 years or more that a Mine Closure Plan review is required every three years. The intention of this Amendment Bill was to streamline a prescriptive process into a “risk based, nonprescriptive” process. This clause simply retains the prescriptive process using resources of time and money in order to comply with what is a repetitive duplication every three years. In practical terms all that may happen is ‘cut & paste’ from the previous closure plan. The Mining Rehabilitation Fund gives the DMP all the information it will ever need to form a progressive opinion of the

¹³⁶ Submission 13 from Amalgamated Prospectors and Leaseholders Association of WA Inc, 22 March 2016, p 17; Submission 9 from Goldfields First, 22 March 2016, p 11 and Submission 15 from North Eastern Goldfields Exploration Pty Ltd, 24 March 2016, p 2.

*condition of the WA Mining Industry and the States liability for any abandonment of mines by companies and small miners.*¹³⁷

- 4.96 The DMP confirmed that mine closure plans in these timeframes were an existing obligation in the Mining Act, stating:

*Reviews are required every three years to ensure these plans are kept up to date and account for changes over time in factors such as rehabilitation methods, or end land uses. These provisions ensure operations are planned for closure and rehabilitation, and are a legislative tool to prevent large rehabilitation liabilities at the end of mine life. In practice, DMP has found three years to be an appropriate time period for review, and has used provisions to alter the lodgement times where the circumstances warrant it. Ongoing reviews enable changing circumstances to be captured and ensure closure is continually considered during the operational phase of a mine.*¹³⁸

Finding 10: The Committee finds that proposed sections 103AJ and 103AK do not place any new obligations on proponents to do with mine closure plans.

CLAUSE 46—SECTION 103AL—LODGE MENT BY AGENTS

- 4.97 For the purposes of proposed Division 4 of Part IVAA of the Mining Act, proposed section 103AL provides a definition of ‘lodging party’. APLA submitted that the existing system of programmes of work and mining proposal lodgement allows for a third party or authorised agent to lodge such programmes and proposals and that section 103AL would exclude the use of third parties and agents.¹³⁹ The DMP addressed this matter and stated:

The amendments in the Bill do not change the existing provisions of the Mining Act that allow tenement holders to authorise mining on their tenements by a third party.

The requirements for lodging programmes of work and mining proposals in the Mining Act now apply to mining tenement holders.

This is because all regulatory obligations under the Act attach to tenement holders, so there is no basis for enforcing requirements

¹³⁷ Submission 13 from Amalgamated Prospectors and Leaseholders Association of WA Inc, 22 March 2016, p 17.

¹³⁸ Richard Sellers, Director General, Department of Mines and Petroleum, Letter, 13 April 2016, p 11.

¹³⁹ Submission 13 from Amalgamated Prospectors and Leaseholders Association of WA Inc, 22 March 2016, p 16.

against any person who may have arrangements with the tenement holder to lodge documents on his or her behalf.

The department has administrative arrangements in place to allow for the lodgement of documents by agents, employees or other people on behalf of tenement holders, and these arrangements will continue.

The term 'lodging party' is a definition introduced for the purposes of Division 4 for the ease and clarity of drafting.¹⁴⁰

CLAUSE 46—SECTION 103AM—GUIDELINES

4.98 The Bill proposes that the Director General of the DMP (**Director General**) would have the power to approve guidelines for the purposes of Part IVAA by inserting proposed section 103AM. The guidelines must be made publicly available and free of charge.¹⁴¹ The proposed new section lists, without limitation, the matters that may be included in such guidelines.¹⁴² These include:

- identifying a range of factors in relation to clearing (including the extent to which the clearing is in accordance or inconsistent with the clearing principles in Schedule 5 of the EP Act)
- identifying the foreseeable risk of environmental harm resulting from a proposed activity and practicable measures proposed to be undertaken to avoid or minimise the risk of environmental harm resulting from a proposed activity
- requiring consultation with persons likely to be affected by a proposed activity and demonstrating that the required consultation has been undertaken
- requiring a management plan, maps or any other documents or information.

Commentary on content of guidelines from witnesses and submitters

4.99 Adverse comments were made in a number of submissions received with respect to the guidelines imposed by proposed section 103AM, including that they are onerous, may increase direct costs and place an increased regulatory burden on small scale miners and prospectors.¹⁴³ It was submitted that miners would need to consult

¹⁴⁰ Richard Sellers, Director General, Department of Mines and Petroleum, Letter, 13 April 2016, p 11.

¹⁴¹ Mining Act proposed s 103AM(3).

¹⁴² *ibid* proposed s 103AM(2).

¹⁴³ Submission 4 from Focus Metals Pty Ltd, 23 March 2016, p 4; Submission 9 from Goldfields First, 22 March 2016, p 11 and Submission 13 from Amalgamated Prospectors and Leaseholders Association of WA Inc, 22 March 2016, p 17.

environmental experts to comply with the proposed guidelines.¹⁴⁴ In response, the DMP stated that:

*The amendment Bill supports a risk-based regulatory approach, so that the level of information required to support an application will be proportional to the size, complexity and environmental risk of a proposal. As a matter of practice, DMP will develop suitable guidance material with stakeholders. As such, DMP considers that all categories of miners will be able to comply with these provisions.*¹⁴⁵

Appropriateness of guidelines as an instrument

4.100 A number of submitters questioned the use of guidelines in the regulatory framework established by the Bill. AMEC was supportive of the use of guidelines generally, but stated that statutory guidelines should not be used.¹⁴⁶ It noted that the DMP release extensive and complex guidelines and that these should be treated as information statements and not have the weight of law.¹⁴⁷ The DMP responded on this matter and said:

Statutory guidelines are currently used under the Mining Act, and they are a common and appropriate legislative tool where legislation confers discretionary decision making powers. The Mining Act provides decision making powers to the Director General of Mines to make decisions on whether or not to approve applications to undertake activities on tenure.

Statutory guidelines on assessment requirements are appropriate to provide clarity and certainty to stakeholders on the way in which the department will exercise their discretionary powers established in the Act for decision making. Guidelines provide clarity to departmental staff as to the scope on which information is requested to support an application, and ensures consistency in the administration of the legislation. Guidelines also provide clarity to the industry as to the department's expectations on the standard of applications, reducing the amount of follow up administrative work to ensure the information provided supports the application.

¹⁴⁴ Submission 9 from Goldfields First, 22 March 2016, p 11; Submission 13 from Amalgamated Prospectors and Leaseholders Association of WA Inc, 22 March 2016, p 17; Submission 21 from Cranston Edwards, 24 March 2016, p 9.

¹⁴⁵ Richard Sellers, Director General, Department of Mines and Petroleum, Letter, 13 April 2016, p 12.

¹⁴⁶ Submission 12 from Association of Mining and Exploration Companies, 24 March 2016, p 7.

¹⁴⁷ Submission 12 from Association of Mining and Exploration Companies, 24 March 2016, p 7.

The effect of statutory guidelines is that if there was a review of decisions made, the guidelines are a relevant consideration in determining whether the department followed procedural fairness in making a decision. The guidelines cannot impose additional obligations onto proponents that are outside the scope of the requirements of the Act or regulations.

*DMP's process for developing and reviewing guidelines includes publishing drafts for public comment and a response to submissions. All guidelines will be subject to external scrutiny and input in this way.*¹⁴⁸

- 4.101 In *Gary Ian Smoker v The Pharmacy Restructuring Authority; Commonwealth of Australia and the Secretary to the Department of Health* (1994) 53 FCR 287, Hill J at paragraph 31, considered that guidelines were ordinarily ‘rules or standards which are not binding and may be relaxed when it is expedient to do so in order to do justice in the particular case’ however, in that case, determined that a requirement that a party ‘must comply with the relevant guidelines’, suggested ‘that the Guidelines to be determined are to be mandatory’.
- 4.102 A number of provisions in the Mining Act, if amended by the Bill, would make it a requirement to comply with the guidelines established under proposed section 103AM:
- Proposed sections 103AE, 103AF and 103AG as to the respective leases and licences, each make it a condition on every lease or licence that the relevant programme of work or proposal is ‘in accordance with Division 4, and the relevant activity is approved under this Part’.
 - Proposed section 103AN provides that a programme of work, a mining proposal and a mine closure plan ‘must’ each ‘be in the form required by the guidelines’ and ‘contain information of the kind required by the guidelines’.
 - Proposed section 103AZC(4) provides that an ‘environmental management system must deal with matters that the guidelines require it to deal with.’
- 4.103 The imposition of the above obligations to comply with the guidelines, through the use of the words ‘condition’, ‘require’ and ‘must’, is potentially significant, depending on how such terms are construed by the courts. On some assessments, such terms can import legislative effect and may result in the guidelines being mandatory in every respect.

¹⁴⁸

Richard Sellers, Director General, Department of Mines and Petroleum, Letter, 13 April 2016, pp 12–13.

4.104 Accordingly, guidelines issued pursuant to proposed section 103AM, in conjunction with proposed provisions incorporating requirements to comply with the guidelines as outlined above, are likely to fall into the category of quasi-legislation,¹⁴⁹ ‘departmental legislation’¹⁵⁰ or ‘law made by administrators, for administrators [and] known only to administrators’.¹⁵¹ It is noted that this area has seen an ‘exponential growth of statutory and extra-statutory rules in a plethora of forms’ and that:

*Codes of practice, guidance, guidance notes, guidelines, circulars, White Papers, development control policy notes, development briefs, practice statements, tax concessions, Health Service Notes, Family Practitioner Notices, codes of conduct, codes of ethics and conventions are just some of the guises in which the rules appear.*¹⁵²

4.105 Quasi-legislation is criticised for four main reasons:

- Proliferation—there are thousands of instruments of this nature throughout the country and witnesses before the Committee noted that the DMP already had a number of guidelines in use.¹⁵³
- Poor quality of drafting—with less control, process and professional drafting expertise involved, there is great variability as to the quality of these instruments.
- Inaccessibility—it can difficult to find the right instrument, to know what instruments apply to you, to know who made an instrument, to know when they made it, to know why they made it and to know its current status.
- Conduct of legislative activity other than by the legislature and without the scrutiny of the legislature—there is a detraction from the power of the Parliament, with too little attention being paid to what powers are delegated and what extent the exercise of those power is subject to Parliamentary oversight. There is also the prevention of the involvement of Parliamentary committees that scrutinise bills and subordinate legislation and no opportunity for disallowance. Guidelines articulate policy dimensions of the legislation. Policy is contestable, and the proper place to contest questions of policy is the

¹⁴⁹ D Pearce and S Argument, *Delegated Legislation in Australia*, Fourth Edition, LexisNexis Butterworths, Chatswood, 2012, pp 15–16.

¹⁵⁰ *ibid*, p 20, citing Lord Hewart of Bury, *The New Despotism*, Ernest Benn, London, 1929, p 59.

¹⁵¹ *ibid*, p 20, citing O’Keeffe, ‘Who is Watching the Regulators?’ (1989) 58 *Business Council Bulletin* 32, p 33.

¹⁵² *ibid*, p 15-16, citing G Ganz, *Quasi-legislation: Recent Developments in Secondary Legislation*, Sweet & Maxwell, London, 1987.

¹⁵³ Submission 12 from Association of Mining and Exploration Companies, 24 March 2016, p 7.

Parliament, not by means of departmental correspondence or in the courts of law.¹⁵⁴

Finding 11: The Committee finds that the legislative status of the guidelines incorporated by proposed section 103AM is uncertain and that guidelines issued under that proposed section may have binding legal effect.

Recommendation 9: The Committee recommends that, for the avoidance of doubt and a best practice approach to the management of the legislative and guidance framework, proposed section 103AM should be removed and consequential amendments made. If it is intended that tenement holders must comply with all aspects of the ‘guidelines’, then those matters should be addressed as requirements in the *Mining Act 1978* itself or in regulations.

Volume of guidance material

4.106 The evidence of AMEC suggested that it was comfortable with the use of guidelines but indicated that it had great concern about the great volume of the guidance materials and the difficulties this placed on users, saying:

*It is just about impossible to identify how many guidelines there are on a particular topic, what they are and, more importantly, which of them are important.*¹⁵⁵

*... Needless to say, the industry is extremely compliant. I like to think that 99.99 per cent of it is, anyway, in the context of the guidance material that is issued. We just know that we have far too much of it and we just have to work diligently with the agencies and make sure that we cut it back to something that is sensible.*¹⁵⁶

¹⁵⁴ D Pearce and S Argument, *Delegated Legislation in Australia*, Fourth Edition, LexisNexis Butterworths, Chatswood, 2012, pp 19–20

¹⁵⁵ Graham Short, National Policy Manager, Association of Mining and Exploration Companies, *Transcript of Evidence*, 4 April 2016, p 6.

¹⁵⁶ Simon Bennison, Chief Executive Officer, Association of Mining and Exploration Companies, *Transcript of Evidence*, 4 April 2016, pp 7–8.

Finding 12: The Committee finds that guidance material can be a useful tool, but notes that any guidelines must include the following aspects:

- be limited in scope and purpose and not purport to operate as quasi-legislation
- be clear to all participants which guidelines they need to use
- be easily locatable and accessible
- be clear and easy to understand and apply
- be concise and user-friendly
- be kept current
- involve notification to proponents where changes are made
- if it is intended that guidelines must be complied with by proponents, those matters should be incorporated into statute or regulations.

Requirement for proponents to consult with stakeholders

4.107 In relation to proposed section 103AM(2)(c), the CME submission agreed that stakeholder consultation is integral and a standard practice, but says that introducing it as a requirement into legislation is not justified, particularly given many companies will already have established means of consulting with relevant stakeholders.¹⁵⁷ The DMP responded to this point and said:

*Environmental regulation often includes mechanisms for facilitating public participation, such as the advertising of applications, public submissions or appeals. The Mining Act requirement puts the onus on the applicant—it is appropriate for the applicant to demonstrate they have consulted with their identified stakeholders and provide this evidence to be considered. DMP recognises the scale and intensity of consultation required is entirely dependent on the size, location and public interest of each proposed activity.*¹⁵⁸

¹⁵⁷ Submission 29 from Chamber of Minerals and Energy of Western Australia, 24 March 2016, p 6.

¹⁵⁸ Richard Sellers, Director General, Department of Mines and Petroleum, Letter, 13 April 2016, p 13.

Minority Finding 1:

A minority of the Committee comprising Hon Robin Chapple MLC finds that:

I support in part the recommendations of the Chamber of Minerals and Energy WA in the notion that stakeholder consultation is integral and standard practice.

However, I am concerned that this stakeholder consultation is only relevant to industry and that as per the environmental protection process there should be the ability for public participation through a public notice process that is currently not available.

The current section 103AM(2)(c) requires that the holder of a mining tenement (or in this case prospector) to consult with persons likely to be affected by the proposed activity. This should be a legislative requirement especially for pastoralists and other stakeholders who may have interests.

The onus put on the applicant to demonstrate that they have consulted is not workable or indeed cost effective for the small mining sector.

CLAUSE 46—SECTION 103AO AND 103AP—LODGING AND APPROVING

4.108 Proposed sections 103AO and 103AP of the Mining Act provide for lodgement and approvals procedures for programmes of work and mining proposals respectively. Three aspects of sections 103AO and 103AP were the subject of adverse commentary by a number of submissions.

Prescribed assessment fee

4.109 Proposed section 103AO(1)(b) provides that lodgement of a programme of work must *‘be accompanied by the prescribed assessment fee.’* Proposed section 103AP(1)(b) requires the same for lodgement of a mining proposal. It was submitted that these assessment fees should not be charged.¹⁵⁹ Under the current Mining Act, reference to a prescribed fee is made in respect of prospecting licences,¹⁶⁰ exploration licences¹⁶¹ and mining leases.¹⁶²

4.110 The submission of CME stated that all sections related to prescribing assessment fees should be removed from the Act,¹⁶³ noting:

¹⁵⁹ Submission 13 from Amalgamated Prospectors and Leaseholders Association of WA Inc, 22 March 2016, p 17 and Submission 12 from Association of Mining and Exploration Companies, 24 March 2016, p 6.

¹⁶⁰ Mining Act ss 41(1)(f) and 46(aa)(ia).

¹⁶¹ *ibid* ss 58(1)(e) and 63(aa)(ia).

¹⁶² *ibid* ss 74(1)(c), 82(1)(ca)(i), 82A(2)(ba) and 83(2)(b)(ii)

¹⁶³ Submission 29 from Chamber of Minerals and Energy of Western Australia, 24 March 2016, p 3.

*the Chamber of Minerals and Energy share opposition to the introduction of cost recovery. That debate has been interwoven with these Mining Act amendments. Even though the bill does not specifically introduce amendments around the charging of fees—that power already exists in the Act—we are opposed to the introduction of cost recovery both for mining proposals and programs of works. There are references within the legislation which relate to the prescribing of fees, and we support the removal of these in the instance of the Minister acknowledging that he is no longer pursuing the introduction of cost recovery in the short term.*¹⁶⁴

4.111 The DMP responded on this matter and said:

The references to ‘prescribed assessment fees’ in the proposed sections 103AO and 103AP continue the existing provisions in the Mining Act. Currently, no assessment fees have been prescribed.

