RESPONSE TO SUBMISSIONS

DRAFT EXCESS TONNAGE GUIDELINE

Introduction

The *Mining Act 1978* (Mining Act) confers the holders of prospecting licences, special prospecting licences, exploration licences and retention licences the rights to excavate and extract or remove from the land, earth, soil, rock, stone, fluid or mineral bearing substances within identified tonnage limits. When the tonnage limit will be exceeded by the proposed activities, an excess tonnage application must be submitted for approval.

In December 2020, DMIRS released the draft guideline to:

- provide clearer direction on the information required from prospecting and exploration licence holders submitting excess tonnage applications
- increase clarity and guidance on types of evidence of native title consent required for an excess tonnage application and
- articulate the inclusion of the extraction of fluid or mineral bearing substances relevant to the potash and salt minerals in brine operations in excess tonnage considerations.

This document is a summary of the feedback received and DMIRS' responses to those comments.

Stakeholder Comments

The review process notified respondents that their submissions would be made publicly available on the DMIRS website. However, personal details or company names attributed to those comments could be made confidential at their request.

For the purposes of more easily grouping and responding to feedback from stakeholders, the submissions have been sorted by section of the draft document, however the text of the submissions are included verbatim. DMIRS thanks all stakeholders for their considered input into the process.

Final Document Revisions

The key changes are: clarifying that the additional supporting information demonstrating consent from a Native Title Party is required where the relevant tenement was granted via the expedited procedure, clarify that 'Native Title Party' refers to a 'registered Native Title Party', clearly state that evidence of Native Title consent needs to be provided for hillside drilling activities and that supporting information should either be a Statutory Declaration or a Letter of Consent from the Native Title Party.

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			GENERAL COMMENTS	
1.	**Cement Concrete & Aggregates Australia (CCAA)**	**General**	Thank you for the opportunity to provide comment on the draft Excess Tonnage Guidelines. CCAA does not have any issues with the new guideline as generally extractive industry exploration programmes would normally be below the threshold extraction tonnage values. CCAA welcomes the new guideline in providing clarity in these situations.	Comments noted with thanks.
2.	**Association of Mining and Exploration Companies (AMEC)**	**General**	AMEC engaged with the Department throughout the consultation period for Excess Tonnage Guidelines when last reviewed in 2017. We made a submission and held a subsequent workshop for our members with Dr Ivor Roberts, then Executive Director Mineral Titles Division to discuss the proposed amendments. The concerns we had with the proposed amendments' effect on Native Title remain relevant to the current consultation process, as well as the proposed inclusion of hillside drilling.	Comments noted and addressed further below.
3.	**Cyril Greach**	**General**	My comment would be why should Native Title approval be further required if land is cleared of any Native Title sites existing to any tonnage excess. Surely, excess tonnage is usually for removal of tonnage below ground rather than across ground? With respect to alluvial diamonds excess tonnage is required fir JORC requirements. The amount of allowable tonnage without Ministerial Approval should be changed to accommodate situations such as for alluvial diamonds.	Comments noted. Excess tonnage applications are assessed on a case by case basis. The prescribed limits as detailed in the *Mining Act 1978* are outside the scope of this review.
4.	**AMEC**	**General**	Industry appreciates and welcomes the provision of good quality guidance materials from Government. Clear, concise policy documents minimise the need for prescriptive measures, and encourages Industry to present high-quality applications to regulatory bodies for assessment, with an overall increase in transparency. AMEC requests insight from the Department into the current state of excess tonnage applications, particularly if there are any areas in the current process that frequently require re-addressing or additional information for assessment? If so, it would be prudent to address these ambiguities in the current consultation period, to continue encouraging consistent, high-quality applications and assessments.	This review has been undertaken with the view of continual improvement and as part of DMIRS' categorisation of documents according to an endorsed document hierarchy for its policy framework. Per DMIRS' Strategic Intent, the Department is committed to continuous improvement of our technical and other capacities and processes to improve service delivery, as well and providing guidance and support to staff, community, business and other stakeholders.
5.	**The PKKP Aboriginal Corporation (PKKPAC)**	**General**	**Introduction** The PKKP Aboriginal Corporation RNTBC ("PKKPAC") has been invited by the Department of Mines, Industry Regulation and Safety ("DMIRS") to make submissions in relation to DMIRS's draft Excess Tonnage Guidelines. It welcomes this opportunity to do so. The draft guidelines were posted by DMIRS on 16 December 2020 and, according to DMIRS, "provide [ ] increased clarity and guidance on the types of evidence of native title consent required for an excess tonnage application". DMIRS further refers to them as the "enhanced guideline… intended to provide clearer direction on the information required from prospecting and exploration licence holders submitting excess tonnage applications".	Comments noted with thanks. The Guideline is focussed on addressing requirements under the *Mining Act 1978*, as distinct from the *Native Title Act 1993*. The Guideline has been updated to state that where the application for excess tonnage is seeking a cumulative total of more than 10,000 tonnes per tenement and the tenement(s) were granted following the expedited procedure, the application must be accompanied by a letter of consent from the registered Native Title Party

