



INDEPENDENT CONSULTANT REPORT

***Aboriginal Cultural Heritage Act 2021* co-design process workshops
Phase one summary
Prepared August 2022**

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Background

The co-design process for the key regulations, statutory guidelines and operational policies to support the new *Aboriginal Cultural Heritage Act 2021 (Act)* commenced in April 2022. Two Department of Planning, Lands and Heritage (DPLH) teams ran the following workshops:

- Albany - 26 April
- Armadale - 5 May
- Broome - 28 April
- Bunbury - 4 May
- Carnarvon - 5 May
- Esperance - 28 April
- Geraldton - 13 May
- Kalgoorlie - 2/3 May
- Karratha - 3 May
- Kununurra - 26 April
- Perth CBD - 29 April
- Port Hedland - 2 May

The workshops were well attended, with a broad group of stakeholders being engaged in respectful and informative discussions. 78 submissions were received following phase one of the co-design.

The following is a summary report prepared by an independent consultant on behalf of DPLH. It highlights the key items raised across nine of the themes considered as part of Phase one of the co-design process. In relation to Theme one: Activity categories, the Activity categories table, released as part of Phase 2 of the co-design process, was developed by the independent consultant based on the submissions received. These items are provided by stakeholder group: Aboriginal Representatives, Proponents (local Government, resource sector, land developers, pastoralists, infrastructure sector), State Government agencies, service providers (legal and heritage professionals) and other (where applicable).

Theme two: ACH Management Code

The ACH Management Code sets out how a due diligence assessment is to be undertaken by a proponent undertaking an activity that may harm Aboriginal cultural heritage (ACH) in order to satisfy the requirements of the Act. The following are the items raised by stakeholder category:

Aboriginal Representatives

- Minister having final decision is a conflict of interest as other Government agencies are major proponents in the Act - an independent agent e.g., Governor, could be used
- Final decisions ought to be appeal-able to accommodate new/changing landscape and information
- Only Aboriginal people are able to assess activities that will cause unacceptable harm
- Proponent ought to be able to access map of sacred sites as part of Aboriginal cultural heritage (ACH) risk assessment
- ACH Management Code must be minimum standard, consider all aspect of ACH e.g., flora, fauna, water, social surrounds, cultural values etc with mandatory triggers for consultation
- It is essential that the Act is consistent with both the principles and practicalities of the *National Native Title Act 1993 (NTA)*

- Heritage surveys are recommended for all tier 3 activities
- Onus ought to be on proponent to record all relevant steps in due diligence
- Success of ACH Management Code contingent on effective resourcing of the system especially: Local ACH Services (LACHS), DPLH, information management systems.
- Aboriginal people should be central to the determination of 'harm' and obligations ought to be on proponent for effectively recording the outcomes of all consultations
- Role of LACHS needs to be considered in conjunction with Prescribe Body Corporates (PBC) responsibilities under NTA
- Proponents ought to be encouraged by undertaking due diligence upfront using information publicly accessible - this will streamline follow-up required by LACHS

Proponents

- Ensure existing agreements are recognised for consultation and engagement
- Workability and efficiency of due diligence process is critical
- Simple due diligence checklist recommended to guide tier 1 ACH compliance
- Steps taken by proponent ought to be considered in assessing due diligence obligations and no positive action from LACHS to be required
- South West Settlement Individual Land Use agreements (ILUA)s could be used to guide due diligence process
- Principles based disturbance thresholds more appropriate than activity category tables
- The ACH Directory should be the source of ACH sites and not having sites on the register increases risk of damage
- Providing surveys conducted by LACHS are comprehensive, S102 of the Act is a neat framework
- Volume of due diligence ought to be graduated and commensurate with the potential ground disturbance
- Sites ought to be graded depending on the risk presented by ground disturbance
- Heritage protection agreements guide engagement
- Accuracy and accessibility of ACH data held by DPLH is crucial to enable due diligence
- Scale and scope of activity and previous surveys and well as previous land disturbance are factors to consider in design of ACH Management Code
- How will ACH Management Code interface with Planning and Development regulation?
- Register and databases to support due diligence and assessments are critical and process of 'practical steps' should be clear and manageable
- ACH Management Code should provide clear, comprehensive and easy to follow guidelines that enable proponents to undertake adequate due diligence
- ACH Management Code should provide clear, comprehensive and easy to follow guidelines that enable proponents to undertake adequate due diligence
- ACH Management Code ought to be educative and informative outlining the key matters to be addressed in due diligence assessment
- Aboriginal heritage matrix recognising existing disturbance ought to be used
- DPLH ought to dedicate more resources for consulting with owners of freehold lands, including farmers, in next phases of co-design
- ACH Regulations ought to consider Streamline WA principles
- The need for urgent infrastructure development on pastoral stations needs to be considered
- Pastoral sector to be treated differently to resource sector recognising the need for a manageable process