*The inclusion of the ability to charge fees reflects changes made to the Mining Act by the Mining Amendment Act 2012. The department’s position is that the existing provisions reflect the decision of Parliament. The department does not set government policy in respect of revenue or cost recovery.*¹⁶⁵

4.112 The Committee acknowledges that the ability to charge fees already exists in the current Mining Act and that, at present, no assessment fees apply. The announcement of an intention to commence charging fees in 2015 is noted, and discussed in paragraphs 7.48 to 7.53.

Unacceptable impact on the environment

4.113 Proposed section 103AO(6) provides that:

The Director General of Mines must not approve a proposed activity in a programme of work if, in his or her opinion, carrying out the activity in the manner proposed will have an unacceptable impact on the environment.

4.114 Proposed section 103AP(6) provides the equivalent in respect of a mining proposal.

4.115 This proposed provision was the subject of adverse commentary in the submissions on the basis that it incorporates ambiguous terminology and is too open to varying

¹⁶⁴ Kane Moyle, Manager, Environment and Land Access, Chamber of Minerals and Energy of Western Australia, *Transcript of Evidence*, 4 April 2016, p 2.

¹⁶⁵ Richard Sellers, Director General, Department of Mines and Petroleum, Letter, 13 April 2016, p 13.

interpretation.¹⁶⁶ Some submissions suggested that all mining has an impact and that this made the provision unworkable.¹⁶⁷ Goldfields First suggested that this proposed provision would grant the Director General too much power.¹⁶⁸ APLA recommended that this decision be made by the Minister rather than the Director General to ‘avoid lengthy/expensive court process of appeal’.¹⁶⁹

4.116 *The Macquarie Dictionary* defines ‘unacceptable’ as ‘so far from a required standard, norm, expectation, etc., as not to be allowed’.¹⁷⁰ This means that a subjective decision would be made by the Director General as to what is an ‘unacceptable impact on the environment’ in each case.

4.117 The DMP considered this issue and responded:

It would be inconsistent with the intent of the new provisions to allow proposals with unacceptable environmental impacts to proceed. Any decision under this provision would need to be reasonable and based on relevant considerations.

*Providing for the Minister to make decisions about whether or not environmental impacts were unacceptable, while the Director General or departmental officers acting under delegation determined other aspects of programmes of work or mining proposals, would build in significant administrative complexity and add substantially to the time and resources taken in deciding applications’.*¹⁷¹

Finding 13: The Committee finds that proposed new sections 103AO(6) and 103AP(6) are indeed subjective and leaves the decision as to what constitutes an unacceptable impact to the Director General’s opinion. The language used in this provision may lack the requisite level of certainty to enable participants to adequately judge whether or not their proposal is likely to have an ‘unacceptable impact on the environment’.

Recommendation 10: The Committee recommends that some clarification in the drafting of these provisions would be useful to allow best operation of the provisions.

¹⁶⁶ Submission 13 from Amalgamated Prospectors and Leaseholders Association of WA Inc, 22 March 2016, p 18.

¹⁶⁷ Submission 9 from Goldfields First, 22 March 2016, p 11.

¹⁶⁸ *ibid.*

¹⁶⁹ Submission 13 from Amalgamated Prospectors and Leaseholders Association of WA Inc, 22 March 2016, p 18.

¹⁷⁰ *The Macquarie Dictionary*, Macmillan Publishers Group Australia, 2015, online edition, entry for ‘unacceptable’.

¹⁷¹ Richard Sellers, Director General, Department of Mines and Petroleum, Letter, 13 April 2016, p 14.

Minority Finding 2:

A minority of the Committee comprising Hon Robin Chapple MLC finds that:

It is unacceptable to provide the Director General of the Department of Mines and Petroleum the ability to determine the criteria for what is an unacceptable impact on the environment, as they may not have any training or competency in matters of the environment. Also, in doing so, it becomes an arbitrary decision-making process and is not the remit of the Director General nor the Department of Mines and Petroleum.

Issues of the environment have always been a matter for the Environmental Protection Authority and/or the Department of Environment Regulation and should remain so.

Ten hectare exemption

4.118 The CME submission noted that existing regulation 5, item 20 of the EP Clearing Regulations:

*provides a 10 hectare exemption where a Mining Proposal is in place. Currently, proponents are required to provide baseline environment data, however they are not required to cover the 10 clearing principles (as the works are likely to be lower risk). The proponent is also not required to obtain a clearing permit. If the proponent is required to assess against the 10 clearing principles for all [programmes of work] or Mining Proposals (even if the proposed clearing would otherwise currently be exempt from the requirement to obtain a clearing permit), then this will increase the requirements to engage external botanical specialists and will add to regulatory requirements.*¹⁷²

4.119 One witness gave evidence that:

*Basically, for most of the miners in here, if they do a project like a [programme of work] proposal or a mining proposal, if they are not doing more than 10 hectares, then they do not go to the EPA. We, in the past, have never worked with the EPA—never. Never in my whole life have I had a document go to the EPA.*¹⁷³

4.120 As outlined above, clarity as to inclusions in the low-impact framework is necessary and will require significant consultation.

¹⁷² Submission 29 from Chamber of Minerals and Energy of Western Australia, 24 March 2016, Attachment 1, p 3-4.

¹⁷³ Cranston Edwards, *Transcript of Evidence*, 11 April 2016, p 3.

Finding 14: The Committee finds that the Mining Legislation Amendment Bill 2015 does not make provision for a 10 hectare exemption for clearing. It has not been established whether the list of clearing exemptions in regulation 5 of the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* will be incorporated into the low-impact activities framework in the same form, in an amended form, or at all.

Recommendation 11: The Committee recommends that all of the existing exemptions from the *Environmental Protection Act 1986* and *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* should be expressly incorporated into the *Mining Act 1978*'s management of clearing activities.

CLAUSE 46—SECTION 103AR—REVISED PROGRAMMES OF WORK AND MINING PROPOSALS

4.121 Proposed section 103AR of the Mining Act provides that, if activity in a programme of work¹⁷⁴ or a mining proposal¹⁷⁵ is approved under proposed Part IVAA and the Director General is of the opinion that the risk of environmental harm is significantly different to any previous assessment of that risk, the Director General may require a revised programme of work or mining proposal to be lodged.

Application of fees for revised programmes of work and mining proposals

4.122 It was submitted that new fees would be involved for each revised programme of work or mining proposal. The DMP responded to this submission by stating that:

*There is no power in the proposed amendments to prescribe fees for revised programmes of work or revised mining proposals.*¹⁷⁶

4.123 The Committee accepts the DMP's submission and does not consider this to be a matter in issue.

Cessation of operations until revised lodgement completed

4.124 It was submitted that operations would have to cease until the revised lodgement.¹⁷⁷ The DMP responded as follows:

¹⁷⁴ Mining Act proposed ss 103AR(1) and (2).

¹⁷⁵ *ibid* proposed ss 103AR(3) and (4).

¹⁷⁶ Richard Sellers, Director General, Department of Mines and Petroleum, Letter, 13 April 2016, p 14.

¹⁷⁷ Submission 9 from Goldfields First, 22 March 2016, p 10.

*There is nothing in the proposed amendments that would have the effect of revoking an existing approval pending the lodgement of a revised application. An existing approval would continue in force until it was varied by a revised approval.*¹⁷⁸

- 4.125 The Committee accepts the DMP's submission and does not consider this to be a matter in issue.

Excessive power granted to inspectors

- 4.126 It was submitted the requirements under proposed section 103AR with respect to allowing the Director General to require a programme of work or mining proposal to be revised, would have the consequence of placing greater responsibility on inspectors, vesting extraordinary powers on them and that this was unjustified.¹⁷⁹ It was submitted that this left scope for DMP inspectors to make errors or to misuse their powers.¹⁸⁰ The DMP responded that:

Proposed new section 103AR does not give any powers to environmental inspectors. It gives power to the Director General to require revised programmes of work or mining proposals to be lodged if he is of the opinion that the risk of environmental harm involved with carrying out an approved activity has significantly changed.

*Any decision by the Director General to do so might be based on information gathered by an environmental inspector or other information. The decision would need to be reasonable and to take into account all relevant factors.*¹⁸¹

- 4.127 For the provision to apply, the Director General must consider that the risk of environmental harm is 'significantly different to any previous assessment of that risk.'¹⁸² 'Significantly' has been held judicially to mean important, notable, weighty or more than ordinary.¹⁸³ Accordingly, this proposed provision requires substantial change to be triggered and would not be readily applicable.

¹⁷⁸ Richard Sellers, Director General, Department of Mines and Petroleum, Letter, 13 April 2016, p 14.

¹⁷⁹ Submission 15 from North Eastern Goldfields Exploration Pty Ltd, 24 March 2016, p 4.

¹⁸⁰ Submission 15 from North Eastern Goldfields Exploration Pty Ltd, 24 March 2016, p 4; Submission 9 from Goldfields First, 22 March 2016, p 10.

¹⁸¹ Richard Sellers, Director General, Department of Mines and Petroleum, Letter, 13 April 2016, p 15.

¹⁸² Mining Act proposed ss 103AR(1)(b) and (3)(b).

¹⁸³ *Bailey v Forestry Commission of NSW* (1989) 67 LGRA 200 and *Jarassius v Forestry Commission of New South Wales* (1988) 71 LGRA 79 .

Finding 15: The Committee finds that while information may be provided by inspectors to the Director General, the Director General would be the decision-maker under proposed section 103AR.

CLAUSE 46—SECTION 103AS—REPLACEMENT OR CHANGE OF APPROVALS

4.128 Proposed section 103AS would provide that approval of proposed activities may be replaced or have their operation affected by another approval in proposed Part IVAA. It was submitted that proposed section 103AS was ‘*changing the goal posts re already approved [programmes of work]*’.¹⁸⁴ The DMP responded as follows:

*Proposed new section 103AS allows for approvals of activities to be replaced or changed by subsequent approvals of the same activity. The Mining Act does not currently expressly support revisions of approvals in this way, however, tenement holders regularly submit programmes of work or mining proposals to propose amendments to their approved operations. This proposed new section ensures that there is clear statutory power to revise existing approvals.*¹⁸⁵

4.129 The Committee considers that this provision does not significantly modify the existing entitlements of proponents under the Mining Act.

CLAUSE 46—SECTION 103AW—CONDITIONS IMPOSED ON A MINING TENEMENT

4.130 Proposed section 103AW of the Mining Act provides that reasonable conditions may be imposed on a mining tenement for the following purposes:

- preventing, reducing or remediating environmental harm on land the subject of the mining tenement or other land
- preventing or reducing the impact of mining on man-made structures or works on land the subject of the mining tenement or other land, or remediating such structures or works
- preventing or reducing the impact of mining on the statutory or public purposes for which land to which section 24 or 24A applies is reserved or managed, or remediating such land.¹⁸⁶

Reasonable conditions and environmental harm

¹⁸⁴ Submission 9 from Goldfields First, 22 March 2016, p 11.

¹⁸⁵ Richard Sellers, Director General, Department of Mines and Petroleum, Letter, 13 April 2016, p 15.

¹⁸⁶ Mining Act proposed s 103AW.

4.131 The inclusion of environmental harm as a condition in the above context was criticised in some submissions.¹⁸⁷ It was questioned what would constitute ‘reasonable conditions’.¹⁸⁸ The APLA submission stated that all mining, even a metal detector, would cause harm to the environment to some degree.¹⁸⁹ The DMP considered this matter and responded as follows:

Proposed section 103AW replaces existing sections 46A, 63AA, 70I and 84 of the Mining Act, which are being repealed. Those sections all allow conditions to be placed on mining tenements “for the purpose of preventing or reducing, or making good, injury to the land”. These words are being replaced by references to “preventing, reducing or remediating environmental harm”.

“Environmental harm” is defined in proposed section 103AA as “adverse ecological effects on the environment”. This is considered to be a more appropriate way of describing the types of effect that environmental conditions are designed to manage, than “injury to land”.

*An effect on the environment must be “adverse” for it to fall within the definition of “environmental harm”. For that reason, it is not accurate to say that all activities on mining tenements will cause environmental harm. The fact that activities on tenements will affect the environment in some way does not mean that those effects amount to environmental harm.*¹⁹⁰

Finding 16: The Committee finds that conditions imposed under proposed section 103AW are a variant of the conditions that can currently be imposed on a tenement under the *Mining Act 1978*. It is noted that ‘reasonable conditions’ is the same qualifier currently used in relation to the imposition of conditions relating to the injury of land in the *Mining Act 1978*. Reference to environmental harm, as defined in section 103AA, is likely to result in broader application of conditions than the current references to injury to land as we have already noted in paragraphs 4.29 to 4.43.

The mining registrar

¹⁸⁷ For example in Submission 9 from Goldfields First, 22 March 2016, p 11.

¹⁸⁸ Submission 9 from Goldfields First, 22 March 2016, p 11 and Submission 13 from Amalgamated Prospectors and Leaseholders Association of WA Inc, 22 March 2016, p 18.

¹⁸⁹ Submission 13 from Amalgamated Prospectors and Leaseholders Association of WA Inc, 22 March 2016, p 18.

¹⁹⁰ Richard Sellers, Director General, Department of Mines and Petroleum, Letter, 13 April 2016, p 15.

- 4.132 It was suggested by Goldfields First that the local mining registrar should not have the power to impose the conditions provided for under proposed section 103AW.¹⁹¹ The DMP considered this matter and responded as follows:

*Proposed section 103AW does not confer any new powers on mining registrars. Proposed section 103AW(2)(a) refers to conditions being imposed on prospecting licences by the mining registrar or warden on the grant of the licence, or otherwise by the Minister. This continues in force the effect of existing section 46A(2) of the Mining Act, which currently refers to environmental conditions being imposed on prospecting licences by registrars or wardens on grant, or otherwise by the Minister.*¹⁹²

- 4.133 The Committee considers that this provision does not modify the existing requirements of the Mining Act.

Right of appeal against environmental conditions

- 4.134 The CME submission noted that existing provisions to impose conditions on tenements currently exist in the Mining Act and that the Bill simply relocates them to Part IVAA.¹⁹³ CME noted that the Bill does not propose to include any avenue to appeal against conditions for preventing, reducing or remediating environmental harm. This submission requested that, at the very least, an avenue for review of conditions should be provided.¹⁹⁴ The DMP considered this matter and responded as follows:

*The Mining Act does not currently provide a mechanism to appeal environmental conditions placed on to a tenement. Under the proposed amendments, activities will be subject to standard conditions and agreed objective based environmental outcomes. The environmental outcomes are determined by the proponent, via risk assessment during the preparation of the mining proposal.*¹⁹⁵

Recommendation 12: The Committee recommends that the Government move to amend the Mining Legislation Amendment Bill 2015 to include an avenue of appeal for proponents to the Minister for Mines and Petroleum against conditions imposed under proposed section 103AW of the *Mining Act 1978*.

¹⁹¹ Submission 9 from Goldfields First, 22 March 2016, p 11.

¹⁹² Richard Sellers, Director General, Department of Mines and Petroleum, Letter, 13 April 2016, p 16.

¹⁹³ Submission 29 from Chamber of Minerals and Energy of Western Australia, 24 March 2016, pp 18–19.

¹⁹⁴ *ibid.*

¹⁹⁵ Richard Sellers, Director General, Department of Mines and Petroleum, Letter, 13 April 2016, p 16.

CLAUSE 46—SECTION 103AY—OFFSETTING

4.135 Without limiting the conditions set out in paragraph 4.130 above, proposed section 103AY provides that a condition imposed under that section:

- a) *may be for the purpose of preventing, reducing or remediating environmental harm from clearing or offsetting the loss of cleared vegetation; and*
- b) *may require the holder of a mining tenement to establish and maintain native vegetation on land, other than land cleared by the holder, to offset the loss of the cleared vegetation; and*
- c) *may require the holder of a mining tenement to make monetary contributions to a fund maintained for the purpose of establishing or maintaining native vegetation on any land.*

4.136 The imposition of conditions relating to offsetting was the subject of some adverse commentary in submissions to this Committee.¹⁹⁶ It was submitted that proposed section 103AY would impose an unreasonable financial and administrative burden for small scale miners.¹⁹⁷ It was suggested that the proposed offsetting obligations were unnecessary because it is ‘*clearly shown that the Goldfields vegetation will regenerate over time.*’¹⁹⁸ It was also queried why miners should face this requirement when farmers do not.¹⁹⁹ The DMP considered these matters and responded as follows:

Proposed section 103AY(1) makes it clear that conditions can be placed on a mining tenement in respect of native vegetation clearing, including conditions as to offsets. One of the aims of the Bill is to replicate provisions of the EP Act relating to native vegetation clearing within the Mining Act in order that clearing can be approved directly under the Mining Act, rather than requiring a separate EP Act application and approval.

It is important that native vegetation clearing approved under the Mining Act is not treated differently from, or subject to a less stringent regime than, clearing approved under the EP Act. Section

¹⁹⁶ Submission 9 from Goldfields First, 22 March 2016, p 11.

