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country  
culture  
people  
future

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## Overview

### Best of Both Worlds: Managing Cultural Obligations and Commercial Imperatives in Heritage & Land Access Negotiations

- Heritage Agreements vs Native Title Land Access Agreements
- Demands of Cultural Obligations vs Demands of Industry
- Taking Instructions in a Culturally Appropriate Manner
- Interdisciplinary nature of Land Access Negotiations
- Optimising Heritage Protection: Contract or Statute?
- Best of Both Worlds? Heritage Protection and Socio-economic Benefit



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# Negotiating Heritage Agreements

- Focus of discussion – “Future Act” environment, predominately mineral exploration, development, production and associated infrastructure

## Key Issues relevant to “negotiating” heritage agreements



- Who negotiates an Aboriginal heritage agreement?
- DIA Cultural Heritage Due Diligence Guidelines
- “Future Act” process (*Native Title Act*)
- Type of proposed Activity
- Tenement by tenement; project by project; “claim wide”
- Agreed Aboriginal Cultural Heritage Principles & Protocols
- Heritage Clearances vs Heritage Protection

## “Land Access” Agreements

Approach to “Heritage Protection” and/or “Heritage Clearances/ Consents” often differs depending on the nature of the proposed activities that will or may affect native title or impact Aboriginal Cultural Heritage including Aboriginal Sites

For example (Illustration Only)

Activity	Observations
Exploration	Site avoidance in most cases, standalone agreements common
Mining	Site avoidance “where practicable” – otherwise minimisation, mitigation of impact (salvage & storage)
Infrastructure (mining)	Site avoidance “where practicable” – usually wider scope to “move” infrastructure
Infrastructure (non-mining)	Site avoidance “where practicable”

## “Land Access” Agreements

### “Bundle of Rights” = “Bundle of Consents” in Land Access Negotiations?

General trend for Proponents to favour “Land Access” agreements with Native Title Parties incorporating mining, infrastructure, general land access consents and Aboriginal Cultural Heritage & Environmental Management consents/ “non-objections” (“comprehensive” agreements)

Native Title Parties may also prefer to deal with heritage and environmental protection in a comprehensive manner acknowledging the nexus between land access consents and potential impact to Aboriginal Sites





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# “Comprehensive Agreements”

## Potential Advantages

“Partnership” approach to heritage management

Ability to negotiate contractual “exclusion zones” and modified consents provisions

Clear, enforceable processes for notification, consultation and making applications under relevant Laws

Ability to negotiate support & training to enhance cultural heritage management processes

Direct (and mandated) involvement of Native Title Parties in heritage (archaeological & ethnographic) surveys

## Potential Disadvantages

“Commercialisation” of heritage & environment processes

Negotiated space: “trade-offs”

Restrictions (or Prohibitions) on ability to make independent comment or objections under relevant Laws

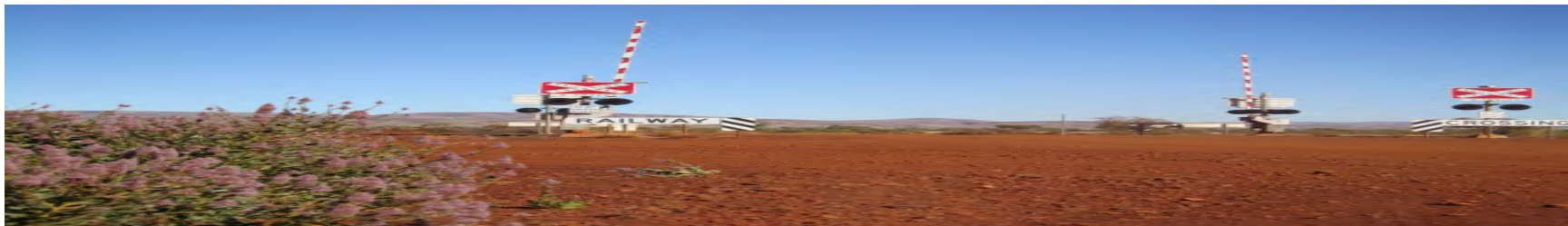
Focus on heritage “clearance” rather than protection

A rejection of the “comprehensive” approach may result in no agreement being reached



# Cultural Obligations vs Commercial Imperatives

- The Quest for “Certainty”
  - Proponents often state that “certainty” is required for the operation and expansion of its “Business”
  - Native Title Parties also require certainty in land access negotiations to ensure the ongoing practice of their law & culture and to uphold cultural obligations to maintain and protect certain areas (ceremonial, spiritual, water sources)
  - Land Access is a two-way street
- Conflicting requirements – agree to disagree?



# Instruction Taking

- “Relationship” factors
  - Native Title Party & Proponent
  - Native Title Party & Legal Representatives
  - Age, gender, experience, knowledge
- Cross cultural communication
- Restricted & Sensitive Information
- Onsite consultations vs “town” meetings
- “Mapping” heritage sites and/or exclusion zones



# Collaborative Approach

## Who's in the room?

- Native Title Claim Group Members
- Mining Companies/Government/Developers
- Lawyers (In-house & external consultants)
- Anthropologists/Archaeologists
- Heritage Service Providers/Coordinators
- Liaison Officers
- GIS Officers

# Best Practice?

- *Aboriginal Heritage Act*: the review we had to have?
- Striking a balance between heritage clearances and heritage protection
- Clear, enforceable notification, consultation and approvals processes
- Contractual Exclusion Zones, modified consents provisions – Agree to disagree?
- Early identification of areas of significance, input into planning processes



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# Best of Both Worlds?



Best Practice Heritage & Environmental Protection and Management regime

Fair and reasonable financial and non-financial benefits package

Partnership approach based on mutual respect for each Party's interests and aspirations recognising that those interests and aspirations may not always align... sometimes

“Good fences make good neighbours”

Robert Frost