- One stop shop support is required by DPLH for pastoralists to avoid entrapment of proponents
- Consider a 'pastoral license' not section 91 to improve workability of legislation - including trouble with access to knowledge holders
- Due diligence ought to consider size of area to be impacted and the type of activity - with low impact activity being a simple checklist and contact with LACHS being facilitated via on-line system

State Government Agencies

- Utilise risk-based approach to assess potential level of harm – the Act to provide due diligence package to guide assessments
- Bushfire reduction activities to be considered as an overall program of work over years - to be considered in ACH Management Code
- DPLH to undertake further consultation with Aboriginal people to inform the reasonable and practical steps to protect ACH
- Act tools ought to consider environmental effects and consider alignment with *Environmental Protection Act 1986* (EP Act) framework and other statutory decision-making processes
- Integrity of ACH Management Code -dependent on access to comprehensive information via ACH Registers
- Consider surveys to be published and spatially represented to avoid doubling up on works

Service Providers

- Aboriginal people should be authorised to make decisions about activities that affect their countries and cultural heritage
- Aboriginal people ought to be consulted on all three activity tiers
- ACH significance ought to extend beyond ground disturbance
- Steps in identification of ACH ought to include
 - a) those involving publicly available information and
 - b) steps that rely on Aboriginal people/ knowledge holder information - steps required ought to depend on type/complexity of activity NOT size of the area
- Proponents who follow Heritage Protection Agreements (HPA) ought not be subjected to more onerous regime under the Act i.e., HPAs will be understood to meet Act standards
- No surveys for tier 1 and 2 activities, only for tier 3
- ACH Directory important source of truth and must be kept up to date
- Proponent ought to demonstrate appropriate due diligence via presentation of due diligence assessment report
- LACHS must be fully resourced, LACHS must have input and only Aboriginal people can determine what 'harm' means

Theme three: Consultation Guidelines

A proponent who intends to carry out an activity under an ACH management plan must consult with Aboriginal people about the proposed activity. The consultation guidelines will set out the standards that a proponent will need to meet. The following are the items raised by stakeholder category:

Aboriginal Representatives

- Consultation guidelines must be less open to interpretation e.g., definition of 'reasonable'
- Penalties should be enforceable for fraudulent representation of consultation
- Competing interests for Aboriginal people engaged by LACHS and PBCs ought to be considered in consultation process and timelines
- Consultation should always align with United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and free, prior and informed consent (FPIC)
- Effective consultation should be defined and based on complexity of activity and potential ACH risk
- Aboriginal people are the only people who can determine what constitutes culturally appropriate consultation and this can differ depending upon the activity and the area it will take place in - flexibility is required to ensure consultation can be considered on a case-by-case basis

Proponents

- Ensure existing agreements are recognised for consultation and engagement
- All consultations should be documented in writing and effectiveness of consultation largely reliant on LACHS being effectively resourced
- Key decision logs and contact tracking ought to be considered. Consultation guidelines must provide for existing agreements and their alignment to intent of the Act
- Proponent activity ought to be the threshold for due diligence not LACHS activity
- Degree of consultation to depend on complexity of activity - commence with email/phone call, progress to face-to face
- Guidelines ought to consider the evidence that consultation has been attempted/actually occurred. LACHS ought to be involved in establishing the culturally appropriate consultation process.
- Consider using existing threshold for consultation such as "Negotiate in Good Faith" as per NTA
- Best practice guidelines are required to ensure good outcomes
- Consultation expectations and timeframes for emergency work require clarification
- Clarity regarding due diligence especially in areas already highly disturbed is required - noting standard of due diligence ought to be proportionate with level of previous disturbance and anticipated impact
- Consultation process ought to be saleable depending on size of activity and resources of proponent AND underpinned by the principle of 'acting on good faith'
- Consultation guidelines need to consider how to proceed if a response is not received within specific timeframe
- Definitions of 'genuine attempt' and 'sufficient information' are required as to a benchmark for reasonable effort to follow-up on permits etc
- All consultation ought to be documented with requests made in writing - no requirement for commercial information to be disclosed