¹⁹⁷ Submission 4 from Focus Metals Pty Ltd, 23 March 2016, p 4; Submission 13 from Amalgamated Prospectors and Leaseholders Association of WA Inc, 22 March 2016, p 19; Submission 15 from North Eastern Goldfields Exploration Pty Ltd, 24 March 2016, p 4 and Submission 9 from Goldfields First, 22 March 2016, p 10.

¹⁹⁸ Submission 15 from North Eastern Goldfields Exploration Pty Ltd, 24 March 2016, p 4.

¹⁹⁹ Submission 9 from Goldfields First, 22 March 2016, p 10.

103AY(1) reflects conditions that can already be placed on native vegetation clearing permits issued under the EP Act because of sections 51H and 51I(2)(b) of the EP Act.

Offset conditions will only be applied in accordance with the WA Environmental Offsets Policy 2011 ... and WA Environmental Offsets Guidelines 2014 ...

Since 2005, DMP has administered the Native Vegetation Clearing Permit requirements for the mining industry under delegation and, in this time, has only applied offset conditions to eleven projects of over two thousand approvals (i.e. approximately 0.5% of projects). Small miners are not likely to meet the threshold for the requirement of an offset.²⁰⁰

Finding 17: The Committee finds that the proposed new provision seeks to introduce conditions relating to offsetting similar to those included in the *Environmental Protection Act 1986* as outlined by the Department of Mines and Petroleum above. As discussed in paragraphs 4.29 to 4.43, the provisions in the *Environmental Protection Act 1986* and proposed section 103AY do differ in that the term ‘environmental harm’ will have a narrower meaning under the *Mining Act 1978* and consequently a narrower application. This has a differential application as to the size of the activity.

CLAUSE 46–SECTION 103AZA–MONITORING OPERATIONS

4.137 Without limiting the conditions set out in paragraph 4.13030 above, proposed section 103AZA may impose a condition requiring the holder of a mining tenement to monitor operations (including remediation and offset operations) or environmental harm, conduct analysis of monitoring data, and provide reports on monitoring data, and analysis of it to the Director General.

4.138 This proposed section was the subject of adverse commentary in some submissions as constituting ‘*Draconian reporting requirements on environmental monitoring. Especially after you have paid large fees to get approval.*’²⁰¹ The DMP considered this and responded as follows:

It is important that native vegetation clearing approved under the Mining Act is not treated differently from, or subject to a less stringent regime than, clearing approved under the EP Act. Section 103AZA reflects conditions that can already be placed on native

²⁰⁰ Richard Sellers, Director General, Department of Mines and Petroleum, Letter, 13 April 2016, pp 16–17.

²⁰¹ Submission 9 from Goldfields First, 22 March 2016, p 11.

*vegetation clearing permits issued under the EP Act because of section 51I(2)(d) of the EP Act.*²⁰²

Finding 18: The Committee finds this proposed provision relating to monitoring seeks to introduce conditions similar to those included in the *Environmental Protection Act 1986* as outlined by the Department of Mines and Petroleum above and consistent with the expressed policy of the Mining Legislation Amendment Bill 2015. Notably, as discussed in paragraphs 4.29 to 4.43, the provisions in the *Environmental Protection Act 1986* and proposed section 103AZA differ in that the term ‘environmental harm’ has a narrower meaning in the Mining Act and consequently a narrower application. This has a differential application as to the size of the activity.

Recommendation 13: The Committee recommends that if conditions are applied to a tenement under proposed section 103AZA of the *Mining Act 1978*, the frequency of any reporting required by those conditions should be limited.

CLAUSE 46—SECTION 103AZB—LODGEMENT OF SECURITY FOR COMPLIANCE

- 4.139 Proposed section 103AZB of the Mining Act provides that the Minister may require the holder of a mining tenement to lodge a security for compliance with conditions imposed on the mining tenement as outlined in proposed section 103AW(1), the conditions set out in paragraph 4.130 above.
- 4.140 This proposed new requirement was criticised by APLA as amounting to a double indemnity for the DMP and unjustified.²⁰³ The Committee notes that the current Mining Act contains provisions for securities to be lodged in respect of conditions (which include environmental conditions). These provisions would be removed under the Bill and replaced by proposed section 103AZB. The DMP considered the matter of securities and said:

The Mining Rehabilitation Fund Act 2012 requires mining tenement holders to pay an annual levy into the Mining Rehabilitation Fund (MRF) if land disturbance on a tenement exceeds a specified threshold. It does not provide for securities or bonds.

The Mining Act allows for securities to be imposed on mining tenements for compliance with conditions for prevention or reduction of injury to land. During the introductory phase of the MRF, in most

²⁰² Richard Sellers, Director General, Department of Mines and Petroleum, Letter, 13 April 2016, p 17.

²⁰³ Submission 13 from Amalgamated Prospectors and Leaseholders Association of WA Inc, 22 March 2016, p 20.

cases, existing Mining Act securities were refunded to tenement holders as a matter of departmental policy, once they began to make contributions into the MRF.

*Some securities have been retained on Mining Act tenements and the statutory power to require securities to be lodged remains. As a general principle, securities have only been retained, and will only be required, where it is likely that there is a high risk of the rehabilitation liability reverting to the State. The department's policy in this regard is set out in a document entitled "The Administration of mining securities for mine sites regulated by the Department of Mines and Petroleum".*²⁰⁴

CLAUSE 46—SECTION 103AZC—ENVIRONMENTAL MANAGEMENT SYSTEM

4.141 Under proposed section 103AZC, it is a condition of every mining lease²⁰⁵ and every miscellaneous license²⁰⁶ that the lessee/licensor maintains an environmental management system and ensures that it is reviewed and revised as necessary. An environmental management system (EMS) means a system of procedures and practices relating to:

- the identification and assessment of the risk of environmental harm occurring as a result of the carrying out of the mining operations
- the implementation of practicable measures to avoid or minimise the risk of such environmental harm occurring, or reduce such environmental harm if it occurs.²⁰⁷

Impact on small scale miners

4.142 It was submitted that the Minister had previously indicated the only additional impost from the Bill may be the requirement to produce an environmental management system, but that this would not impact many prospectors as not many prospectors have mining leases.²⁰⁸ Mr Nicholas Cukela suggested that this position was incorrect²⁰⁹ and

²⁰⁴ Richard Sellers, Director General, Department of Mines and Petroleum, Letter, 13 April 2016, p 17.

²⁰⁵ Mining Act proposed s 103AZC(2).

²⁰⁶ ibd s 103AZC(3).

²⁰⁷ ibid proposed s 103AZC(1).

²⁰⁸ Submission 2 from Nicholas Cukela, 21 March 2016, p 5, referencing letter from Hon Bill Marmion MLA, then Minister for Mines and Petroleum, to Jason Wells dated 21 May 2015 at p 9 of submission.

²⁰⁹ Submission 2 from Nicholas Cukela, 21 March 2016, p 5.

North Eastern Goldfields Exploration Pty Ltd submitted that 726 prospectors and individuals hold mining leases.²¹⁰

- 4.143 A number of submissions expressed concern about the impact of section 103AZC, primarily as it was believed that it would increase cost and regulatory burden for small scale miners.²¹¹ Goldfields First stated that:

*The net effect of this will most likely require the largely sole operators to have to engage specialized consultants, at prohibitive costs, in order to comply. Quoted costs for specialized consultations and reporting of this type are in the tens of thousands of dollars.*²¹²

- 4.144 It was submitted that an EMS was not relevant for small scale miners.²¹³ While prospecting and exploration activity is exempted, small scale miners are not:

*In contrast prospecting/small scale mining and exploration activities will not be subject to an EMS on prospecting licenses and exploration licenses, even though they are undertaking the same activities that on a mining lease will require an EMS. This is a significant financial burden on...prospectors and small-scale miners operating on mining leases. Rather than reducing red tape (a major claim of the DMP) this significantly increases it for the small operator.*²¹⁴

- 4.145 In respect of the small scale mining sector, a witness for CME stated that it did:

*not believe it is the DMP's intent to require the smaller miners to go out to a third party to develop an environmental management system, and it can be quite simple. I guess the point of the environmental management system is to ensure the environmental risks are managed and it is documented how you go about that.*²¹⁵

Reporting obligations

²¹⁰ Submission 15 from North Eastern Goldfields Exploration Pty Ltd, 24 March 2016, p 3.

²¹¹ Submission 4 from Focus Metals Pty Ltd, 23 March 2016, p 4; Submission 9 from Goldfields First, 22 March 2016, pp 2–3; Submission 13 from Amalgamated Prospectors and Leaseholders Association of WA Inc, 22 March 2016, p 18; Submission 15 from North Eastern Goldfields Exploration Pty Ltd, 24 March 2016, p 3 and Submission 16 from Mick Photios, 24 March 2016, pp 2–3.

²¹² Submission 9 from Goldfields First, 22 March 2016, pp 2–3.

²¹³ Submission 9 from Goldfields First, 22 March 2016, pp 2–3 and Submission 13 from Amalgamated Prospectors and Leaseholders Association of WA Inc, 22 March 2016, p 18.

²¹⁴ Submission 9 from Goldfields First, 22 March 2016, p 3.

²¹⁵ Kirrillie Caldwell, Policy Adviser, Environment, Chamber of Minerals and Energy of Western Australia, *Transcript of Evidence*, 4 April 2016, p 6.

- 4.146 A number of submissions to the Committee highlighted the fact that there are extensive reporting obligations on tenement holders and that the required reports often overlap in content. It was noted that miners are already required to prepare a Mining Rehabilitation Fund Report and an Annual Environmental Report.²¹⁶ It was further noted that many participants are struggling to navigate these reporting requirements, particularly in relation to the technical aspects.²¹⁷ One witness before the Committee said:

*A lot of it is in the regulatory reporting. I have been doing the annual environmental report for something like 16 years, since 2000. It used to be a two-page report, which was basically a handwritten report. Now I have to have computer access. Some of it gets a bit beyond me. It is doubled up in the MRF. Now it is going to be tripled up in the EMS. It is all basically to do with the same thing. They should be starting to get rid of the AER because they have got the MRF. If we are going to bring in the EMS, they should definitely get rid of the annual environmental because the EMS is only a double up of the annual environmental.*²¹⁸

- 4.147 It was recommended that the DMP better coordinate and streamline reporting requirements to avoid duplication and ease administrative burden.²¹⁹

Support for EMS

- 4.148 Some witnesses before the Committee expressed support for the EMS. AMEC ‘were quite comfortable with the fact that EMSs are part and parcel of the industry, and our operations, and there are varying degrees of EMSs’.²²⁰ Witness testimony on behalf of CME stated:

*We would see an environmental management system being very useful for a mining proposal; but, for a basic exploration activity, developing and maintaining an environmental management system is an over-requirement in our experience.*²²¹

²¹⁶ Submission 15 from North Eastern Goldfields Exploration Pty Ltd, 24 March 2016, p 3 and Submission 16 from Mick Photios, 24 March 2016, pp 2–3.

²¹⁷ Submission 15 from North Eastern Goldfields Exploration Pty Ltd, 24 March 2016, p 3.

²¹⁸ Michael Photios, *Transcript of Evidence*, 11 April 2016, pp 7–8.

²¹⁹ *ibid*, p 8.

²²⁰ Simon Bennison, Chief Executive Officer, Association of Mining and Exploration Companies, *Transcript of Evidence*, 4 April 2016, pp 4–5.

²²¹ Kane Moyle, Manager, Environment and Land Access, Chamber of Minerals and Energy of Western Australia, *Transcript of Evidence*, 4 April 2016, p 5.

*... But an environmental management [system] does not have to be an overly complex or even detailed document. It can be prepared and maintained fairly efficiently if it is managing what are the appropriate environmental risks to that site. In the case of a number of mining operations that may be in fairly benign areas or ones that do not have high conservation values surrounding them, they should be relatively simple to maintain.*²²²

Use of EMS templates

- 4.149 One witness from AMEC noted that it was ‘looking at how you can generate a template for low environmental activity on a particular tenement versus something that is obviously far higher in the context of mining activity.’²²³ A witness on behalf of CME suggested the following:

*a recommendation from this committee may be for even a template EMS for smaller operations that could assist those that do not have experience in this form of regulation to, I guess, submit something without the impost of costly environmental consultants.*²²⁴

The DMP’s response to commentary from submissions and witness evidence

- 4.150 The DMP considered the proposed EMS provision and commentary from submissions to the Committee and witnesses appearing before the Committee and stated:

The department is moving from “prescriptive” to a “risk and outcomes based regulatory” framework. Greater freedom and flexibility is provided to proponents by this framework, however, proponents need to demonstrate they have a “fit for purpose” mechanism to achieve the agreed outcomes. An Environmental Management System (EMS) is the mechanism to support this and provides the opportunity for continual improvement of environmental management outcomes, consistent with industry standards.

The proposed legislation is not prescriptive in terms of the type of environmental management system that must be used, other than requiring that it covers the procedures and practices relating to the assessment of risk and the implementation of actions to minimise or avoid environmental harm.

²²² ibid, p 6.

²²³ Simon Bennison, Chief Executive Officer, Association of Mining and Exploration Companies, *Transcript of Evidence*, 4 April 2016, pp 4–5.

²²⁴ Kane Moyle, Manager, Environment and Land Access, Chamber of Minerals and Energy of Western Australia, *Transcript of Evidence*, 4 April 2016, p 6.

For small mining operations, particularly where low impact activities will take place, the environmental management system may be a simple paper-based system, such as a one or two page table listing potential impacts and controls to manage them. DMP will be liaising with the industry to develop a template to assist small mining operations.

The Mining Rehabilitation Fund does not meet the intentions behind the EMS requirement.

*... the complexity of the environmental management system will be proportional to the size and complexity of the operations.*²²⁵

- 4.151 The Committee recognises the support from the representatives of larger scale miners for the use of an EMS. It also recognises the concerns faced by small miners as to what will be involved for them in order to comply with this section. It is understood that the DMP intends to make EMSs scalable according to size of operation and it is considered that small scale operations should not have overly significant obligations to meet. It is noted that provision of a template, or templates, by the DMP would likely relieve some of the anticipated regulatory burden associated with an EMS.

- 4.152 The Second Reading speech indicated the intention of the Bill as being to:

reduce the administrative burden on industry

*... significantly reduce regulatory burden on tenement holders as they will no longer have to report against a myriad of conditions set over time.*²²⁶

Finding 19: The Committee finds that the introduction of additional environmental reporting requirements, particularly if these overlap with existing requirements, does not appear to align with the reported policy intention of the Mining Legislation Amendment Bill 2015 to reduce regulatory burden. To meet the intention of the Bill, the reporting obligations associated with the environmental management system must be streamlined and avoid overlap with other reporting obligations.

Recommendation 14: The Committee recommends that a template environmental management system form be created for use by small scale miners.

²²⁵ Richard Sellers, Director General, Department of Mines and Petroleum, Letter, 13 April 2016, p 18.

²²⁶ Hon Ken Baston MLC, Minister for Agriculture and Food, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 20 October 2015, pp 7518–20.

CLAUSE 50—SECTION 156—USE OF THE WORD HINDERS

- 4.153 Current section 156(1)(b) of the Mining Act creates an offence for anyone who assaults, obstructs, resists or insults a warden, inspector, officer of the DMP or person performing duties under the Mining Act. Clause 50 proposes to insert the word ‘hinders’ into the list of behaviours constituting an offence. It was submitted to the Committee that this was more onerous and making it easier for someone to be successfully prosecuted. The DMP considered the inclusion of the word ‘hinders’ in this section and said:

*The inclusion of the word “hinder” is consistent with other provisions of the Mining Act, including section 158, which makes it an offence to obstruct or hinder persons requesting information about authority to mine, as well as the analogous Mines Safety and Inspection Act 1994 offence of obstructing, hindering or interfering with an inspector under that Act. It is also consistent with similar offences under other comparable Western Australian statutes.*²²⁷

- 4.154 This language, or similar language, is not uncommon in legislation pertaining to inspectors. While it notes that this is a word of broader meaning, the Committee does not consider that its inclusion in this provision has any adverse consequences.

CLAUSE 51—SECTION 158—\$10 000 PENALTY

- 4.155 Clause 51 proposes minor changes to section 158 of the Mining Act, which provides for penalties in relation to persons providing information as to their right to mine. A number of submissions made adverse comments about the \$10 000 penalties imposed by section 158(2) and (4) suggesting that a \$10 000 fine is excessive and it should be drafted as a maximum.²²⁸ These penalties existed prior to the amendments introduced by the Bill. As to maximum penalties, we refer to paragraphs 4.69 to 4.70 above. The Committee notes that the substantive changes to the existing section proposed by the Bill are of an administrative and procedural nature.

CLAUSE 52 – SECTION 162 – REGULATIONS AS TO INSPECTORS

- 4.156 Section 162 of the current Mining Act provides that the Governor may make regulations and those regulations may include regulations in relation to inspectors. Clause 52 of the Bill proposes to incorporate a broad range of matters for which the regulations may authorise an inspector to do.