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			In these submissions PKKPAC will challenge these assertions and, in particular, will argue that the draft guidelines: • Do not properly identify what constitutes native title consent; • Do not properly identify what constitutes evidence of that consent; and • Do not provide clarity as to what the requirements are or should be. Further, PKKPAC will submit as to what properly constitutes native title consent for the purposes of an excess tonnage application, what evidence of that consent should be provided and what the requirements more generally should be. **Statutory Background** Section 48 of the *Mining Act 1978* sets out the rights conferred by a prospecting licence in relation to the land which is the subject of that licence. These include: *"(c) to excavate, extract or remove… from such land, earth, soil, rock, stone, fluid or mineral bearing substances in such amount, in total during the period for which the licence remains in force, as does not exceed the prescribed limit, or in such greater amount as the Minister may, in any case, approve in writing."* Section 66 sets out the rights conferred by an exploration licence, in substantially similar terms. In particular, the wording of paragraph 66(c) is a precise repetition of paragraph 48(c). Regulations 14 and 20 of the Mining Regulations 1981 identify the "prescribed amount" for the purposes of paragraph 48(c) and paragraph 66(c) as 500 tonnes in total in respect of a prospecting licence and 1,000 tonnes in respect of an exploration licence *"during the period for which the licence remains in force"*. Accordingly, if a prospector or explorer wishes to excavate, extract or remove more than 500 or 1,000 tonnes of material they are required to seek the Minister's approval. Subdivision P in Part 2 Division 3 of the *Native Titles Act 1993* (Cth) ("NTA") sets out provisions relating to 'future acts' giving the 'right to mine' on native title land, including the right to prospect or explore for minerals. These provision differentiate between acts to which the normal negotiation procedure applies and those which "attract [ ] the expedited procedure". The normal negotiation procedure provides the native title party with a 'right to negotiate' and requires the State, the mining company (or 'grantee party') and the native title party to negotiate in good faith in accordance with section 31, with a view to an agreement under which the native title party agrees to the State's grant of the relevant tenement to the grantee party and the activities that tenement authorises. On the other hand, the expedited procedure (detailed in section 32), where it applies, avoids the operation of the normal negotiation procedure and the tripartite obligation to negotiate in	or a statutory declaration from the applicant stating that they have agreement from the registered Native Title Party to future approvals or consent to excess tonnage. The letter of consent or Statutory Declaration are not required for tenements granted following the right to negotiate process under the *Native Title Act 1993*. The Guideline has been updated to clarify that 'native title party' refers to a 'registered native title party'.