State Government Agencies

- Definitions such as 'genuine attempt' and 'sufficient' require confirmation and LACHS to set engagement preferences
- Consultation to commence early and be documented e.g., via approvals letter from LACHS
- Proponent ought to demonstrate outcome of consultation not just the process

Service Providers

- Consultations ought to be genuine, where possible face-to-face and: based on a formalised process for each region, measurable, documented and properly resourced
- Written records and alignment to FPIC are essential and LACHS must be adequately resourced
- Consultations ought to be genuine, where possible face-to-face and: based on a formalised process for each region, measurable, documented and properly resourced
- LACHS ought to be consulted in all activity tiers and proponents MUST contact not just attempt

Other

- Consultation guideline ought to align with international standards such as FPIC

Theme four: Knowledge Holder Guidelines

The Act requires Knowledge Holder Guidelines to assist with the identification of knowledge holders where there is not a LACHS, and for those matters requiring the ACH Council, which is established by the Act, to notify knowledge holders with regard to protected area applications. The Knowledge Holder Guidelines will assist proponents and the ACH Council to identify knowledge holders where they are required to do so. The following are the items raised by stakeholder category:

Aboriginal Representatives

- Essential to be clear about who can/not speak on behalf of country
- NTA offers best guidance for process to establish knowledge holders - must be captured on database
- First port of call for knowledge holder via LACHS and in the absence of LACHS in the region, neighbouring LACHS could be consulted
- Knowledge holder guidelines could be informed by genealogies
- Traditional Owners/native title holders are the only people who can determine the relevant knowledge holders and should be the reference point for determining whether a person is a 'knowledge holder'

Proponents

- Enable knowledge holders to nominate to DPLH where there are no LACHS
- Knowledge holders must be accountable and contactable
- ACH Directory is critical for DPLH to deliver its ACH obligations
- Adequate resourcing of functional Directory is essential - guidelines where there are gaps in Directory are required
- Relying on DPLH to maintain Directory of knowledge holders
- Interactive maps and details of knowledge holders to be provided by DPLH
- Long term residents not just Aboriginal people should be considered knowledge holders

State Government Agencies

- ACH Directory to hold knowledge holders as determined by DPLH
- Currency of DPLH ACH Directory is critical

Service Providers (legal, archaeologist, anthropologists)

- The term 'knowledge holder' is inappropriate - there must be a distinction between talking about and talking for Country and ACH - only Traditional Owners can talk FOR country

- A matter exclusively for Traditional Owners
- Mediation ought to be available to both parties, State funded

Theme five: Management Plan template

When a proponent intends to undertake a tier 3 activity that may harm ACH, the Act requires an approved or authorised Aboriginal cultural heritage management plan (ACH management plan). A template is being developed to assist proponents and Aboriginal parties. The following are the items raised by stakeholder category:

Aboriginal Representatives

- Templates ought to be regionally specific to recognise the conditions of country and Aboriginal people to have input into Impact Assessment Statements, existing Heritage Agreements also require consideration
- ACH management plan ought to be flexible and make provision for ongoing monitoring of activity
- LACHS should review and comment on ACH Impact Assessments to ensure their integrity
- LACHS should be provided with the flexibility to develop their own ACH management plans

Proponents

- Templates ought to contain minimum structure and not be too prescriptive
- ACH management plans ought to provide minimal standards for compliance and prior agreements must be recognised
- Providing an ACH management plan template to assess would help proponents to refine them. An ACH Impact Statement is a key component of the assessment.
- A number of templates are required to acknowledge complexity/scale of activity
- Templates are required to guide process for consultation and responses to incidents. Ease of use important
- Templates should be provided by DPLH as a guide with flexibility for LACHS and proponents to add additional information. An ACH Impact Statement should be included
- Self-populating ACH management plan template would help minimise workload for small Shires
- Different ACH management plans should be developed to take into account the different scale and complexity of projects AND a ACH management plan specific for Local Government
- ACH management plans ought to consider specific project context: scale, complexity, level of impact, location - one size fits all doesn't work
- One ACH management plans for many activities on pastoral stations would ensure manageable workload