²²⁷ Richard Sellers, Director General, Department of Mines and Petroleum, Letter, 13 April 2016, p 19.

²²⁸ Submission 15 from North Eastern Goldfields Exploration Pty Ltd, 24 March 2016, p 4; Submission 9 from Goldfields First, 22 March 2016, pp 2–3; Submission 13 from Amalgamated Prospectors and Leaseholders Association of WA Inc, 22 March 2016, p 19 and Submission 21 from Cranston Edwards, 24 March 2016, p 5.

Power to enter premises, search and seize documents and property

- 4.157 Proposed sections 162(2)(aa)(i), (iii), (v), (vi), (vii), (viii), (ix) and (x) relate to inspectors entering land, conducting examinations, taking samples, taking things for testing or use of evidence, taking photographs, measurements, sketchings and recordings and requiring production of, and taking copies or extracts from, documents.
- 4.158 The proposed new powers attracted adverse commentary in a number of submissions and it was suggested that they constituted a violation of fundamental legislative scrutiny principle number five *‘Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?’*²²⁹
- 4.159 While this principle must be strictly adhered to generally, and particularly in relation to residential matters, inspectorial powers by necessity interfere with rights and liberties of individuals and must be accommodated within the appropriate parameters. Some of the appropriate parameters to consider here are listed below:
- Property must not be interfered with or seized without particular justification.
 - If property may be seized, the circumstances of its return must be specified and the circumstances must be fair, and the owner must be permitted reasonable access to it while it is seized.
 - If property is damaged, provision must be made for notice to be given to the owner of property and for payment of compensation unless there is particular justification for not providing compensation.
 - There must be particular justification for the provision of power to force someone to provide information and documents, and care must be taken to define the circumstances and way in which the power is exercised.²³⁰

Acquisition of property

- 4.160 Proposed section 162(2)(vii) allows the grant of power to an inspector to *‘to take and remove samples of any substance or thing whatsoever at a mine without paying for them.’* Proposed section 162(2)(viii) allows the grant of power to an inspector to *‘take possession of any plant, equipment or other thing for further examination or testing or for use as evidence.’* This was the subject of criticism in some submissions as it was

²²⁹ Submission 21 from Cranston Edwards, 24 March 2016, p 13; Submission 17 from Dr Robert Fagan, 20 March 2016, p 28 and Michael Photios, *Transcript of Evidence*, 11 April 2016, p 1.

²³⁰ Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, Queensland, January 2008, pp 45–6.

seen to be heavy handed. There was concern that an inspector may attend a mine site and, within rights, confiscate gold nuggets and bullion without compensation.²³¹ It was suggested that these provisions constituted a violation of fundamental legislative scrutiny principle number nine: ‘Does the Bill provide for the compulsory acquisition of property only with fair compensation?’²³² As to this matter, paragraph 4.159 above is referred to and it is considered that:

*A legislatively authorised act of interference with a person’s property must be accompanied by a right of compensation, unless there is a good reason (for example, the power to confiscate the profits of crime, or to confiscate property to investigate a criminal offence committed by a person and of which the person is subsequently convicted).*²³³

4.161 The DMP stated that:

This is a standard provision allowing inspectors to lawfully remove material for use as evidence and is reflected in other comparable Western Australian statutes dealing with inspections. There is no scope for inspectors to confiscate any valuable material under the authority of any regulation made under this provision.

*Inspectors are public servants and are subject to requirements preventing corrupt conduct, deriving from a range of sources including departmental codes of conduct, professional standards, the Public Sector Management Act 1994, the Criminal Code and the ... Corruption, Crime and Misconduct Act 2003.*²³⁴

Self-incrimination

4.162 The proposed amendments include the following grants of power in relation to interviews under section 162(2)(aa):

(xi) *to interview any person who the inspector has reasonable grounds to believe may be able to provide information*

²³¹ Submission 9 from Goldfields First, 22 March 2016, p 10; Submission 15 from North Eastern Goldfields Exploration Pty Ltd, 24 March 2016, p 4; Submission 16 from Mick Photios, 24 March 2016, pp 2–3 and Submission 21C from Cranston Edwards, 24 March 2016, p 4.

²³² Submission 21 from Cranston Edwards, 24 March 2016, p 13; Submission 17 from Dr Robert Fagan, 20 March 2016, p 28 and Michael Photios, *Transcript of Evidence*, 11 April 2016, p 1.

²³³ Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, Queensland, January 2008, p 35.

²³⁴ Richard Sellers, Director General, Department of Mines and Petroleum, Letter, 13 April 2016, p 21.

relevant to a matter about which the inspector is inquiring and to record the interview with or without the person's consent.

(xii) *to require the attendance of any person for an interview referred to in subparagraph (xi).*

(xiii) *to require any person whom the inspector interviews as referred to in subparagraph (xi) to answer any question put to that person.*

(xiv) *to require any person to state his or her name or address.*

4.163 Concern was raised in a number of submissions as to the inspector's power to interview and record a person without their consent.²³⁵ It was suggested that this was an undue grant of power, overly severe and impinged upon the right to silence.²³⁶ It was suggested that the provisions relating to interviewing were a violation of fundamental legislative scrutiny principle number six: *'Does the Bill provide appropriate protection against self-incrimination?'*²³⁷

4.164 As to self-incrimination, it is noted that:

*It has been a firmly established rule of the common law, since the seventeenth century, that no person can be compelled to incriminate himself (or herself). A person may refuse to answer any question, or to produce any document or thing, if to do so "may tend to bring him (or her) into the peril and possibility of being convicted as a criminal."*²³⁸

4.165 It is noted that at common law, the privilege against self-incrimination is only available to individuals and not artificial entities.²³⁹ Where privilege is removed, provision:

ought be made to grant immunity against the use of information gained, directly or indirectly, from forced disclosure contrary to the privilege. The legislation should generally provide that the self-incriminating evidence is not admissible in evidence against the person in any proceeding other than proceedings where the admission

²³⁵ Submission 16 from Mick Photios, 24 March 2016, pp 2–3 and Submission 15 from North Eastern Goldfields Exploration Pty Ltd, 24 March 2016, p 4.

²³⁶ Submission 16 from Mick Photios, 24 March 2016, pp 2–3 and Submission 9 from Goldfields First, 22 March 2016, p 10.

²³⁷ Submission 21 from Cranston Edwards, 24 March 2016, p 13; Submission 17 from Dr Robert Fagan, 20 March 2016, p 28; Michael Photios, *Transcript of Evidence*, 11 April 2016, p 1.

²³⁸ *Sorby v Commonwealth* (1983) 152 CLR 281 at 288 per Gibbs CJ.

²³⁹ *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

of the evidence is justifiable, for example, a proceeding on a charge that the evidence provided was false. This also means that the usefulness of a provision denying the privilege is substantially reduced because the evidence produced cannot be used in a court except for the narrow exception.

Traditionally, removing the privilege should be contemplated only when it is more important to know the facts leading to the contravention than to prosecute the contravention. This may be the case if knowledge will allow action to be taken that may save lives or prevent injury in the future.²⁴⁰

4.166 The DMP addressed this matter and stated as follows:

This amendment brings the Mining Act in line with other existing (for example Section 53 of the Dangerous Goods Safety Act 2004) and proposed safety legislation in Western Australia, in that inspectors would be able to record (by video/audio) what a person says during an interview. This “power to record” is critical to support the amendment regarding “power to interview”.

It is important to distinguish that the power to record without consent does not imply power to record “without knowledge”. It is important from an evidence gathering perspective to be able to record without permission because, if unable to do so, the witness can insist that their responses are written or typed, and this becomes a long and drawn out procedure, with the ability for the witness to change what was documented as their response. This is not the case when inspectors have the power to record. The recording of an interview protects not only the State, the inspector, but also the person being interviewed.²⁴¹

Grant of powers generally

4.167 Submissions to the Committee suggested that concerns of a general nature were held about granting additional powers to inspectors, including those that submitters considered to be coercive, draconian and investigative.²⁴² It was suggested that this raises questions as to civil liberties.²⁴³

²⁴⁰ Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, Queensland, January 2008, p 52.

²⁴¹ Richard Sellers, Director General, Department of Mines and Petroleum, Letter, 13 April 2016, pp 21–22.

²⁴² Submission 2 from Nicholas Cukela, 21 March 2016, p 4; Submission 4 from Focus Metals Pty Ltd, 23 March 2016, p 4 and Submission 9 from Goldfields First, 22 March 2016, p 12.

²⁴³ Submission 15 from North Eastern Goldfields Exploration Pty Ltd, 24 March 2016, p 4.

- 4.168 The submission lodged by APLA stated that the proposed new powers would be ‘*far reaching and provid[ing] strong powers to a departmental officer.*’ This submission considered that this could present an opportunity to restrict individual rights. However, the APLA submission also noted:

*the protection potentially granted to leaseholders by these provisions against any illegal mining must be taken into account as a positive outcome. The opportunity for an officer to be overzealous and shut down a prospectors operation due to some small environmental misdemeanour or other oversight of failing to correctly complete forms or requirements is unwarranted. While not recommending to oppose these powers completely, the prescribed circumstances in which they might occur need to be seen.*²⁴⁴

- 4.169 The DMP considered the adverse comments made in submissions relating the proposed amendment to section 162 and stated:

*Amendments to section 162 of the Mining Act will enable regulations to be made to give inspectors a range of investigative powers that are comparable with the powers of inspectors under other Western Australian legislation, including inspectors under the Mines Safety and Inspection Act 1994, and the powers of environmental officers in the Department of Environmental Regulation.*²⁴⁵

- 4.170 Some submissions queried what the penalties would be for a failure to comply with the proposed new heads of power and related regulations. Existing section 156 of the Mining Act provides for an offence in relation to failing to comply with the requirements of an inspector.

Recommendations as to changes to section 162(2) provisions

- 4.171 The Committee notes that the powers that would be available to inspectors under proposed amendments to section 162(2) as outlined above are powers commonly granted to inspectors in a number of comparative areas. One example of this is in the health and safety area, for example, see section 43 of the *Occupational Safety and Health Act 1984*. Another example is the inspectors’ powers included in Part VI of the EP Act. The powers in section 162(2) do not appear to be inconsistent with these comparative statutory powers. The inclusion of such powers in other legislation is

²⁴⁴ Submission 13 from Amalgamated Prospectors and Leaseholders Association of WA Inc, 22 March 2016, p 19.

²⁴⁵ Richard Sellers, Director General, Department of Mines and Petroleum, Letter, 13 April 2016, p 20.

primarily to allow inspectors to obtain information and to investigate in matters of health, safety or danger to the environment. It is considered that in those circumstances, there is sufficient policy reason for such powers to be utilised.

- 4.172 While the proposed amendments to section 162(2) would allow an inspector to use those powers in relation to a matter of suspected danger to the environment, they are not limited to that purpose and could be used to investigate other matters, such as illegal mining activity. This may result in use of the powers in questionable circumstances.

Finding 20: The Committee finds that it is important to adopt a best practice approach to drafting provisions relating to the grant of investigative powers and it is considered that some minor amendments might be made to better protect the interests of participants who may be affected by the operation of those provisions:

- proposed new powers exercised under an amended section 162(2) should be qualified to provide that an inspector is authorised to do those things listed for some defined purpose which encompasses the inspector's role, for example: *'for the purposes of the administration of Part IVAA of the Act'*
- provision should be made for the receipt and return of seized property

The Committee notes that the powers of compulsion that are proposed to be inserted into section 162(2)(aa) of the *Mining Act 1978* by clause 52 of the Mining Legislation Amendment Bill 2015 have a somewhat ambiguous connection to the expressed policy of the bill. It is only by reference to oblique statements in the Second Reading Speech and the Explanatory Memorandum dealing with general propositions interrelating the new statutory framework with the existing *Environmental Protection Act 1986* framework that one can determine a possible policy intention. Given the fundamental nature of the rights that stand to be abrogated under these proposed provisions of the *Mining Act 1978* proposed by the bill, the Parliament (and through it, the people of Western Australia) is entitled to a clear policy articulation as to why the proposed new powers are to be inserted into the Mining Act.

Recommendation 15: The Committee recommends that, in their response to the Second Reading Debate on the Mining Legislation Amendment Bill 2015 in the Legislative Council, the Minister representing the Minister for Mines and Petroleum should provide a clear and unambiguous policy articulation as to why the powers of compulsion in relation to interviews, gathering of evidence, confiscation, seizure and taking of documents contained in clause 52 of the Bill have been included.

Inclusion of powers in Mining Act or Mining Regulations

- 4.173 The Committee questioned whether it would be more appropriate to include the inspectors' powers in the Mining Act rather than in the Mining Regulations. The DMP responded as follows:

*To move to the next question as to why proposed inspectors' powers would be set out in regulations rather than being contained directly in the act, the answer is that that reflects the schema we have at the moment. ... at the moment, all of the investigators' powers are set out in regulations so we would propose to augment those powers by way of other regulations, rather than have provisions in the act that talk about inspectors' powers and then another set of existing provisions in the regs that are already there that talk about another suite of investigators' powers.*²⁴⁶

- 4.174 The DMP accepted that there was no legal reason not to incorporate all of the relevant powers of inspectors in the Act, but that this was the division of legislative arrangements that already exists and the amendments in the Bill were a continuation of this.²⁴⁷

- 4.175 The Committee refers to paragraphs 4.50 to 4.57 and 4.98 to 4.105 above.

CLAUSE 53—SCHEDULE 2—DIVISION 3—ITEM 23—TRANSITIONAL PROVISIONS FOR PROGRAMMES OF WORK

- 4.176 This clause proposes to insert a new Division 3 into the end of the Schedule 2 of the existing Mining Act. The proposed new Division 3, item 23 provides that on and from commencement day, an existing undetermined programme of work is taken to have been lodged in accordance with proposed Part IVAA, Division 4 and will be dealt with by the Director General in accordance with that Part. It was submitted that this meant that any programme of work previously issued would now be subject to rules that were not applicable at the time of issue and that this made the provision invalid for retrospectivity.²⁴⁸

- 4.177 The Committee notes that '*Legislation only operates retrospectively if it provides that rights and obligations are changed with effect prior to the commencement of the legislation.*'²⁴⁹ On this matter, the DMP stated:

²⁴⁶ Jane Hammond, Legal Manager—Reform, Department of Mines and Petroleum, *Transcript of Evidence*, 4 April 2016, p 9.

²⁴⁷ *ibid*, p 10.

²⁴⁸ Submission 9 from Goldfields First, 22 March 2016, p 12.

²⁴⁹ Pearce, DC and Geddes, RS, *Statutory Interpretation in Australia*, LexisNexis Butterworths, Eighth Edition, 2014, Chatswood, p 399.

*Proposed [item] 23 in Division 3 is a transitional provision with the effect that programmes of work approved before the amendments take effect will remain valid in respect of the activities to which they relate. This will mean that tenement holders can continue operating under existing programmes of work without needing to submit new applications to the department. It does not have any retrospective effect.*²⁵⁰

Finding 21: The Committee finds that the operation of this transitional arrangement is not retrospective.

CLAUSE 53—SCHEDULE 2—DIVISION 3—ITEM 24—TRANSITIONAL PROVISIONS FOR MINING PROPOSALS

4.178 Similar concerns to those raised in paragraph 4.1766 as to retrospectivity were raised in respect of proposed item 24 of proposed Division 3 of the Second Schedule.²⁵¹ In this respect, the Committee refers to paragraph 4.177 above and echoes its observations in Finding 21 above.

4.179 CME suggested that there may be circumstances where the transition period of six years is not appropriate. An example that was given was sites which are on care and maintenance. It was recommended that proposed item 24 should be amended to allow for an extension to be granted by the Director General or Minister as appropriate.²⁵² The DMP considered this matter and stated:

A transitional period of six years was considered appropriate to capture the range of circumstances that mining operations may be in during this period and this provides more than enough time to resubmit a mining proposal that meets the requirements of the new Part.

*DMP will be working with the industry to provide assistance throughout the transitional period.*²⁵³

Finding 22: The Committee finds that an option for extension would be a prudent inclusion should the need arise and could be addressed as needed by the Director General of Mines or Minister for Mines and Petroleum.

²⁵⁰ Richard Sellers, Director General, Department of Mines and Petroleum, Letter, 13 April 2016, p 22.

²⁵¹ Submission 9 from Goldfields First, 22 March 2016, p 12.

²⁵² Submission 29 from Chamber of Minerals and Energy of Western Australia, 24 March 2016, p 26.

²⁵³ Richard Sellers, Director General, Department of Mines and Petroleum, Letter, 13 April 2016, p 22.

Recommendation 16: The Committee recommends that the Mining Legislation Amendment Bill 2015 should be amended to include a provision allowing for a proponent to apply to the Minister for Mines and Petroleum or Director General of Mines for an extension of time under this item.