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			good faith. The application of the expedited procedure may be asserted (by the State) where, in a section 29 notice initiating the Subdivision P process, the State includes a statement that it considers the act is "*an act attracting the expedited process*", an expression defined in section 237. Of particular relevance in this context is paragraph (c) of that definition, the effect of which is (for the purposes of section 32) that, in making the ('expedited procedure') statement, the State considers that the act (comprising the grant of the relevant exploration or prospecting licence to the grantee party" "*is not likely to involve major disturbance to any land or waters concerned* ***or create the rights whose exercise is likely to involve major disturbance to any land or waters concerned***". (emphasis added) **DMIRS Current Practice** The long-standing practice of DMIRS, including, as previously, the Department of Mines and Petroleum ("**DMP**"), (perhaps even since Subdivision P first became part of the NTA in 1998) has been to include an 'expedited procedure' statement with all section 29 notices relating to proposed exploration licences and prospecting licences over native title land in Western Australia. Having regard to section 237(c), this must have been and continue to be based on the State's considering that the grant of these licences is not likely to involve major disturbance to land or to create rights whose exercise is likely to involve such major disturbance. However, it is noteworthy, that the Department of Planning, Land & Heritage ("**DPLH**") published *Aboriginal Heritage Due Diligence Guidelines (April 2013)* where, at page 14, it identifies various activities that "*may cause major and lasting disturbance*". These include large scale land clearing, exploration drilling, bulk sampling, soil excavation and mechanical earthmoving. It is clear that DMP had been aware of the significance of the issue of 'major disturbance' and section 237(c) in the context of excess tonnage approval applications, if not before, then at least by late 2015 (see pages 16 and 21 of DMP's 'Response to Submissions' of December 2015 in relation to the April 2015 Discussion Paper). Further, following the review referred to in footnote 4 and at least since June 2018, DMIRS has had a policy requiring 'native title party authorisation' in relation to excess tonnage applications on native title land. This is set out in the DMIRS 'Excess Tonnage Procedure' (June 2018) document, which states: *"If the application for excess tonnage exceeds a cumulative total 10,000 tonnes for the specific tenement, the applicant must have the agreement to the disturbance of any affect native title party. A copy of the agreement must be lodged with the application."* However, for reasons which are entirely unexplained in the document (and, on the face of, inconsistent and illogical), the June 2018 document states that this requirement "*does not apply if the tonnage is for hillside drill pads or access tracks*".	

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			It also indicates that: • The excess tonnage application approval process "*is separate to the approval for a PoW* [Programme of Work]"; • "*Approval of an application for excess tonnage does not give the licensee the right to disturb the ground*"; and • "*the license holder must have an approved [PoW]*" before disturbing the ground. It is understood that consequently the usual practice has been for the licence holder, when applying for excess tonnage approval, to seek an associated PoW approval at the same time. **Proposed new Excess Tonnage Guideline** Paragraph 8 of the draft guidelines is in the following term: ***"Agreement from affected Native Title Party (where required)*** *Where the application for excess tonnage is seeking a cumulative total of more than 10,000 tonnes per tenement, the application must be accompanied by evidence of an agreement from the affected native title party to future approvals or consent to excess tonnage.* *Evidence should be provided in the form of:* • *An Agreement entered between the licence holder and the registered Native Title party showing details of native title party consent to future approvals or consent to excess tonnage;* • *An Indigenous Land Use Agreement entered between the licence holder and the registered native title party showing details of native title party consent to future approvals or consent to excess tonnage; or* • *Written/Letter of Consent from the registered native title party."* It is noted that the 10,000-tonnne threshold above which the agreement of the affected native title party is required is in line with the existing June 2018 document, but that, importantly, this paragraph does not include and, by implication therefore, excludes the purported exception in that document in relation to hillside drill pads and access track. The draft Guidelines otherwise appear to be seeking to provide greater clarity than in the June 2018 document as to the form of evidence required of the native title party's agreement. Paragraph 3 refers to the interaction with PoW applications. The effect of its terms is substantially similar to the equivalent section in the June 2018 document, save that the paragraph focusses on the use of ground disturbing equipment and the need for an approved PoW giving approval to the use of such equipment – in line with sections 46(aa) and 63(aa) of the Mining Act.	

