The purpose of the Aboriginal Cultural Heritage Act 2021 (the Act) is to recognise the fundamental importance of Aboriginal cultural heritage to Aboriginal people. Aboriginal cultural heritage (ACH) has a central role to Aboriginal communities past, present and future because of its living, historical and traditional nature. In order to achieve this objective, the Act recognises that Aboriginal people should be involved in the recognition, protection, conservation and preservation of ACH.

What is being Co-designed?
The purpose of this co-design process is to develop the Protected Area Order Guidelines that are to include the factors to be considered in determining whether ACH is of outstanding significance for the purposes of the Act.

Under the Act it is a requirement that the ACH in question be of outstanding significance in order for the application for an area to be Protected Area to be considered.

About this Fact Sheet
This Fact Sheet includes information relevant to the co-design of Protected Area Order Guidelines and is designed to include information that will provide relevant context and information relating to the requirements under the Act. Appendix 1 to this document provides all the relevant sections of the Act.

A set of questions to assist with the co-design process are found on page 4 of this fact sheet.
What is a protected area?
Part 4 of the Act deals with providing special protection to an area of land where ACH of outstanding significance for the purposes of the Act, by declaring an area a ‘protected area’. ACH that is within a protected area is afforded the highest level of protection under the Act. A protected area declaration means that an ACH Permit or ACH management plan cannot be applied for over the protected area, thus protecting it from activities that may cause harm to the ACH.

Part 4 of the Act includes the processes required to consider an application for a protected area which includes the ACH Council seeking views of Aboriginal people as well as the wider community.

Once a protected area is declared, a repeal of a declaration or an amendment to reduce the area can only take place after a thorough engagement process with the relevant Aboriginal people and if it is approved by both Houses of Parliament. This will ensure higher levels of protection for ACH within protected areas than have previously been afforded. It is important therefore that the standard for determining an area to be of outstanding significance is rigorous.

How is a protected area defined under the Act?

According to Section 11 of the Act:

protected area means an area declared as a protected area by an order under section 82(1);

accordingly, under 82(3) –

An order under subsection (1) must —

[...]  
 a) state that Aboriginal cultural heritage of outstanding significance for the purposes of this Act is located in the protected area; and  
 b) state the conditions, if any, to which the declaration of the area, or areas, as a protected area is subject.

Appendix 1 lists all further sections of the Act that are relevant to the Protected Area Order Guidelines

The purpose of these guidelines [as per s71] is to determine how to establish outstanding significance.

Who is able to make an application for a protected area?
An application for the declaration of a protected area may be made by a knowledge holder [s72].
Why are the Protected Area Order Guidelines important?
Under the Act, when reviewing an application for a protected area, the ACH Council needs to be satisfied that the ACH that is subject of the application is of outstanding significance.

The Protected Area Order Guidelines will guide knowledge holders as to what will need to be considered and the evidentiary requirements prior to lodging an application.

What is outstanding significance?

The Act defines outstanding significance [s69] as follows:

a) that the Aboriginal cultural heritage is of outstanding significance to —
   (i) a knowledge holder for the Aboriginal cultural heritage; or
   (ii) a group or community, the members of which are knowledge holders for the Aboriginal cultural heritage; and
b) that the significance is recognised through social, spiritual, historical, scientific or aesthetic as part of Aboriginal tradition

In recognising outstanding significance, the Act recognises that some ACH is of a higher, outstanding, significance to Aboriginal people or communities than other ACH, and that such ACH must be conserved for present and future generations and requires special protection.

Considerations
Below are some of the matters that should be considered when co-designing the Protected Area Order Guidelines:

• Once ACH is declared a protected area, land users are not permitted to access the area nor submit ACH Permit or ACH management plan applications to undertake activities which may cause harm to ACH within the protected area.
• The Guidelines will be used both to assist the knowledge holders and the ACH Council in forming a view whether the ACH subject of a protected area application is of outstanding significance.
• In determining the type of information that is to be submitted in support of an application, consideration should be given to the secret or confidential nature of some ACH that may be subject of an application.
• Conditions for protected areas will need to be considered and determined on a case by case basis when an application is made.
**Co-design questions**

To assist the co-design of the Protected Area Order Guidelines, your views are being sought on the following questions:

<table>
<thead>
<tr>
<th>Question</th>
<th>Description</th>
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<tbody>
<tr>
<td>1. What factors make ACH of outstanding significance? How does this differ compared to other important ACH?</td>
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<td>2. What are the key factors that knowledge holder(s) need to consider when applying to have ACH declared a protected area?</td>
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<td>3. What sort of evidence will demonstrate that the ACH is of outstanding significance? What form should that evidence take?</td>
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<td>4. Does ACH need to be of outstanding significance to more than one knowledge holders to qualify?</td>
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Appendix 1. Sections of the Act relevant to protected area order guidelines