CHAPTER 5

PROPOSED AMENDMENTS TO THE EP ACT

CLAUSES 56 & 57—SCHEDULE 6 AMENDED—CLEARING

- 5.1 Part V, Division 2 of the EP Act addresses clearing. Section 51C of the EP Act provides that a person who causes or allows clearing commits an offence unless an exception applies. Paragraphs 3.17 to 3.22 above address the exemptions from section 51C. One of the exemptions is Schedule 6 of the EP Act, which prescribes types of clearing for which a clearing permit is not required.
- 5.2 Clause 57 of the Bill proposes to amend the EP Act to include new items 15 and 16 at Schedule 6 to incorporate the following categories of clearing activity:
- clearing that is a proposed activity in a programme of work or a mining proposal approved under Part IVAA of the Mining Act (after commencement)
 - clearing that is required for the purposes of carrying out a low-impact activity as defined in section 103AA of the Mining Act (in respect of which a notice of low-impact activity has been given)
- 5.3 If the Bill is adopted, the clearing permit exception in section 51C(a), as far as it relates to mining activity, will no longer be necessary. The associated provisions in Part V, Division 2 of the EP Act will likewise not be applicable. All mining activities as categorised in items 15 and 16 will fall under section 51C(b), and will accordingly be exempt from section 51C.
- 5.4 There is some uncertainty as to the application of section 51C(c) as the result of the proposed amendments. Sections 51C(b) and 51C(c) operate disjunctively. If an activity arises that falls into both of those subsections, being something that falls into items 15 or 16 of Schedule 6 and also into one of the categories set out in regulation 5 of the EP Clearing Regulations, it is unclear which would apply. If section 51C(c) applies, there would be a simple exemption. If section 51C(b) applies, it would then be subject to assessment by the DMP under section 103AQ, and would result in the application of other provisions, including the imposition of conditions and guidelines relating to clearing, as outlined below.
- 5.5 The drafting of these provisions requires clarification. If it is intended that the exemptions under section 51C(c) and regulation 5 of the EP Clearing Regulations are to apply in addition to section 51C(b), items 15 and 16 of Schedule 6 should be amended accordingly to make this intention express. The Mining Act should also be clarified to incorporate relief from obligations as to clearing if a section 51C(c)

exemption applies. Alternatively, if those exemptions in section 51C(c) are not intended to apply, this should also be clarified. Although it is considered that if those provisions were no longer applicable, this would constitute a significant change and a more onerous system as to clearing for mining activities than was previously in place.

SCHEDULE 5—CLEARING PRINCIPLES APPLY

5.6 Under a number of provisions of proposed Part IVAA, the clearing principles from Schedule 5 of the EP Act are incorporated and will apply to mining activities:

- Compliance with the clearing principles is a matter that must be considered by the Director General when deciding whether or not to approve a programme of works or mining proposal.²⁵⁴
- Guidelines may require a programme of work or mining proposal to identify accordance with the clearing principles.²⁵⁵
- Accordance with the clearing principles must be considered by the Minister, warden or registrar when imposing a condition relating to offsetting.²⁵⁶

5.7 Accordingly, the DMP will need to apply the EP Act's Schedule 5 clearing principles in each of these instances.

APPLICABLE OFFENCES

5.8 Section 51C of the EP Act currently provides that clearing of native vegetation is an offence unless subject to an exemption under that section. As the Bill proposes placing mining activities into Schedule 6 of the EP Act, the effect of this amendment will be to exempt mining activities from the offence provisions of the EP Act. This means that the Bill will result in there being no EP Act offence applicable to any clearing associated with mining activities. The Mining Act, as amended by the Bill, does not contain equivalent offence provisions to address these matters. It is noted that Part IV of the EP Act would continue to operate.

WHO SHOULD BE RESPONSIBLE?

5.9 The EDO submission considered that the:

The proposed exemption for native vegetation clearing effectively transfers all regulatory oversight for clearing associated with mining activities to the Department of Mines and Petroleum (DMP). This exemption is indeed a significant change from the current law – a

²⁵⁴ Mining Act proposed ss 103AO(7)(a), 103AP(7)(a), 103AQ(1) and (2).

²⁵⁵ ibid proposed s 103AM(2)(a)(viii).

²⁵⁶ ibid proposed ss 103AW(1) and 103AY(2).

*most unwelcome and inappropriate change at that. Contrary to the Explanatory Memorandum's tacit suggestion that there will be little effect of the amendment as the DMP has been regulating native vegetation clearing for mining activities by delegation for some time, the amendment works a radical step backward when it comes to protecting WA biodiversity and landscapes.*²⁵⁷

*By exempting clearing associated with mining activities from the EP Act's reach, and leaving such matters to be regulated solely by the DMP under its jurisdiction under the Mining Act 1978, the proposed amendment essentially removes core principles of environmental protection, contained in the EP Act, from the DMP's decision-making.*²⁵⁸

- 5.10 The EDO submission further observed that the *'removal of vegetation clearing from the EP Act and vesting of responsibility for such activities in the Mining Act results in the loss of clear offence provisions or penalties that obtain under the EP Act. From our review, there are no offence provisions or penalties associated with non-compliance with the clearing provisions of the Mining Act, as amended by the Bill.'*²⁵⁹
- 5.11 The EDO indicated that its preferred position would be that this aspect of the Bill not be adopted.²⁶⁰
- 5.12 The Wilderness Society of Western Australia (WSWA) submission expressed its concern with the effect of the Bill to *'further place environmental assessment and decision making responsibilities'* with the DMP as opposed to the EPA or DER for the following reasons:
- The DMP is conflicted
 - The DMP lacks appropriate statutory environmental objects
 - The DMP does not have the appropriate environmental policies, skills and resources.²⁶¹
- 5.13 The WSWA further noted that the EPA exists to: *'carry out rigorous environmental impacts assessments for all proposals likely to have a significant impact on the environment and it must be free and able to carry out its statutory functions*

²⁵⁷ Submission 31 from Environmental Defender's Office WA Inc, 24 March 2016, p 2.

²⁵⁸ *ibid.*

²⁵⁹ *ibid.*, p 6.

²⁶⁰ But if it were adopted, recommended a harmonisation of the definitions of "environment" and "environmental harm" and an inclusion of the EP Act's core objectives in Part IVAA of the Mining Act.

²⁶¹ Submission 20 from The Wilderness Society of WA Inc, 24 March 2016, p 1.

accordingly—without any suggestion that it has given up or been stripped of its responsibilities to the environment, the public and future generations.’²⁶²

PURPOSE AND GUIDING PRINCIPLES

- 5.14 The EDO suggested that the purpose and nature of the Mining Act is such that it is not appropriate for it to be the tool for governing environmental matters:

The Mining Act’s overriding purpose is facilitating the extraction of mineral resources. Moreover, protective conditions that may be attached to mining approvals are focus on the ‘prevention or reduction of injury to land’

... The environment, biodiversity, species of flora and fauna, ecological communities and such cultural values as amenity or heritage are simply not an express focus of the Mining Act.

... In contrast to the Mining Act, vegetation clearing under the EP Act—even where regulated by the DMP per delegation, is subject to all the objects and principles that promote and advance protection of WA’s environment and biodiversity.²⁶³

... The Mining Act really is about the development of mineral resources; the Environmental Protection Act truly is about protecting the environment, so that is a significant concern for us.²⁶⁴

- 5.15 It was suggested, in witness evidence from the EDO, that if the Bill does proceed, it should incorporate the:

core fundamental guiding principles that govern agency decision-making under the Environmental Protection Act, such as the precautionary principle, intergenerational equity and conservation of ecological integrity.’²⁶⁵

... Those principles and objectives are missing from the mining law. Those would need to be picked up and incorporated to the extent that DMP is now going to be implementing a clearing program. They apply currently under the Environmental Protection Act part V; they do not, from our review, apply to the part IVAA, even though the 10

²⁶² Submission 20 from The Wilderness Society of WA Inc, 24 March 2016, p 1.

²⁶³ Submission 31 from Environmental Defender’s Office WA Inc, 24 March 2016, p 3.

²⁶⁴ Patrick Pearlman, Principal Solicitor, Environmental Defender’s Office of WA, *Transcript of Evidence*, 4 April 2016, p 2.

²⁶⁵ *ibid.*

*clearing principles are, I think, picked up and reflected in the provisions of part IVAA.*²⁶⁶

5.16 The relevant object and principles of the EP Act are set out in section 4A as follows:

The object of this Act is to protect the environment of the State, having regard to the following principles —

1. The precautionary principle

Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In the application of the precautionary principle, decisions should be guided by —

(a) careful evaluation to avoid, where practicable, serious or irreversible damage to the environment; and

(b) an assessment of the risk-weighted consequences of various options.

2. The principle of intergenerational equity

The present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.

3. The principle of the conservation of biological diversity and ecological integrity

Conservation of biological diversity and ecological integrity should be a fundamental consideration.

...

5. The principle of waste minimisation

All reasonable and practicable measures should be taken to minimise the generation of waste and its discharge into the environment.

5.17 The objectives of proposed Part IVAA of the Mining Act will be as set out in proposed section 103AB:

The object of this Part is to support the responsible environmental management of mining, including land rehabilitation and mine closure.

²⁶⁶ *ibid*, pp 7–8.

Minority Finding 3:

A minority of the Committee comprising Hon Robin Chapple MLC finds that:

I support the position put forward by the Environmental Defenders Office WA and the Wilderness Society WA that the remit of environmental protection should be the purview of the Environmental Protection Authority and the Department of Environment Regulation, and is not the remit of the Department of Mines and Petroleum.

It should also be noted that whereas there is currently no criteria for a lesser environmental assessment for small-scale miners under the *Mining Act 1978* or the *Mining Legislation Amendment Bill 2015* that the Environmental Protection Authority in regulation 5 of the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* provides exemptions specifically for small-scale miners. With respect to this sector of the industry, administration of the small-scale mining sector would be better served under this regulation 5.

DUPLICATION AND INCONSISTENCY

5.18 The testimony presented on behalf of the EDO suggested that if there was significant difference in the legislation, there would be inconsistencies and contradictions over matters such as enforcement, inspection and the general application of environmental principles.²⁶⁷

5.19 Evidence before this Committee from, and on behalf of, CME noted that there were some areas of duplication or inconsistency between the Mining Act and the EP Act which would prevent the delivery of promised red-tape reduction. Examples given by CME include:

- the different definitions of the terms ‘environment’ and ‘environmental harm’ across the Acts²⁶⁸
- requiring certain vegetation clearing to be assessed and approved by DMP in circumstances where clearing has already been assessed or would ordinarily be exempt from the requirement for a clearing permit
- including powers to impose additional reporting requirements to those which apply under the EP Act in relation to the reporting of incidents, environmental reporting and matters of environmental harm
- circumstances where incidents may need to be reported to both the DMP and the DER

²⁶⁷ ibid, p 3-6.

²⁶⁸ See paragraphs 4.29 to 4.43 above.

- annual environmental reports being required to be submitted to the DMP and other agencies depending on your regulatory status
- situations where the same information is required to be reported on multiple occasions for the DMP
- under section 72 of the EP Act, proponents being required to report discharges of waste which is potential duplication if DMP require this also
- inconsistencies and duplication of process which increase administrative burden and cost to industry with little overall environmental benefit.²⁶⁹

5.20 CME recommended that the different departments work together to streamline reporting and address these matters.²⁷⁰

THE BILATERAL AGREEMENT

5.21 Paragraphs 3.6 to 3.10 above outline the matters relating to the Commonwealth EPBCA and the Bilateral Agreement. If the Bill comes into force in its present form, clearing determinations made by the DMP would no longer be made under delegation and would not fall under the current Bilateral Agreement. The Committee notes that the granting of powers regarding determinations relating to clearing in the Bill will create the need for the State to either enter into a bilateral agreement with the Commonwealth in respect of the Commonwealth EPBCA, or amend the current Bilateral Agreement, to give effect to the new provisions in the Bill relating to clearing.²⁷¹

5.22 Evidence provided on behalf of the EDO suggested that this ‘*would add a layer of complexity and cost, and potentially even delay, even to the proponents, who would want to get this thing through.*’²⁷² Evidence presented on behalf of CME addressed the fact that, as the amendments had not yet gone through, it was impossible to enter a new agreement relating to them and considered that the new agreement would be pursued as the first course of business.²⁷³

²⁶⁹ Submission 29 from Chamber of Minerals and Energy of Western Australia, 24 March 2016, pp 1–2 and Kane Moyle, Manager, Environment and Land Access, Chamber of Minerals and Energy of Western Australia, *Transcript of Evidence*, 4 April 2016, pp 7–8.

²⁷⁰ Kirrillie Caldwell, Policy Adviser, Environment, Chamber of Minerals and Energy of Western Australia, *Transcript of Evidence*, 4 April 2016, pp 7–8.

²⁷¹ Dr Phil Gorey, Executive Director Environment, Department of Mines and Petroleum, *Transcript of Evidence*, 4 April 2016, p 14 and Sarah McEvoy, Executive Director, Strategic Policy and Programs, Department of Environment Regulation, *Transcript of Evidence*, 4 April 2016, pp 2–4.

²⁷² Patrick Pearlman, Principal Solicitor, Environmental Defender’s Office of WA, *Transcript of Evidence*, 4 April 2016, p 6.

²⁷³ Kane Moyle, Manager, Environment and Land Access, Chamber of Minerals and Energy, *Transcript of Evidence*, 4 April 2016, p 9.

- 5.23 It was noted that resolving this apparent anomaly would require the cooperation and agreement of the Commonwealth Government. It was further noted that in the interim, land clearing would potentially be referred to the Commonwealth under the Commonwealth EPBCA.²⁷⁴ This would only apply to ‘controlled actions’ and it was suggested that ‘*small-scale operations, by their nature, are unlikely to be matters of national environmental significance*’ and that very few of the DMP’s native vegetation clearing permits relate to matters that are controlled actions under the Commonwealth EPBCA.²⁷⁵
- 5.24 The DMP further stated that the Bill did ‘*not affect the assessments that happen under Part IV, so, by practice, the majority of our assessments in the State, which are also matters of NES, go through the Part IV process.*’²⁷⁶ The DER noted that if a significant proposal was referred to the EPA ‘*and it was assessed in accordance with the terms of the [Bilateral Agreement], whether it is clearing or any other kind of aspect of mining impacts would be accredited under the Bilateral Agreement.*’²⁷⁷

Minority Finding 4:

A minority of the Committee comprising Hon Robin Chapple MLC finds that:

In relation to the Bilateral Agreement established between the Commonwealth and the State of Western Australia in October 2014 and signed by the Minister for Environment, there has been no evidence provided of what effect the Mining Amendment Bill will have on land clearing currently delegated by this Bilateral Agreement to the Department of Environment Regulation (Environmental Protection Authority).

It has been stated that the transfer of powers would have no effect on the Bilateral Agreement. There is a lack of clarity about this statement and it is unclear as to whether the Commonwealth would allow the transfer of its powers, given to the Environmental Protection Authority, to be transferred to the Department of Mines and Petroleum. It also has the potential to re-involve the Commonwealth in land clearing matters should the Commonwealth not agree to the transfer of powers by the Environmental Protection Authority by the Department of Mines and Petroleum.

²⁷⁴ Dr Phil Gorey, Executive Director Environment, Department of Mines and Petroleum, *Transcript of Evidence*, 4 April 2016, p 15.

²⁷⁵ *ibid.*

²⁷⁶ *ibid.*

²⁷⁷ Sarah McEvoy, Executive Director, Strategic Policy and Programs, Department of Environment Regulation, *Transcript of Evidence*, 4 April 2016, pp 2–4.

CHAPTER 6

PROPOSED AMENDMENTS TO MINING REHABILITATION FUND ACT 2012

CLAUSE 61—SECTION 15—PENALTY

- 6.1 Clause 61 proposes to amend section 15 of the *Mining Rehabilitation Fund Act 2012*. This provision, if amended as proposed, imposes a penalty, listed as a fine of \$20 000 on a person, registered as the holder of a mining authorisation, who fails to give to the CEO,²⁷⁸ assessment information as required. It was suggested that this was a drastic remedy for what may be an administrative oversight, management error or omission.²⁷⁹ It was also put to the Committee that the fine ought to be a maximum to allow a scalable penalty depending on the severity of the offence.²⁸⁰ As to the imposition of maximum penalties, the Committee refers to paragraphs 4.69 to 4.70 above.

²⁷⁸ As defined in the *Mining Rehabilitation Fund Act 2012*.

²⁷⁹ Submission 13 from Amalgamated Prospectors and Leaseholders Association of WA Inc, 22 March 2016, p 20.

²⁸⁰ Submission 13 from Amalgamated Prospectors and Leaseholders Association of WA Inc, 22 March 2016, p 20.

CHAPTER 7

ISSUES PERTAINING TO SMALL SCALE MINERS

INTRODUCTION

- 7.1 In addition to concerns raised about specific clauses of the Bill which are addressed in Chapters 4, 5 and 6 above, a number of other issues arose from submissions and witness evidence provided to the Committee. These matters are outlined below.