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			Assessment of the Proposed Guideline The draft Excess Tonnage Guidelines necessarily address the issue of tonnage in excess of the prescribed amounts for the purposes of section 48(c) (500 tonnes) and section 66(c) (1,000 tonnes). It requires native title party agreement to cumulative 10,000 tonnes. The basis for this cumulative amount of 10, 000 tonnes is not identified or substantiated (and nor was it is the June 2018 document). In particular, it does not refer to the NTA (e.g., to section 32 or 237(c)). However, implicit from the draft Guidelines (and the June 2018 document) is that DMIRS considers more than cumulative 10,000 tonnes give rise to 'major disturbance' to land, which, if it had anticipated the excavation or removal of that amount of soil or other material at the time of the section 29 notice, it would have considered such major disturbance to be likely or at least "not unlikely". In those circumstances the act of granting the prospecting or exploration licence could not have been an act attracting the expedited procedure, but rather the normal negotiation procedure would have applied. A further inference may be drawn that DMIRS rightly recognises that what had been a limited right to prospect or explore at the time of the grant of the licence (as being subject to the prescribed 500 or 1,000 tonne limit in section 48(c) or 66(c)) would, following excess tonnage application approval (along with an approved PoW), become substantially unlimited in that regard and, it may be argued, give rise to a different, new 'right to mine' attracting the normal negotiation procedure and the associated tripartite obligation to 'negotiate in good faith' with a view to an agreement, as provided for in section 31 of the NTA (as noted above). Indeed, the draft Guidelines state that "[T]here is no limit on the amount of excess tonnage that can be applied for". PKKPAC agrees that there should be criteria for determining 'major disturbance'. For example, it would be appropriate for there to be criteria which take account of the actual physical location, or of the extent of the area (in square and cubic metres), to be disturbed. However, the quantity of tonnage of soil and other material to be excavated or removed is certainly an appropriate criterion as well and, whilst PKKPAC considers that 10,000 tonnes is too high a threshold for this purpose, it agrees that the excavation or removal of 10,000 tonnes will always constitute 'major disturbance' and on that basis that the prior written agreement or consent of the native title party to each approval by the Minister to an excess tonnage application under section 48(c) or 66(c) should be a pre-condition, and in particular in all cases where the excess tonnage application involves the cumulative total of more than 10,000 tonnes. PKKPAC acknowledges that, in relation to some (perhaps many) prospecting or exploration licences, DMIRS may not be able, at the time they applied for (or, more particularly, at the time of their related section 29 notices), to anticipate a later application for excess tonnage approval. However, in the case of certain mining companies, having regard to their past activities and practices (invariably applying for excess tonnage approval), such applications may be anticipated and, at the time of giving a section 29 notice for a new prospecting licence or exploration licence, it can only be considered likely, or at least not unlikely, that	