<table>
<thead>
<tr>
<th>Part 4 – Protected Areas</th>
<th>All of this Part is relevant to this guideline</th>
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<tbody>
<tr>
<td>Section 89</td>
<td>Part 5 Offences about harming Aboriginal cultural heritage and compensation for harm to Aboriginal cultural heritage</td>
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<td>Application of Part</td>
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<td>This Part applies to the following Aboriginal cultural heritage only —</td>
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<tr>
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<td>(a) an Aboriginal place;</td>
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<td>(b) an Aboriginal object;</td>
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<td>(c) Aboriginal ancestral remains;</td>
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<td>(d) Aboriginal cultural heritage located in a protected area.</td>
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<td>Section 97</td>
<td>Defences that apply in relation to protected areas</td>
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<td>It is a defence to a charge of an offence under section 92 or 93(1) in relation to Aboriginal cultural heritage located in a protected area to prove that the act that harmed the Aboriginal cultural heritage was carried out in accordance with —</td>
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<td>(a) the protected area order for the protected area; or</td>
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<td></td>
<td>(b) regulations applicable to the protected area.</td>
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<td>Section 102</td>
<td>Due diligence assessment</td>
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<td>For the purposes of this Act, a person undertakes a due diligence assessment in relation to a proposed activity that is intended to be carried out in an area if the person, in accordance with the ACH Management Code, makes an assessment about the following —</td>
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<td>(a) whether the area where it is intended that the proposed activity be carried out includes any area that is part of a protected area;</td>
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<td>(b) whether the proposed activity is a —</td>
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<td>(i) a tier 1 activity; or</td>
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<td>(ii) a tier 2 activity; or</td>
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<td></td>
<td>(iii) a tier 3 activity;</td>
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<td></td>
<td>(c) whether Aboriginal cultural heritage is located in the area where it is intended that the proposed activity be carried out;</td>
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<td></td>
<td>(d) whether there is a risk of harm being caused to Aboriginal cultural heritage by the proposed activity;</td>
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<td></td>
<td>(e) in relation to a proposed activity that has been assessed as a tier 2 activity or a tier 3 activity — the identity of the persons to be notified or the persons to be consulted about the proposed activity.</td>
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</tbody>
</table>
Section 179

### Part 7 — Stop activity orders, prohibition orders and remediation orders

This Part applies to the following Aboriginal cultural heritage only —

(a) an Aboriginal place;
(b) an Aboriginal object;
(c) Aboriginal ancestral remains;
(d) Aboriginal cultural heritage located in a protected area.

Section 213

### Information and documents on ACH Directory

1. The ACH Directory must contain the prescribed information about the following —

   (a) a protected area;
   (b) a local ACH service for an area;
   (c) a native title party for an area;
   (d) the knowledge holders for the following —
      (i) a particular area;
      (ii) particular Aboriginal cultural heritage;
   (e) an ACH protection agreement endorsed under Part 8;
   (f) an ACH permit;
   (g) an ACH management plan approved under section 150(1)(b)(i);
   (h) an ACH management plan authorised under section 165(1)(b)(i);
   (i) a determination under section 176(1)(b)(i) that Aboriginal cultural heritage is of State significance for the purposes of this Act;
   (j) a Part 7 order.

2. The ACH Directory must also contain —

   (a) information about Aboriginal cultural heritage of the State, including, where relevant —
      (i) a description of the characteristics of the Aboriginal cultural heritage; and
      (ii) a description of the location of the Aboriginal cultural heritage; and
      (iii) in relation to an Aboriginal object, a description of where it is reasonably believed to have originated from; and
      (iv) particularly in relation to intangible Aboriginal cultural heritage — recordings (including photographs, films, audio, video, digital and other recordings);

   and

   (b) any other information and documents, including historical information and documents, relevant to Aboriginal cultural heritage that —
      (i) are prescribed for the purposes of this paragraph; or
      (ii) the ACH Council considers appropriate to include in the Directory.

3. In subsection (2)(a)(iv) —

   **intangible Aboriginal cultural heritage** means the intangible elements of Aboriginal cultural heritage, including knowledge, or oral expression, of Aboriginal tradition.
(4) Information and documents may be placed on the ACH Directory, in accordance with the regulations —
(a) on the initiative of the ACH Council; or
(b) at the request of a local ACH service or another person

### Section 218

**Access to information about protected areas and management of activities**

The ACH Council must ensure that the information and documents on the ACH Directory are available to the general public to the extent necessary to enable the following to be ascertained —

(a) whether or not a particular area includes any area that is part of a protected area;
(b) the conditions, if any, to which a protected area order, declaring a particular area as a protected area, is subject;
(c) the Aboriginal cultural heritage that has been determined by the ACH Council under section 176(1)(b)(i) to be of State significance for the purposes of this Act;
(d) whether or not a particular area is the subject of —
   (i) an ACH permit; or
   (ii) an approved or authorised ACH management plan;
(e) a local ACH service for an area;
(f) a native title party for an area;
(g) if a particular area is the subject of an ACH permit — the contact details of the holder of the permit;
(h) if a particular area is the subject of an approved or authorised ACH management plan — the contact details of the parties to the plan;
(i) whether or not a particular area is the subject of a Part 7 order

### Section 289

**Regulations about protected areas**

Regulations may be made about protected areas, including the following —

(a) activities, or classes of activities, that may be carried out in a protected area;
(b) the regulation, control or prohibition of the carrying out of an activity, or a class of activities, in a protected area;
(c) the erection or placement of notices or signs to identify an area as a protected area and to provide information about the following —
   (i) regulations referred to in paragraph (a) or (b);
   (ii) the conditions, if any, to which the protected area order declaring the area as a protected area is subject;
   (iii) any offence under this Act, or the regulations, that relates to a protected area;
(d) the destruction, removal or other interference with a notice or sign erected or placed under paragraph (c).