IMPORTANCE OF SMALL MINERS TO WA INDUSTRY, COMMUNITY AND ECONOMY

- 7.2 Many submissions drew the attention of the Committee to the importance of small miners to industry, community and the economy in Western Australia.²⁸¹ Focus Metals Pty Ltd noted that the small scale mining sector:

*comprises over 3,200 tenement holders and is believed to directly employ in the order of 5,000 people. The sector produced in the order of 2-5 tonnes of gold per year with an approximate value in the order of \$50,000,000-\$200,000,000 per year. The sector pays royalties and taxes.*²⁸²

- 7.3 Focus Metals Pty Ltd submitted that the:

*we believe in the importance of the small-scale mining sector ... if those people go away, we go away. The jobs that we create go away. The businesses that we support go away, whether it is the pub in Menzies that relies on these people coming in, whether it is the fuel suppliers, whether it is the coffee shop that we eat at in Leonora when we go out to visit clients up there or the other businesses that support and contribute to this community that are based on the support of these small-scale miners. These people are a vital contributor to the goldfields' economy.*²⁸³

²⁸¹ Including Submission 2 from Nicholas Cukela, 21 March 2016, p 4; Submission 4 from Focus Metals Pty Ltd, 23 March 2016, p 2; Submission 6 from the Shire of Laverton, 23 March 2016, p 2; Submission 8 from David Woodiwiss, 21 March 2016, p 5; Submission 9 from Goldfields First, 22 March 2016, pp 4–5; Submission 13 from Amalgamated Prospectors and Leaseholders Association WA Inc, 22 March 2016, p 4; Submission 17 from Dr Robert Fagan, 20 March 2016, pp 5–11; Submission 19 from Mr Lynch, 24 March 2016, p 1 and Submission 26 from Glyn Morgan, 24 March 2016, p 1.

²⁸² Submission 4 from Focus Metals Pty Ltd, 23 March 2016, p 2.

²⁸³ Jeremy Samuel, Business Development Executive, Focus Metals Pty Ltd, *Transcript of Evidence*, 11 April 2016, p 2.

Finding 23: The Committee acknowledges the role that the small scale mining sector plays in the State and the contributions it makes to industry, community and the economy and considers that it is important to protect the interests of those in the sector.

RATE OF ENVIRONMENTAL COMPLIANCE

- 7.4 Many submissions noted that the DMP reported 97 per cent compliance by proponents with environmental conditions.²⁸⁴ It was intimated that such a level of compliance was grounds for no further environmental conditions as performance could only be improved by 3 per cent.
- 7.5 The Committee acknowledges the high level of compliance but notes that the Bill focuses more on changing the environmental parameters and management frameworks rather than seeking to increase levels of compliance within the industry.

IMPACT OF THE BILL ON THE INDUSTRY

- 7.6 Of those prospectors and small miners that submitted to the Committee, most were of the belief that the effect of the Bill favoured large miners and would have cost and compliance impacts on smaller participants.²⁸⁵ It was suggested that this would bring the small mining sector in Western Australia to an end.²⁸⁶ It was suggested that this would cost jobs, harm communities and deprive the State of revenue.²⁸⁷ It was further

²⁸⁴ Submission 1 from Hugh Walley, 20 March 2016, p 1; Submission 4 from Focus Metals Pty Ltd, 23 March 2016, p 2; Submission 15 from North Eastern Goldfields Exploration Pty Ltd, 24 March 2016, p 3; Submission 17 from Dr Robert Fagan, 20 March 2016, pp 1–3, 15; Submission 21 from Cranston Edwards, 24 March 2016, pp 1–2; Submission 24 from George Setnik, 24 March 2016, p 1 and Submission 28 from Monika Doeppen, 24 March 2016, p 1.

²⁸⁵ Submission 1 from Hugh Walley, 20 March 2016, p 2; Submission 2 from Nicholas Cukela, 21 March 2016, p 1; Submission 3 from Paul Simmonds, 22 March 2016, p 4; Submission 3A from Paul Simmonds, 22 March 2016, p 1; Submission 3C from Paul Simmonds, 22 March 2016, p 1; Submission 7 from Nigel Heald, 18 March 2016, p1; Submission 13 from Amalgamated Prospectors and Leaseholders Association of WA Inc, 22 March 2016, p 2; Submission 15 from North Eastern Goldfields Exploration Pty Ltd, 24 March 2016, p 1; Submission 16 from Mick Photios, 24 March 2016, p 1; Submission 17 from Dr Robert Fagan, 20 March 2016, p 4; Submission 21 from Cranston Edwards, 24 March 2016, p 17; Submission 22 from Darby Renton, 24 March 2016, p 1; Submission 24 from George Setnik, 24 March 2016, p 1; Submission 26 from Glyn Morgan, 24 March 2016, p 1 and Submission 28 from Monika Doeppen, 24 March 2016, p 1.

²⁸⁶ Submission 1 from Hugh Walley, 20 March 2016, p 2; Submission 2 from Nicholas Cukela, 21 March 2016, p 1; Submission 3 from Paul Simmonds, 22 March 2016, p 4; Submission 3A from Paul Simmonds, 22 March 2016, p 1; Submission 3C from Paul Simmonds, 22 March 2016, p 1; Submission 7 from Nigel Heald, 18 March 2016, p1; Submission 13 from Amalgamated Prospectors and Leaseholders Association of WA Inc, 22 March 2016, p 2; Submission 16 from Mick Photios, 24 March 2016, p 1; Submission 17 from Dr Robert Fagan, 20 March 2016, p 5; Submission 22 from Darby Renton, 24 March 2016, p 1 and Submission 25 from Christopher Potts, 24 March 2016, p 1.

²⁸⁷ Submission 4 from Focus Metals Pty Ltd, 23 March 2016, p 1.

suggested that the new legislative environment would lead to corruption and illegal mining.²⁸⁸

7.7 Goldfields First noted that:

*Of the prospectors and small operators affected, most at the very small end can work within the new system at their very small scale. However there are significant numbers (around 500 individuals) of larger operators amongst the professional prospectors and small miners who fall just beyond this “low impact” threshold, who feel their small business will be crippled with costs, compliance and other unnecessary impediments that they will be incapable of complying with, or will be cost prohibitive.*²⁸⁹

7.8 Mr Michael Charlton gave evidence that:

*Clauses in the Mining Amendment Bill 2015 are going to greatly increase this regulatory burden for small-scale mining industry operating on mining leases that they own or that they tribute on. The Mining Amendment Bill 2015 will cause ongoing business disruption to our section of the mining industry and also disruption to the symbiotic relationship we share with the corporate mining industry.*²⁹⁰

7.9 AMEC submitted that:

*The amendment bill is in the public interest. ... AMEC has supported the implementation of a robust, transparent, efficient and best-practice environmental regulation model, which would be risk based, outcome focused. In doing so, AMEC has contended that the introduction of risk based, outcome-focused assessment and compliance processes should result in efficiency improvements within the Department of Mines and Petroleum and not result in additional resources or costs to the taxpayer or the industry. We believe that the Mining Legislation Amendment Bill meets those objectives.*²⁹¹

7.10 The DMP stated that:

This bill does not introduce significant new clauses that will disadvantage prospectors and small miners; in fact, it makes it easier

²⁸⁸ Submission 9 from Goldfields First, 22 March 2016, p 3; Submission 17 from Dr Robert Fagan, 20 March 2016, p 15 and Submission 30 from Gerard Brewer, 24 March 2016, p 1.

²⁸⁹ Submission 9 from Goldfields First, 22 March 2016, p 3.

²⁹⁰ Michael Charlton, Executive Member, Goldfields First, *Transcript of Evidence*, 11 April 2016, p 2.

²⁹¹ Simon Bennison, Chief Executive Officer, Association of Mining and Exploration Companies, *Transcript of Evidence*, 4 April 2016, pp 1–2.

*for prospectors and small miners by reducing the regulatory burden.*²⁹²

- 7.11 Mr Lynch represented that under the former system, a programme of work was approximately two pages to fill in, and that lodgement of this was manageable for the Aboriginal prospecting community.²⁹³ He further noted that under that system, good rehabilitation of sites was achieved²⁹⁴ and that a departure from these systems would be very difficult for Aboriginal participants and that some ‘*would not be able to do it.*’²⁹⁵
- 7.12 Participants noted the high costs of engaging consultants in the mining industry, with the preparation of a mining proposal costing around \$250 000.²⁹⁶ There was concern that the amendments effected by the Bill will increase the need for consultants, for example, to comply with environmental guidelines and conditions, and to prepare an EMS.
- 7.13 The effect of the Bill has been addressed by reference to specific clauses of concern as outlined above in Chapters 4, 5 and 6.

STAKEHOLDER CONSULTATION

- 7.14 The Committee received evidence that during the consultation process in relation to the Bill that the Minister and the DMP focused their attention on large, corporate miners and their representative bodies and failed to consult with many prospectors and small miners.²⁹⁷
- 7.15 Some submitters perceived that APLA membership consisted of ‘*recreational fossickers*’ and ‘*weekend warriors*’, while AMEC and CME’s constituents were much

²⁹² Dr Phil Gorey, Executive Director Environment, Department of Mines and Petroleum, *Transcript of Evidence*, 4 April 2016, p 2.

²⁹³ Mr Lynch, *Transcript of Evidence*, 11 April 2016, p 4.

²⁹⁴ *ibid.*

²⁹⁵ *ibid.*

²⁹⁶ Michael Photios, *Transcript of Evidence*, 11 April 2016, p 4.

²⁹⁷ Submission 2 from Nicholas Cukela, 21 March 2016, p 1; Submission 3A from Paul Simmonds, 22 March 2016, p 1, Submission 3B from Paul Simmonds, 22 March 2016, p 1; Submission 3C from Paul Simmonds, 22 March 2016, p 1, Submission 3D from Paul Simmonds, 22 March 2016, p 1; Submission 4 from Focus Metals Pty Ltd, 23 March 2016, p 3; Submission 5 from George Buckley, 23 March 2016, pp 1–2; Submission 9 from Goldfields First, 22 March 2016, p 5; Submission 13 from Amalgamated Prospectors and Leaseholders Association WA Inc, 24 March 2016, pp 9–12; Submission 8A from David Woodiwiss, 21 March 2016, pp 1–2; Submission 14 from Peter Smith, 23 March 2016, p 1; Submission 15 from North Eastern Goldfields Exploration Pty Ltd, 24 March 2016, p 1; Submission 17 from Dr Robert Fagan, 20 March 2016, pp 14–15; Submission 18 from Ray Kean & Paul Fitzgerald, 20 March 2016, p 1; Submission 22 from Darby Renton, 24 March 2016, p 1; Submission 25 from Christopher Potts, 24 March 2016, p 1; Submission 26 from Glyn Morgan, 24 March 2016, p 1; Submission 27 from Michael Charlton, 24 March 2016, pp 11–12; Submission 30 from Gerard Brewer, 24 March 2016, p 1.

larger.²⁹⁸ It was suggested that this resulted in a group of small, professional miners being excluded from the consultations, being too big for APLA but too small for AMEC and CME.

- 7.16 Some participants suggested that the DMP did not properly participate in its consultation with APLA.²⁹⁹ APLA stated, as to the consultation process, that:

*there was a lot of it, but it was not quality consultation.*³⁰⁰

*... The central issues in here are that APLA feels that small-scale miners will need to differentiate between the term “prospectors” and “explorers” and “small-scale miners”. It is an important distinction. Small-scale miners have been missed out in this demographic and the DMP have actually admitted that they did miss that demographic. That has led to why APLA is here today and why people in Kalgoorlie are—I would probably use the term—outraged.*³⁰¹

- 7.17 It was further contended that participants should not need to be members of representative organisations in order to be consulted on proposed legislation.³⁰² It was suggested that, as the DMP has the email addresses and postal addresses of all tenement holders, all tenement holders could have been contacted and consulted in this manner.³⁰³ It was noted that the DMP sent letters or emails to all tenement holders during consultation in relation to the Mining Rehabilitation Fund and considered that this was an effective consultation process.³⁰⁴

- 7.18 It was submitted that the DMP had failed to consult with the Aboriginal mining and prospecting community, of which there are between 300 and 400 participants in Kalgoorlie and associated regions.³⁰⁵

- 7.19 Some submissions claimed that these purported failures in consultation amounted to a failure to provide natural justice to interested parties.³⁰⁶ It was suggested that this has

²⁹⁸ Submission 5 from George Buckley, 23 March 2016, p 1; Submission 19 from Mr Lynch, 24 March 2016, p 2.

²⁹⁹ Submission 8A from David Woodiwiss, 21 March 2016, p 1.

³⁰⁰ Leslie Lowe, President, Amalgamated Prospectors and Leaseholders Association of WA, *Transcript of Evidence*, 4 April 2016, p 2.

³⁰¹ *ibid.*

³⁰² Submission 5 from George Buckley, 23 March 2016, p 1.

³⁰³ Submission 8C from David Woodiwiss, 21 March 2016, p 1 and Submission 14 from Peter Smith, 23 March 2016, p 1.

³⁰⁴ Submission 21 from Cranston Edwards, 24 March 2016, p 16.

³⁰⁵ Mr Lynch, *Transcript of Evidence*, 11 April 2016, p 1.

³⁰⁶ Submission 9 from Goldfields First, 22 March 2016, pp 1–2; Submission 13 from Amalgamated Prospectors and Leaseholders Association of WA Inc, 22 March 2016, pp 11–12 and Submission 18 from Ray Kean & Paul Fitzgerald, 20 March 2016, p 1.

led to the Bill, which small scale miners do not consider appropriately meets their needs.

- 7.20 Some proponents claimed that a meeting or meetings which the DMP had referred to as consultation with prospectors and small scale miners had not actually involved any notification or discussion of the Bill.³⁰⁷
- 7.21 On 21 June 2015, the then Minister, the Hon Bill Marmion MLA attended Kalgoorlie and spoke at a public meeting with representatives of Goldfields First.³⁰⁸ During that meeting, the Minister made statements to the effect that there was a group of participants who had been missed out and not properly consulted in relation to the Bill.³⁰⁹
- 7.22 Not all participants were displeased with the consultation process. The DER stated that:

*the Department of Mines and Petroleum consulted with the Department of Environment Regulation in relation to the operation of the regulation of clearing, under the mining amendment legislation and specifically how that would intersect with consequential amendment to schedule 6 of the Environmental Protection Act. They did that on a number of occasions, both during the preparation of drafting instructions through to the final bill.*³¹⁰

*... We have direct officer engagement and input into the drafting as it related to intersections with our Act.*³¹¹

- 7.23 AMEC stated that it ‘has been directly and constructively involved in the government’s reforming environmental regulation agenda since its commencement in 2011’.³¹² CME commented on its role in the consultation process:

Now to the consultation process: the Chamber, as you would imagine, has been a key stakeholder throughout this. We have been engaged right back till 2012 when a Ministerial Committee was established on

³⁰⁷ (Being 20 May 2014, 23 May 2014, 6 June 2014, 6 August 2014). Cranston Edwards, *Transcript of Evidence*, 11 April 2016, pp 2–3; Michael Photios, *Transcript of Evidence*, 11 April 2016, p 5 and Andrew Pumphrey, Goldfields First, *Transcript of Evidence*, 11 April 2016, pp 3–4.

³⁰⁸ Byron Moller, Letter and attached audio file, 7 April 2016.

³⁰⁹ Byron Moller, Letter and attached audio file, 7 April 2016.

³¹⁰ Sarah McEvoy, Executive Director, Strategic Policy and Programs, Department of Environment Regulation, *Transcript of Evidence*, 4 April 2016, pp 1–2.

³¹¹ Jason Banks, Director General, Department of Environment Regulation, *Transcript of Evidence*, 4 April 2016, p 7.

³¹² Simon Bennison, Chief Executive Officer, Association of Mining and Exploration Companies, *Transcript of Evidence*, 4 April 2016, pp 1–2.

*the back of an Auditor General's report into environmental regulation and compliance. We have reviewed exposure drafts of the legislation and provided comment. ... So, in terms of consultation, whilst there have been some criticisms with the observers from other stakeholders, the chamber has felt as though it has been adequately consulted throughout the process.*³¹³

7.24 The DMP provided the Committee with details of all of its stakeholder consultation and development in relation to the Bill. The DMP stated that it engaged on an ongoing basis since 2012, in particular with AMEC, CME and APLA. The activities undertaken included the following:

- the Ministerial Advisory Panel on Reforming Environmental Regulation, 2012
- the Mining Industry Liaison Committee, 2012 to 2015
- the Reforming Environmental Regulation Advisory Panel, 2013 to 2015
- nine discussion papers for public comment since August 2013
- DMP presentations at APLA annual general meetings
- 23 formal meetings between January 2014 and February 2016 with representatives of the prospecting community
- a dedicated consultative meeting with APLA and DMP representatives in Kalgoorlie
- three industry briefing sessions in Perth and Kalgoorlie each of which 1 970 people were invited to.³¹⁴

7.25 The DMP stated that *'In preparing this bill, the level of engagement with all key stakeholders that started in 2012 has been extensive and second to none.'*³¹⁵ The Hon Robin Chapple noted that APLA appeared to represent prospectors and weekend participants primarily and queried whether the DMP had become aware that it was *'talking to the wrong people'*.³¹⁶ Dr Gorey responded as follows:

APLA has been around for a long time and has been a member of the Mining Industry Liaison Committee for quite a while. When we

³¹³ Kane Moyle, Manager, Environment and Land Access, Chamber of Minerals and Energy of Western Australia, *Transcript of Evidence*, 4 April 2016, p 2.