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			an excess tonnage application will be made and that 'major disturbance' will consequently occur. In those circumstances, the giving of an 'expedited procedure' statement would be wholly inappropriate, if not disingenuous, and seen as a device to circumvent the normal negotiation procedure under the NTA. ***What constitutes native title consent?*** As has been emphasized by Federal Parliament's Joint Standing Committee on Northern Australia in its December 2020 Interim Report into the destruction of the Juukan rock shelters ("Never Again"), the required standard of consent of Traditional Owners in relation to mining and related activities should be: • *"free, prior and informed"* ("FPIC"); and also • *"current"*. ***What constitutes appropriate evidence of that consent?*** The draft Guidelines refer to the requirement for evidence of *"an agreement from the affected native title party to future approvals or consent to excess tonnage"*. Before considering what is proposed by way of evidence of such an agreement, it is necessary to consider what is or may be intended by the expression *"future approvals or consent to excess tonnage"*. The *"approvals or consents"* referred to in the draft Guidelines should be clearly identified as being limited to approvals in writing, for the purposes of section 48(c) or 66(c), by the Minister to amounts in excess of the 'prescribed limit' (for the purposes of whichever is the relevant section). We consider that the use of the words "*or consent*" in addition to "*approvals*" (as if referring to something else) tends to confuse. More problematic is the use of the word "*future*". For evidence of a native title party's agreement to be capable of reflecting its "*free, prior and informed consent*" and be "*current*", it is necessary for adequate details of the excess tonnage approval application to be available to the native title party prior to that agreement. What might otherwise be (possibly) have been inferred to be such an agreement should, in the absence of such details of the application, be recognised as failing to meet the necessary consent standard, and accordingly it cannot and does not constitute evidence of a native title party's consent that can be relied upon. Further, an Agreement or ILUA purporting to show details of such consent would not in actuality do so, because, in the absence of specific details of the excess tonnage applied for, there is no express FPIC to such approval evidence nor can such FPIC be inferred in the circumstances. In any event, insofar as the proposed Guidelines require the Agreement or ILUA to "*show [ ] details of native title party consent to future approvals… to excess tonnage*", in the absence of a specific reference in that Agreement or ILUA to the relevant native title party's grant of consent to approvals to excess tonnage (for the purposes of section 48(c) or 66(c) of the Mining Act), no "*details*" of such consent can properly be said to be shown in it.	

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			PKKPAC considers that even where an Agreement or ILUA may appear to provide for a native title party's general consent to approvals to excess tonnage, it would be inappropriate for the State to rely on a copy or extract of that Agreement or ILUA as constituting evidence of consent, particularly in circumstances where the State is not a party t it. In that instance, the State is in no proper position to infer from its terms, let alone rely on a mining proponent's interpretation of them, as to the extent of their application, scope, validity or enforceability. Evidence of native title party agreement to applications for excess tonnage approvals must be current and clearly expressed by the relevant native title party itself. The same principles apply equally in relation to approvals for the purposes of sections 56A(6)(d) (special prospecting licence), 70(6)(d) (special prospecting licence on an exploration licence), 70J(c) (retention licence) and 86B(3)(d) (special prospecting licence on a mining lease). With regard to the third possible form of evidence "*Written/Letter of Consent from the registered native title party*", the Guidelines should make clear that, for a relevant consent to be given, the written document purportedly evidencing such consent must similarly refer specifically to the excess tonnage for which a specific application for the Minister's approval has been made (and to which native title party consent is being given). Alternatively, at the very least, the document must refer, and the native title party consent be given, to excess tonnage approvals (which may be limited, e.g., in cumulative total, in location or in size of area) for which applications may be made in the future. **Native Title Party** We now turn to two final issues: • What is a 'native title party' or 'registered native title party'? • Who must sign the relevant document as part of the evidencing of native title party consent? Both expressions, i.e., 'native title party' and 'registered native title party', are understood to be referring to the same thing, i.e: • In the case of the land the subject of an undetermined native title claim, the registered native title claimants (as defined in the NTA), whose obligations include representing the wishes and interests of the relevant claim groups; and • In the case of native title determined land, the relevant registered native title body corporate. PKKPAC is the registered native title body corporate ("RNTBC") in relation to PKKP native title determined land. Accordingly, PKKPAC's primary focus is on RNTBCs. We do however, in passing, express concern about the potential inadequacies of consent processes in relation to land the subject of undetermined native title claims. Where purportedly given by the registered native title claimants, such consent requires the signatures of all those comprising 'the applicant' in relation to the claim on the relevant	