³¹⁴ Submission 11 from the Department of Mines and Petroleum, 18 March 2016, pp 2–3.

³¹⁵ Dr Phil Gorey, Executive Director Environment, Department of Mines and Petroleum, *Transcript of Evidence*, 4 April 2016, p 2.

³¹⁶ Hon Robin Chapple MLC, *Transcript of Evidence*, 4 April 2016, p 3.

*started this process way back in about 2012 with the industry advisory panel, which APLA was represented on as well, the main industry associations were APLA, the Chamber of Minerals and Energy and AMEC, so through that process. As we went through that consultation, some people would have contacted the Department and some individuals decided to make their own submissions into particular consultation processes as well. Some of that is because they were not members of one of those associations. We continue to engage with those. We maintain things like a list of subscriptions. We have about 1 800 individuals registered on our subscription list. Through that process, if people are able to register with us, we will also keep them contacted throughout that process as well.*³¹⁷

- 7.26 Dr Gorey confirmed that the amendments would have been covered in the quarterly newsletter, which was sent to those 1,800 people.³¹⁸ Dr Griffin from the DMP elaborated further about how the DMP sought to address gaps in consultation:

*we were very open about what we were trying to do from the beginning. ...At no time were we being secretive about this. We were quite open to any input. We invited input. We prepared draft materials and put that out for consultation. It was not restricted in any way.*³¹⁹

- 7.27 Dr Griffin then addressed how the process could have been improved:

*I guess in hindsight you can always identify things that you would do differently if you had another crack at it. I suppose the only thing that I can think of that we could have done differently is that we could have made a bigger effort right from the start to have the contact addresses and emails of everybody who might be affected by the bill and make sure that they were emailed on a regular basis about how we are moving forward. But, as I said earlier on, there was no secrecy about what we are doing. We invited a lot of input. I suppose it was particularly because we did not see that the changes would disadvantage the small miners and prospectors. In fact, we saw the changes as being advantageous, which is what the committee said. So we did not sense that there was any serious, or likely to be any serious, concern with the amendments.*³²⁰

³¹⁷ Dr Phil Gorey, Executive Director Environment, Department of Mines and Petroleum, *Transcript of Evidence*, 4 April 2016, pp 3–4.

³¹⁸ *ibid*, p 4.

³¹⁹ Dr Tim Griffin, Deputy Director General, Approvals and Compliance, Department of Mines and Petroleum, *Transcript of Evidence*, 4 April 2016, p 4.

³²⁰ *ibid*, p 5.

Finding 24: The Committee finds that the Department of Mines and Petroleum made efforts to undertake consultation for the Mining Legislation Amendment Bill 2015. It appears, however, that a particular category of interested participants, being small scale miners, were either not consulted, or were engaged in very little consultation. The Committee finds that the Department of Mines and Petroleum should have taken steps to engage via email or post all tenement holders in relation to the progress of the bill and to invite comment. The Committee also finds that the Department of Mines and Petroleum should have taken constructive steps to engage the Aboriginal prospecting community in the process to address any issues that they may have had with the bill, for example, online lodgement.

ABSENCE OF REGULATIONS DURING THE BILL'S CONSULTATION PERIOD

- 7.28 The absence of regulations to accompany the Bill was the subject of significant concern, as individuals were unable to gain a clear understanding of what the ultimate legislative position would be.³²¹ A number of submissions requested participation in the preparation of the regulations when that occurs.³²²
- 7.29 The Committee recognises that the regulations would ordinarily follow the amendments to the Mining Act. It is noted that the DMP prepared the draft policy paper in relation to low-impact activities to provide some guidance on the matter. The material proposed to be included in regulations forms a substantial component of the legislative reform associated with the Bill and the lack of clarity as to the content of those regulations prevents the Committee from fully comprehending the nature of the legislative reform.

Finding 25: The Committee finds that it is inhibited in its ability to properly scrutinise legislation on behalf of the House where significant legislative detail is left to unseen regulations and departmental guidelines.

Recommendation 17: The Committee recommends that the Legislative Council should adopt a resolution asserting its right to be fully informed about the legislative detail of Bills including, where relevant any contingent delegated legislation and guidelines that is expressly intended to provide absent legislative detail omitted from primary legislation.

³²¹ Submission 6 from Shire of Laverton, 23 March 2016, pp 2–4; Submission 8G from David Woodiwiss, 21 March 2016, pp 1–2; Submission 13 from Amalgamated Prospectors and Leaseholders Association of WA Inc, 22 March 2016, p 15 and Submission 21C from Cranston Edwards, 24 March 2016, p 6.

³²² Submission 12 from Association of Mining and Exploration Companies, 24 March 2016, p 2 and Kane Moyle, Manager, Environment and Land Access, Chamber of Minerals and Energy of Western Australia, *Transcript of Evidence*, 4 April 2016, p 5.

SUGGESTIONS TO ADDRESS THE NEEDS OF THE SMALL SCALE MINING SECTOR

A category for small miners

7.30 A number of participants submitted that the Bill should make a marked distinction between large and small miners, with a specific set of provisions to apply only to small scale miners.³²³ The following alternatives were proposed:

- a separate set of provisions for small scale miners, being miners mining an area under 50 hectares and with fewer than 10 employees³²⁴
- a separate set of provisions for small scale miners with no more than 25 hectares disturbance open at any one time³²⁵
- a threshold of 10 hectares per tenement per year to be included in the definition of “low-impact activity” (with 10 hectares being a commonly referred threshold in aspects of native vegetation clearing and in alignment with regulation 5, item 20 of the EP Clearing Regulations)³²⁶
- operations in the intermediary size to have their own classification, between 50,000 to 1 million tonnes for the life of the project.³²⁷

7.31 It was suggested that a new section of miners be established as outlined above and that there be minimal reporting and compliance conditions for those that fall into that category.³²⁸ It was suggested that the section that establishes this category of miner should outline their rights, include an overview of the activities of participants in that category and should exclude application of certain sections of the Mining Act, including those introduced by the Bill.³²⁹

7.32 The DER noted that it supported a risk-based approach to regulation, with tiering more likely to be centred around risk. It noted that:

³²³ Submission 21A from Cranston Edwards, 24 March 2016, p 2.

³²⁴ Submission 4 from Focus Metals Pty Ltd, 23 March 2016, p 1.

³²⁵ Submission 8 from David Woodiwiss, 21 March 2016, p 3; Submission 17 from Dr Robert Fagan, 20 March 2016, p 21 and Submission 9 from Goldfields First, 22 March 2016, p 6.

³²⁶ Submission 12 from Association of Mining and Exploration Companies, 24 March 2016, p 5; Kane Moyle, Manager, Environment and Land Access, Chamber of Minerals and Energy of Western Australia, *Transcript of Evidence*, 4 April 2016, p 4; Kirrillee Caldwell, Policy Adviser, Environment, Chamber of Minerals and Energy of Western Australia, *Transcript of Evidence*, 4 April 2016, p 4 and Simon Bennison, Chief Executive Officer, Association of Mining and Exploration Companies, *Transcript of Evidence*, 4 April 2016, p 2.

³²⁷ Submission 16 from Mick Photios, 24 March 2016, p 3.

³²⁸ Submission 17 from Dr Robert Fagan, 20 March 2016, p 21.

³²⁹ Submission 21 from Cranston Edwards, 24 March 2016, p 18.

*That is the approach that is currently in the Environmental Protection (Clearing of Native Vegetation) Regulations where things like prospecting and small-scale mining activity within less sensitive environments does not require a clearing permit.*³³⁰

7.33 CME addressed the notion of a tiered structure and said:

I do not think segregating those aspects is necessarily the right way to go. Earlier I made a recommendation around a template EMS as a way to overcome what are some very real issues that have been put forward by the prospecting side of the industry. I do not think segregating cohorts or parts of the sector is an efficient way to legislate or regulate in the case of mining and exploration in Western Australia. That would be our preferred approach out of this.

*... I would also just like to put on the record that whilst, yes, you are correct that we do represent some of the very large miners in Western Australia, we also represent some small miners and also exploration companies in Western Australia. I do not think the lens in which we have looked at this legislation is purely just for the large mining companies in Western Australia.*³³¹

7.34 Focus Metals Pty Ltd addressed the notion of a tiered structure and requested that the Committee and legislators be ‘generous’ with the limits applied to a category for small scale miners, to encourage and allow people to grow their businesses without unnecessary constraint.³³²

Finding 26: The Committee is supportive of the proposals put forward at paragraph 7.30 above by prospectors and small scale miners as to a tiered approach.

Recommendation 18: The Committee recommends that the Government acknowledge the diversity of the sector by introducing a tiered approach to the mining industry.

³³⁰ Sarah McEvoy, Executive Director, Strategic Policy and Programs, Department of Environment Regulation, *Transcript of Evidence*, 4 April 2016, p 4.

³³¹ Kane Moyle, Manager, Environment and Land Access, Chamber of Minerals and Energy of Western Australia, *Transcript of Evidence*, 4 April 2016, pp 8–9.

³³² Jeremy Samuel, Business Development Executive, Focus Metals, Pty Ltd, *Transcript of Evidence*, 11 April 2016, p 6.

A new approvals process for large mines

7.35 Mr Cranston Edwards suggested that a new approvals division of the EP Act be established for large mine approvals (projects over 50 hectares).³³³

Categories for certain regions

7.36 Other submissions suggested that certain exclusion zones be made for certain areas, for example:

- *‘designated mining or resource provinces special mining reserve areas, for well-worked and already stressed mining regions, requiring less stringent tenement application, reporting and rehabilitation standards. These areas to be confined to already identified regions where the principle activity is mining. We have designated national parks and marine reserves, why not designated resource parks?’*³³⁴
- different mining areas should receive different treatment and that the Goldfields area, in particular should be treated differently by the DMP as an area where historical mining has been undertaken³³⁵
- known areas around Kalgoorlie and Coolgardie should be treated entirely differently, a *‘special precinct for existing known goldfields’*, land that has already been mined, with no obligation for an EMS.³³⁶

7.37 The Wilderness Society of WA was not in favour of regional segregation:

*If I could just comment on the suggestion that we put in some sort of regional based provisions, I think that would just add yet another layer of unnecessary complication. There are already numerous different things under different acts—whether it is the CALM act or the Land Administration Act or the Mining Act or the EP act—which all apply, to some extent, in different ways in different regions for different reasons. I do not really think that is making anybody’s lives better.*³³⁷

³³³ Submission 21 from Cranston Edwards, 24 March 2016, p 18.

³³⁴ Submission 17 from Dr Robert Fagan, 20 March 2016, p 22.

³³⁵ Submission 15 from North Eastern Goldfields Exploration Pty Ltd, 24 March 2016, p 3.

³³⁶ Leslie Lowe, President, Amalgamated Prospectors and Leaseholders Association of WA, *Transcript of Evidence*, 4 April 2016, p 8-9.

³³⁷ Peter Robertson, Senior Campaigner, The Wilderness Society of WA, *Transcript of Evidence*, 4 April 2016, p 7.

State Government agreement

- 7.38 Mr Cranston Edwards suggested the establishment of a State Government agreement to cover the requirements of small miners.³³⁸

The Queensland approach

- 7.39 One example of a tiered approach to regulation of mining activities is the system operating in Queensland. In Queensland, under the operation of the *Environmental Protection Act 1994* (Qld) (**EPAQ**), certain environmentally relevant activities trigger a requirement for a person or entity to apply to the Department of Environment and Heritage Protection (**EHP**) for an environmental authority (**EA**). Environmental activities are industrial, resource or intensive agricultural activities with the potential to release contaminants into the environment. They incorporate a range of activities, including mining and resource activities.
- 7.40 When applying for a resources permit in Queensland, an EA must be applied for to cover the particular activities you intend to carry out. The form of application varies depending on the level of risk associated with the project.
- 7.41 In recognition of the fact that small scale mining activities generally have a relatively low environmental impact, a legislative framework was established in Queensland such that certain small scale miners can operate without an EA and instead operate according to the Small Scale Mining Code.³³⁹
- 7.42 Miners that fall under the Small Scale Mining Code must follow the guidelines and mandatory conditions contained therein and also comply with the general environmental obligations under the EPAQ.
- 7.43 The following table sets out mining activities which may be exempt from the requirement of an EA:

Claim/Permit	Mineral	Activities	Area
Prospecting permit	Any	Any	Any
Exploration permit	Minerals other than coal	Any	4 sub-blocks or less

³³⁸ Submission 21 from Cranston Edwards, 24 March 2016, p 18 and Submission 21A from Cranston Edwards, 24 March 2016, pp 2–3.

³³⁹ Department of Natural Resources and Mines, *Small Scale Mining Code*, March 2013, Available at: https://www.dnrm.qld.gov.au/_data/assets/pdf_file/0006/262374/small-scale-mining-code.pdf Viewed 19 April 2016.

			No more than 1 ha can be disturbed at any time
Mining claim	Corundum, gemstones or other precious stones	Machine or hand-mining	20 ha or less No more than 5 ha can be disturbed at any time
Mining claim	Minerals other than coal	Hand-mining	1 ha or less

7.44 Mining activities cannot occur:

- in a designated precinct in a strategic environmental area
- within 1 km of a Category A or 500 m of a Category B environmentally sensitive area
- on a strategic cropping area
- in a watercourse or riverine area.

DEFINITION OF ‘PROSPECTOR’

7.45 A number of participants submitted that a definition of ‘prospector’ should be incorporated into the Mining Act.³⁴⁰ Dr Robert Fagan stated that what was required was:

*a proper definition of professional prospector and small miner as a recognised category, and accommodation of the special needs and circumstances of this category within the Mining Act, as distinct from the needs of the larger corporate miners and the small recreational prospectors*³⁴¹

7.46 Although when asked by the Committee about whether ‘prospector’ should be defined, APLA responded:

*You have to be careful what you wish for, I suppose, the answer to that would be. I do not know. I am not sure I would. I would really have to think about that.*³⁴²

³⁴⁰ For example, Leslie Lowe, President, Amalgamated Prospectors and Leaseholders Association of WA, *Transcript of Evidence*, 4 April 2016, p 10.

³⁴¹ Submission 17 from Dr Robert Fagan, 20 March 2016, p 21.

³⁴² Leslie Lowe, President, Amalgamated Prospectors and Leaseholders Association of WA, *Transcript of Evidence*, 4 April 2016, p 10.

- 7.47 It is acknowledged that ‘prospector’ is not defined in the Mining Act. However, terms such as ‘miner’ and ‘explorer’ are not defined either. This is a consequence of how the Mining Act is drafted. Rather than referring to the persons who hold the rights, it addresses the rights and tenements themselves (being the miner’s right, prospecting licence, exploration licence, retention licence, mining lease, general purpose lease and miscellaneous licence). Creating a definition for prospector would likely be inconsistent with the operation of the Mining Act. This does not necessarily mean that prospectors’ interests are not incorporated and addressed by the Mining Act.

NEW OR INCREASED FEES

- 7.48 In 2015, a preliminary version of the draft Mining Amendment Regulations (No. 2) 2015³⁴³ became known to the industry. Regulation 5 proposed to amend Schedule 2 of the Mining Regulations to insert the following:

23. *Assessment fee in respect of a programme of work* 590.00

24. *Assessment fee in respect of a mining proposal* 6 950.00

- 7.49 It is important to note that these amendment regulations were never published in the *West Australian Government Gazette* and consequently did not become law. Despite this, many of the submissions made reference to these fees, with proponents greatly concerned about the imposition of new fees.³⁴⁴ There appeared to be great uncertainty in the community as to whether the fees actually applied or as to whether they would be introduced in the future. The Shire of Laverton noted these serious concerns about fees and recommended that a proper explanation be given in order to clarify matters.³⁴⁵ CME and APLA considered that some of the strong opposition towards the Bill from the prospecting sector had evolved out of the proposed fees.³⁴⁶

- 7.50 Mr Christopher Potts noted that small miners and prospectors often did not have funds at their disposal at the outset of a project:

‘What we do is we fund our projects out of our own cash flow from the previous income that we have earned. We have to use our machinery smartly and keep the costs down. If we go to the bank and

³⁴³ See Appendix 3 to this Report.

³⁴⁴ Submission 3 from Paul Simmonds, 22 March 2016, p 2; Submission 3D from Paul Simmonds, 22 March 2016, pp 1–2; Submission 9 from Goldfields First, 22 March 2016, p 3; Submission 12 from Association of Mining and Exploration Companies, 24 March 2016, p2; Submission 15 from North Eastern Goldfields Exploration Pty Ltd, 24 March 2016, pp 1–3; Submission 17 from Dr Robert Fagan, 20 March 2016, p 21 and Submission 27 from Michael Charlton, 24 March 2016, p 2.