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			document and may additionally need greater scrutiny (by the State) to verify proper FPIC by or on behalf of the claim group. On the other hand, RNTBCs have substantially clearer statutory responsibilities to the common law holders of native title, including, in particular, under regulation 8 of the Prescribed Bodies Corporate (Native Title) Regulations 1999 ("PBC Regulations") in relation to all 'native title decisions'. These require the common law holders' prior, informed consent, which is to be evidence by a certificate signed by at least five of them (they must also be members of the RNTBC): Regulation 9(4). Accordingly, an agreement to a Ministerial approval to excess tonnage from an affected native title party comprising an RNTBC such as PKKPAC should, in addition to meeting the standards set out earlier, have the prior, informed consent of the common law holders, as evidenced by the signed certificate as referred to. In addition, the relevant Agreement, ILUA or letter or other written document of consent on the part of the RNTBC on behalf of the common law holders should be signed by at least two of its directors in accordance with section 99-5 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, duly authorised pursuant to a properly minuted resolution of the RNTBC's Board. PKKPAC has submitted that the draft (and former) Guidelines fail to acknowledge the appropriate standard of consent required. In addition, the draft Guidelines fail to identify with sufficient precision what evidence of consent shall be required in connection with an application for excess tonnage. Having regard to the nature and extent of the potential disturbance to land purportedly authorised by such approvals, these are matters of enormous significance to the PKKP People. For the avoidance of doubt, PKKPAC and the PKKP People take this opportunity to reiterate that they have not at any time given their approval or consent to any excess tonnage application in relation to their land, nor do they consent to approval to any existing excess tonnage applications. Despite this, the Minister/DMIRS have approved numerous such excess tonnage applications over a number of years without their knowledge or consent. These are matters of fundamental concern to PKKPAC and PKKP people, and demonstrate that the process for approving excess tonnage applications under the Mining Act is in need of significant overhaul. So as to avoid any misunderstanding, where approval or consent is given by PKKPAC in the future, written confirmation of that consent will be provided **directly** by PKKPAC to DMIRS. In summary, PKKPAC maintains that the draft Guidelines are not consistent with DMIRS's stated values of being "*responsive, forward thinking, fair, ethical, transparent and respectful*" and require substantial modification in line with these submissions. PKKPAC would be pleased to address any queries or amplify any matters further, upon request by DMIRS.	

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6.	**AMEC**	**General**	AMEC continues to welcome opportunities to engage with the Department as regulatory reforms are undertaken. Similar to this consultation process, we request ongoing engagement to ensure there are no unintended consequences for industry.	Comments noted with thanks.
7.	**Datum Peg Mining Titles Solutions**	**Legislative Context**	My only feedback is that the amounts for exploration licences should reflect that an EL can range anywhere from 1 – 200 blocks in size. 1,000 tonnes for a 1 block EL is the same limit as for a tenement 200 x its size. Maybe a sliding scale can be put into place to reflect the size of a tenement. Yes I understand that, essentially, there is no limit to this, however after 50,000 tonnes Ministerial consent is required? Again – for a tenement that is 200 blocks, 50,000 tonnes might be reached very quickly. Just a thought.	Comments noted, however the prescribed limits as detailed in the *Mining Act 1978* and Mining Regulations 1981 are outside the scope of this review.
8.	**AMEC**	**Legislative Context**	AMEC acknowledges that Special Prospecting Licences have been added to the 500-tonne draft excess tonnage category.	Section 56A(6) sets the limit of 500 tonnes for Special Prospecting Licences without the written approval of the Minister. No amendments to the limits within the *Mining Act 1978* were made or are proposed as part of this review.
9.	**AMEC**	**Legislative Context**	However, the proposed addition of hillside drilling is of concern to industry. It is noted that DMIRS will provide a calculator to assist with the calculation of tonnage for cut-and-fill drill pads required for hillside drilling, however as no other tools have been specified, and hillside drilling is not currently included in excess tonnage requirements, the intent behind this new requirement and the extent of additional information required is unclear. We would like to request more clarity, and dependent on the information presented, may request further consultation before this change is implemented.	Hillside drilling is currently included in excess tonnage requirements, and there is an existing calculator on DMIRS' website to support the calculation of tonnage for hillside drilling. Hillside drilling has always been considered as part of excess tonnage requirements, however the Guideline has been updated to clearly state that evidence of Native Title consent is to be provided for hillside drilling activities.
10.	**Amalgamates Prospectors and Leaseholders Association (APLA)**	**Demonstrating Relevant Activities for Excess Tonnage Applications**	This is misleading and confusing. There IS a limit on tonnage unless TO permission is obtained. It's pointless for DMIRS to make such a statement. A better statement would be "tonnage grants are limited by the requirement of the Traditional Owners. Applications made for tonnages in excess of 10,000 tonnes must have the permission of the Traditional Owners". It's not on to say "you can apply for anything you like but we'll near on guarantee you won't get it"!!!	Comments noted. There is no limit to the amount of excess tonnage that can be applied for, however it needs to be demonstrated that the tonnage is for exploration or prospecting purposes.
11.	**APLA**	**1.1 Determination**	See section 5. There is no distinction here at 1.1 regarding exploration or prospecting purpose. So whys is the distinction made at section 5?	Comments noted. When applying for excess tonnage, justification needs to be provided to support that the proposed activities and tonnage are for exploration or prospecting purposes. Per Section 5 of the Guideline, sufficient detail on the activities needs to be provided to inform an assessment as to whether the activity constitutes prospecting or exploration.

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12.	**APLA**	**2. Information Required in Excess Tonnage Applications**	Unless I'm mistaken this is a change in policy. It was once the case that if you applied for say, 5000 tonnes, then that was all you got. There was no extension or increase. Is this a change?	The tonnage is calculated on a per tenement basis and applicants may apply for excess tonnage throughout the life of the tenement. It is important to note that the tonnes do not reset to zero once rehabilitation is complete, but accrue cumulatively over the life of the tenement. If you have applied and received approval for 5,000 tonnes you may apply for further tonnes in future.
13.	**APLA**	**2. Information Required in Excess Tonnage Applications**	These two operations are almost synonymous for practical purposes. The only separator is whether the proposed activity is on an EL or PL. i.e POW-P or POW-E. So why is this item 5 necessary? The deciding factor is the POW application type that is in use. Nothing else is needed???	The details of the ground disturbing work to be carried out are needed to provide sufficient support that the activities are exploration or prospecting.
14.	**The Chamber of Minerals and Energy**	**2. Information Required in Excess Tonnage Applications**	CME's brief feedback on the draft excess tonnage guideline is outlined below; ***Agreement from affected Native Title Party (where required)*** CME suggests this section be overarchingly considered in a practical sense regarding the common drafting and parameters of exploration and/or prospecting agreements. Any re-negotiation of an agreement is highly resource and time intensive for all parties. Exploration licence restrictions pertaining to both time and activities add to the importance of practical and workable evidence requirements, while delivering on the intent of the provision. Suggested edits to provide clarification and improve functionality of this provision are below; • Evidence requirements must allow for the provision of an '*extract of an agreement*' *rather than 'an agreement*'. Agreements often include a range of provisions, including commercially and culturally sensitive information. In a large number of cases, it will not be possible for proponents to provide the whole agreement. Provision of an extract containing relevant information regarding consent to approvals should be sufficient to deliver on the practical intent of this requirement. • The above point also applies to ILUA agreements. • CME suggest consideration be given by the Department to other policy documentation for consistency in reference to native title parties. In this document the reference *Native Title party and registered Native Title party* are used at different intervals. For clarity it should be clear throughout the document, and consistent with application of other Department policy, which parties this refers to. This distinction is particularly critical in areas like the Goldfields, where both tenement and native title claim activity is consistently high. • An "…; or" should be inserted at the end of the first dot point, and before dot point two. This is consistent with dot point two and three. It is presumed that it is not intended for evidence of both '*an agreement*' **and** an '*ILUA*' to be required. This would not be practical. Please get in touch if there is anything which requires further clarification. CME looks forward to receiving a copy of the guidelines once edits have been made for circulation to our membership.	Comments noted. Regarding the evidence requirements, the Guideline has been updated to state that where the application for excess tonnage is seeking a cumulative total of more than 10,000 tonnes per tenement and the tenement(s) were granted following the expedited procedure, the application must be accompanied by a letter of consent from the registered Native Title Party or a statutory declaration from the applicant stating that they have agreement from the registered Native Title Party to future approvals or consent to excess tonnage. The letter of consent or Statutory Declaration are not required for tenements granted following the right to negotiate process under the *Native Title Act 1993*. The Guideline has been updated to clarify that 'native title party' refers to a 'registered native title party'.