³⁴⁵ Submission 6 from Shire of Laverton, 23 March 2016, p 3.

³⁴⁶ Submission 29 from Chamber of Minerals and Energy of Western Australia, 24 March 2016, p 2 and Leslie Lowe, President, Amalgamated Prospectors and Leaseholders Association of WA, *Transcript of Evidence*, 4 April 2016, p 12.

say, 'Look, I know there's gold there; I can feel it in me waters', they would laugh you out of the bank!

... It is not easy to go along and raise money, so it is all out of our own cash flow. Often we have to go and get part-time jobs.³⁴⁷

7.51 The DMP stated that:

*This Bill does not introduce any new fees or charges. The power to charge fees for assessing environmental applications already exists in the Mining Act, but there is currently no intention to introduce fees.*³⁴⁸

7.52 The Committee questioned whether the DMP intended to change or introduce fees and asked whether it could make a statement to that effect. The DMP responded:

The department is not in that position. I guess we will respond to government in terms of fees and charges, so the department itself does not have any plans to introduce fees and charges.

... It is up to the government to make decisions.

*... We react to them. That is, unfortunately, the case where we are asked to provide some material around introducing fees and charges and governments will say, "What are the likely thresholds and what is the justification if we did it?" We do that scenario work, but it is up to government to decide whether they want to progress it or not.*³⁴⁹

7.53 The current Mining Act contains the legislative power for the application of assessment fees.³⁵⁰ It was also submitted that the ability to charge a fee, that is, all cost recovery, be removed from the Mining Act.³⁵¹ It was submitted that there were other options for the DMP than charging fees:

There is tens of millions of dollars that comes in from the collection of rents and other revenue streams from the industry, let alone royalties and other taxes and so forth, and goes into consolidated revenue. I think if the government is truly intent on encouraging investment in this state, particularly in new discoveries, particularly in greenfields

³⁴⁷ Christopher Potts, *Transcript of Evidence*, 11 April 2016, p 10.

³⁴⁸ Submission 11 from the Department of Mines and Petroleum, 18 March 2016, p 3.

³⁴⁹ Dr Tim Griffin, Deputy Director General, Approvals and Compliance, Department of Mines and Petroleum, *Transcript of Evidence*, 4 April 2016, p 9.

³⁵⁰ See for example, Mining Act s 46(aa)(ia); s 63(aa)(ia); s 82(1)(ca)(i) and 82A(2)(ba).

³⁵¹ Submission 9 from Goldfields First, 22 March 2016, p 5; Submission 17 from Dr Robert Fagan, 20 March 2016, p 21 and Submission 29 from Chamber of Minerals and Energy of Western Australia, 24 March 2016, p 2.

*exploration, of which [programmes of work] is a key component, it should be looking at accessing, for example, consolidated revenue to make up any differences that the department may need to really meet those changes that have eventuated through this whole process that vindicate further resourcing. I am not sure, having said that, that the addition of, say, a dozen FTEs, or whatever numbers are required to meet further inspectorial requirements of the department, are necessarily the most efficient use of those sorts of funds.*³⁵²

*...Just to add to the comment regarding tens of millions of dollars, as I understand it, the last time we inquired it was somewhere around \$80 million a year in terms of collection that goes into Treasury—not through the Department of Mines and Petroleum’s accounts, but through Treasury and into the consolidated account. That is through tenement rentals, through application fees and other charges that are raised through the process.*³⁵³

FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

7.54 A number of submissions suggested that the Bill was not consistent with fundamental legislative scrutiny principles. As outlined in paragraph 1.8 above, fundamental legislative scrutiny principles have been used as a framework for scrutinising bills since 2004. The following fundamental legislative scrutiny principles were identified by proponents as being violated by the Bill:³⁵⁴

- (2) Is the Bill consistent with principles of natural justice?
- (5) Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?
- (6) Does the Bill provide appropriate protection against self-incrimination?
- (7) Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?
- (9) Does the Bill provide for the compulsory acquisition of property only with fair compensation?

³⁵² Simon Bennison, Chief Executive Officer, Association of Mining and Exploration Companies, *Transcript of Evidence*, 4 April 2016, p 3.

³⁵³ Graham Short, National Policy Manager, Association of Mining and Exploration Companies, *Transcript of Evidence*, 4 April 2016, p 3.

³⁵⁴ Submission 21 from Cranston Edwards, 24 March 2016, p 13; Submission 17 from Dr Robert Fagan, 20 March 2016, p 28 and Michael Photios, *Transcript of Evidence*, 11 April 2016, p 1.

- (10) Does the Bill have sufficient regard to Aboriginal tradition and Island custom?

7.55 Principles five, six and nine are addressed above in paragraphs 4.156 through 4.172 above. The remainder are addressed below.

(2) Is the Bill consistent with principles of natural justice?

7.56 The Committee was not directed to a particular aspect of the Bill. Whether or not natural justice has been achieved is based on three aspects: the right to be heard, an absence of bias and procedural fairness.

Right to be heard

7.57 This requires that action must not be taken which will deprive a person of some right, interest, or legitimate expectation of a benefit, without the person being given an adequate opportunity to put their case to the decision-maker. The Bill does not provide for interference with existing rights without due process.

Absence of bias

7.58 A decision-maker must be unbiased and the test is ‘*whether the relevant circumstances would give rise, in the mind of a party or a fair-minded member of the public, to a reasonable apprehension or suspicion of a lack of impartiality on the part of the decision-maker.*’³⁵⁵ Decision-makers provided for in the Bill are the Minister, the Director General, the mining registrars and mining wardens. There is no evidence of bias as regards the application of the provisions of the Bill on the behalf of those parties. The Bill does not include appeal provisions.

Procedural fairness

7.59 It is noted that in referring to this principle, participants may have intended to refer to the matter of stakeholder consultation rather than the natural justice granted by the provisions of the Bill itself. The matter of stakeholder consultation is covered in paragraphs 7.14 to 7.27 above.

7.60 The Bill does not appear to offend the principles of natural justice.

(7) Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?

7.61 The Committee was not directed to a particular aspect of the Bill but, based on other aspects of the submissions, presumed this to be a reference to transitional provisions

³⁵⁵ Department of the Premier and Cabinet, *The Queensland Legislation Handbook: Governing Queensland*, The State of Queensland, January 2014, p 32.

items 23 and 24 of Schedule 2 Division 3. These sections are addressed in paragraphs 4.176 to 4.178 above.

- 7.62 The Committee does not consider that those provisions (or any other provisions of the Bill) operate retrospectively and accordingly considers this principle upheld.

(10) Does the Bill have sufficient regard to Aboriginal tradition and Island custom?

- 7.63 On the whole, the Committee does not consider that the amendments contained in the Bill themselves fail to give proper regard to Aboriginal tradition and Island custom. However, the Committee notes that it was submitted that the Aboriginal prospecting community would have great difficulty in managing a wholly online DMP framework. Further comments on online systems are provided in paragraphs 4.59 to 4.65 above.
- 7.64 The Committee considers that the DMP failed to give proper consultation for and consideration of the formal processes involved for Aboriginal prospectors in navigating solely online systems of operation.

PARLIAMENTARY PROCEDURE GUIDELINES

- 7.65 Mr Peter Smith, Mr Ray Kean and Mr Paul Fitzgerald suggested that Parliamentary procedures guidelines were not met.³⁵⁶ The Department of Premier and Cabinet published the *Parliamentary Procedures Guide*, which includes the following guideline:³⁵⁷

Detailed drafting instructions should be included in Cabinet submissions seeking approval to draft legislation, unless there are exceptional circumstances. Before these drafting instructions are finalised by an agency, consultations should be undertaken with individuals and bodies likely to be affected by the proposal.

- 7.66 The Committee recognises the importance of stakeholder consultation and refers to its discussion on this point in paragraphs 7.14 to 7.27 above.

³⁵⁶ Submission 14 from Peter Smith, 23 March 2016, p 2 and Submission 18 from Ray Kean & Paul Fitzgerald, 20 March 2016, p 1.

³⁵⁷ Department of Premier and Cabinet, *Parliamentary Procedures Guide*, prepared by Parliamentary Services Branch, The Government of Western Australia, Western Australia, July 2013, p 1.

CHAPTER 8

CONCLUSION

- 8.1 The Committee has identified that the application of certain provisions of the Mining Act, as purported to be amended or introduced by the Bill, create uncertainty and may have certain negative consequences.
- 8.2 The Committee has outlined these matters in the body of the Report and made appropriate findings and recommendations to reconcile those concerns.
- 8.3 The Committee commends its Report to the House.



Hon Robyn McSweeney MLC
Chair

10 May 2016

APPENDIX 1

STAKEHOLDERS, SUBMISSIONS AND HEARINGS

STAKEHOLDERS INVITED TO PROVIDE A SUBMISSION

The following stakeholders were invited to provide a submission:

- Department of the Premier and Cabinet
- Department of Mines and Petroleum
- Department of Environment Regulation
- Environmental Protection Authority
- Department of State Development
- Law Society of Western Australia
- Professor Richard Bartlett, UWA Law School, Director Centre for Mining, Energy and Natural Resources Law
- Professor Alex Gardner, UWA Law School
- Australian Mining Petroleum Law Association
- Chamber of Minerals and Energy of Western Australia
- Australasian Institute of Mining and Metallurgy
- Association of Mining and Exploration Companies
- Minerals Council of Australia
- Amalgamated Prospectors & Leaseholders Association of Western Australia
- Goldfields First
- Chamber of Commerce and Industry
- Conservation Council of Western Australia
- Pastoralists and Graziers Association of Western Australia
- Environmental Defender's Office of Western Australia
- Commonwealth Department of Environment

SUBMISSIONS RECEIVED

Submissions were received from the following parties. The submissions are available for viewing on the Committee's website at <http://www.parliament.wa.gov.au/leg>.

- Hugh Walley
- Nicholas Cukela
- Paul Simmonds
- Jeremy Samuel, Business Development, Focus Metals Pty Ltd
- George Buckley
- Steven Deckert, Chief Executive Officer, Shire of Laverton
- Nigel Heald
- David Woodiwiss
- Dr Robert Fagan, Goldfields First
- Dr Tom Hatton, Chairman, Environment Protection Authority
- Richard Sellers, Director General, Department of Mines and Petroleum

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- Simon Bennison, Chief Executive Officer, Association of Mining and Exploration Companies
 - Leslie Lowe, President, Amalgamated Prospectors and Leaseholders Association of WA Inc
 - Peter Smith
 - Andrew Pumphrey, Exploration Geologist, North Eastern Goldfields Exploration Pty Ltd
 - Michael Photios
 - Dr Robert Fagan
 - Ray Kean and Paul Fitzgerald
 - Mr Lynch
 - Peter Robinson, Campaigner, Kimberley, Great Western Woodlands, The Wilderness Society of WA Inc
 - Cranston Edwards
 - Darby Renton
 - Steve Kean
 - George Setnik
 - Christopher Potts
 - Glyn Morgan
 - Michael Charlton
 - Monika Doepgen
 - Reg Howard-Smith, Chief Executive, Chamber of Minerals and Energy of Western Australia
 - Gerard Brewer
 - Patrick Pearlman, Principal Solicitor, Environmental Defender's Office WA Inc
 - Chris Clegg, Senior Associate, MKII Consulting Pty Ltd, Mining Tenement Management
 - Phil Nolan

HEARINGS

The Committee held public hearings for interested parties, in Perth on 4 April 2016 and in Kalgoorlie on 11 April 2016. A summary of the parties who appeared before the Committee is set out below. Transcripts of the public hearings are available on the Committee's website at <http://www.parliament.wa.gov.au/leg>.

Monday, 4 April 2016, Perth

- Department of Environment Regulation
 - Jason Banks, Director General
 - Sarah McEvoy, Executive Director, Strategic Policy and Programs
 - Agnes Tay, Acting Director, Strategy and Reform
- Department of Mines and Petroleum
 - Dr Tim Griffin, Deputy Director General, Approvals and Compliance
 - Dr Phil Gorey, Executive Director Environment
 - Jane Hammond – Legal Manager – Reform
 - Dan Machin, General Manager Petroleum

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- The Chamber of Minerals and Energy of Western Australia
 - Kane Moyle, Manager, Environment and Land Access
 - Kirrillie Caldwell, Policy Adviser, Environment
 - Association of Mining and Exploration Companies Inc
 - Simon Bennison, Chief Executive Officer
 - Graham Short, National Policy Manager
 - Amalgamated Prospectors and Leaseholders Association of WA Inc
 - Leslie Lowe, President
 - The Wilderness Society of WA Inc
 - Peter Robinson, Campaigner
 - Environmental Defender's Office WA Inc
 - Patrick Pearlman, Principal Solicitor

Monday, 11 April 2016, Kalgoorlie

- Goldfields First
 - Dr Robert Fagan
 - Mike Charlton
 - Steve Kean
 - Andrew Pumphrey
- Focus Metals Pty Ltd
 - Jeremy Samuel, Business Development Executive
- Mr Lynch
- Cranston Edwards
- Nicholas Cukela
- Michael Photios
- Paul Simmonds
- Byron Moller
- Phil Nolan
- David Woodiwiss
- Christopher Potts
- Gerard Brewer
- Ray Kean
- Paul Fitzgerald
- Darby Renton

APPENDIX 2

FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

Does the Bill have sufficient regard to the rights and liberties of individuals?

1. Are rights, freedoms or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?
2. Is the Bill consistent with principles of natural justice?
3. Does the Bill allow the delegation of administrative power only in appropriate cases and to appropriate persons?
4. Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?
5. Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?
6. Does the Bill provide appropriate protection against self-incrimination?
7. Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?
8. Does the Bill confer immunity from proceeding or prosecution without adequate justification?
9. Does the Bill provide for the compulsory acquisition of property only with fair compensation?
10. Does the Bill have sufficient regard to Aboriginal tradition and Island custom?
11. Is the Bill unambiguous and drafted in a sufficiently clear and precise way?

Does the Bill have sufficient regard to the institution of Parliament?

12. Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?
13. Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?
14. Does the Bill allow or authorise the amendment of an Act only by another Act?
15. Does the Bill affect parliamentary privilege in any manner?
16. In relation to uniform legislation where the interaction between state and federal powers is concerned: Does the scheme provide for the conduct of Commonwealth and State reviews and if so, are they tabled in State Parliament?

APPENDIX 3

DRAFT MINING AMENDMENT REGULATIONS (No. 2) 2015

DRAFT

Mining Act 1978

Mining Amendment Regulations (No. 2) 2015

Made by the Governor in Executive Council.

1. Citation

These regulations are the *Mining Amendment Regulations (No. 2) 2015*.

2. Commencement

These regulations come into operation as follows —

- (a) regulations 1 and 2 — on the day on which these regulations are published in the *Gazette*;
- (b) the rest of the regulations — on 1 July 2015.

3. Regulations amended

These regulations amend the *Mining Regulations 1981*.

4. Part V Division 3B inserted

After Part V Division 3A insert:

Division 3B — Assessment fees for programmes of work and mining proposals

74B. Programmes of work (Act s. 46, 63, 70H(1) and 82(1))

- (1) The assessment fee for the purposes of sections 46(aa)(ia), 63(aa)(ia), 70H(1)(aa)(ia) and 82(1)(ca)(i), is the fee set out in Schedule 2 item 23.

Mining Amendment Regulations (No. 2) 2015**DRAFT****r. 4**

- (2) Despite subregulation (1), the assessment fee is not payable in respect of a programme of work if —
- (a) the programme of work is in respect of the use of ground disturbing equipment on land that —
 - (i) comprises an area of not more than 0.25 ha; and
 - (ii) is not land, or land of a class, to which section 24 applies;
 - and
 - (b) the holder of the relevant mining tenement has complied with a former programme of work in respect of that use.
- (3) In subregulation (2) —
former programme of work means a programme of work that is lodged and approved on or after 1 July 2015.

74C. Mining proposals (Act s. 74 and 82A(2))

- (1) A mining proposal accompanying an application for a mining lease under section 74(1)(ca), or lodged under section 74(1AA), is to be accompanied by the fee for the assessment of the proposal set out in Schedule 2 item 24.
- (2) The assessment fee for purposes of section 82A(2)(ba) is the fee set out in Schedule 2 item 24.

DRAFT***Mining Amendment Regulations (No. 2) 2015***

r. 5**5. Schedule 2 amended**

- (1) Delete the reference after the heading to Schedule 2 and insert:

[r. 2, 4D(2), 16C(2), 23BA(2), 25B, 28A(1), 64(1b) and (1c), 74B(1), 74C(1) and (2), 84D, 109(1) and (3), 121(2), 163(2) and (4) and 165(7)(f)]

- (2) In Schedule 2 after item 22 insert:

23.	Assessment fee in respect of a programme of work	590.00
24.	Assessment fee in respect of a mining proposal	6 950.00

Clerk of the Executive Council.