Ref #	Stakeholder	Section	Comment	DMIRS Response/Action
15.	**AMEC**	**2. Information Required in Excess Tonnage Applications**	AMEC had significant concerns with the introduction of this requirement in the 2017 consultation process, and these concerns have not been alleviated. Native Title is a sensitive issue that is covered under Federal Legislation. As a Native Title approval is sought with a tenement application, this requirement is duplicative and will introduce a considerable time delay. The Programme of Work application process necessary for any ground disturbance has an effective due diligence process for preventing damage to Aboriginal Cultural Heritage. The requirement to also seek Native Title agreement for excess tonnage adds a further element of duplication. In the event an application seeks a cumulative total of more than 10,000 tonnes per tenement, AMEC does not consider the requirement to provide evidence of an agreement from the affected Native Title party to future approvals or consent to excess tonnage, to be an effective policy requirement. Industry was uncertain about the type of activity this new requirement would be applicable to, and the intent behind the requirement. As the guidelines are being updated, now is an opportune time for the Department to engage with Industry to advise of: • How many applications for excess tonnage were received? • How many were required to provide Native Title agreement evidence? • What activities were covered by the guideline? • At what stage is exploration considered mining, as this has correlation with tonnage in excess of 10,000 tonnes? • Is the consent of the primary tenement holder required for Special Prospecting Licences? Additionally, "or" should be added to the end of the first dot point under "8.", on page 3 of the draft guidelines. Consistency of language is important; this requirement should only apply to 'determined' Native Title parties, not 'registered', as a 'registered' party is only an applicant in relation to the claim.	Comments noted. The Guideline has been updated to state that where the application for excess tonnage is seeking a cumulative total of more than 10,000 tonnes per tenement and the tenement(s) were granted following the expedited procedure, the application must be accompanied by a letter of consent from the registered Native Title Party or a statutory declaration from the applicant stating that they have agreement from the registered Native Title Party to future approvals or consent to excess tonnage. The letter of consent or Statutory Declaration are not required for tenements granted following the right to negotiate process under the *Native Title Act 1993*. In the 2019/20 financial year, 389 applications were received affecting 567 tenements. Where required, evidence of agreement is provided as part of the application but numbers are not recorded in the system. Activities considered to be exploration or prospecting include costeaning for all types of minerals to take samples for analysis, bulk sampling alluvial material for treatment, bulk sampling for iron ore, treatment of alluvial material to establish whether grades would support gold mining and the construction of 'cut and fill' access tracks and drill pads. The consent of the primary tenement holder is not required for excess tonnage on special prospecting licences. The Guideline has been updated to clarify that 'native title party' refers to a 'registered native title party' which is inclusive of determined and registered claims. This is consistent with the consultation requirements of the Native Title Act.
16.	**APLA**	**3. Interaction with Programme of Work (PoW) Applications**	There is a trap in this method. e.g if a tenement is sold and transferred but the tonnage used by the previous holder has not been divulged to the buyer then there is no way for the buyer to know how much tonnage is remaining. The vendor is under no obligation to tell the seller anything in this regard. Its caveat emptor. Do we need to change the Regs re tenement transfers or do we change this Section 3 or does DMIRS need to keep better records of tonnages used vs tonnages applied for??	It is DMIRS' expectation that applicants will keep records of tonnage used to support both excess tonnage requests and the applications for Programme of Work. In addition, excess tonnage approvals are publicly available through Mineral Titles Online.

Government of Western Australia

Department of Mines, Industry Regulation and Safety

8.30am – 4.30pm

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