State Government Agencies

- Progressive process outlined in Fact Sheet 2 is sound
- ACH Management Plans need to consider the land development process with one overarching ACH management plan for the project
- Templates ought to be sector specific, e.g., mining/resources and 'other industries' to ensure fit for purpose assessments

Service Providers

- ACH management plans do not align with industry best practice
- LACHS ought to establish ACH management plan format
- Predicted ground disturbance should not be the only trigger for ACH management plan
- Concern that ACH management plan will be box-ticking - all ACH management plans must have an integrity measure
- Aboriginal people with LACH support, ought to be central to process to ensure full scope of risk to ACH (e.g., pollution, spiritual harm etc) considered
- Taboo for Aboriginal people to 'agree' to harm sites and Aboriginal people ought to be able to prevent site disturbance under ACH management plan

Theme six: Timeframes

Where a proposed activity may harm ACH, the Act establishes processes that outline the responsibilities for proponents as well as the roles for Aboriginal people and the ACH Council for the management of the activities. In order to create certainty for all parties, the Act requires that certain processes are required to be undertaken in accordance with timeframes prescribed in regulations. The following are the items raised by stakeholder category:

Aboriginal Representatives

- Timeframes are too short to allow authentic consultation with Aboriginal people
- Contingencies for exceptional circumstances are required and the process for "Agreeing on terms of an ACH management plan " ought to be defined
- Timeframes ought to be case by case to consider workload/complexity and recognise shortage of professional in sector, 90 days is more reasonable
- Timeframes are unrealistic given workload, capacity challenges and importance of sound negotiations. Stop the clock considerations are required to allow for cultural practices and climatic conditions

Proponents

- Recommend 50 business days - noting need to ensure ACH Council is adequately resourced
- 20-day turnaround for permits is welcomed. Timeframe for ACH management plan should be halved to 60 working days
- Recommend maximum of 50 business days for authorisation of ACH management plan
- Potentially align timeframes with government streamlining such as Low Impact Notifications for program of works (POW)
- Stop the Clock mechanism for Government timeframes should only be limited and transparent
- 120 days excessive and may affect project viability. 40 working days should be sufficient
- Timeframes are reasonable for consultation, yet ACH Council appears excessive
- Timeframes required further consultation to test the practicalities
- Timeframes ought to be confirmed once activity categories are finalised
- Permits for Local Government activities such as ongoing maintenance, ought to have lengthier approval terms such as 20 years
- Timeframes for responses from LACHS should be 2 days and for inspection 5 days from submission - not longer than 10 days end-to-end
- Timeframes appear lengthy and costly and should be shortened and include economic impact

State Government Agencies

- Staged approach to timeframes be applied in consultation with LACHS and knowledge holders
- Timeframes should only commence once proponent has provided all the information required and LACHS capability critical to system efficiency so need to be well resourced

Service Providers

- Timeframes must allow for climatic events, cultural business and access to country
- LACHS workloads and cultural obligations need to be considered and timelines should be able to be extended
- Timeframes must allow for cultural activities

Theme seven: Fee for Service Guidelines

In recognition of the key role that LACHS will undertake, a LACHS, once appointed by the ACH Council, will be able to charge fees for services it provides to proponents associated with undertaking relevant functions. The fees a LACHS is able to charge will need to be in accordance with a schedule that is endorsed by the ACH Council. The following are the items raised by stakeholder category:

Aboriginal Representatives

- Proponents must cover full cost of engaging with Aboriginal people
- Fees should not be cost prohibitive and double-dipping for work already undertaken avoided
- Rates may vary across LACHS due to capability and capacity. Funding requires modelling and review to ensure adequate coverage
- Economic modelling is required to determine costs and inform fees
- It is anticipated administration of permits will comprise the majority of activity and LACHS ought to be compensated for each step in the end-to-end process OR State could fund a permit administrators for LACHS
- Cash flow can be an issues - upfront payment to allow LACHS/PBC to engage specialist resources and pay Aboriginal people in a timely manner is required
- LACHS ought to be able to charge for all tasks associated with ACH Management Code
- Upfront fees to support cash flow are critical to system viability
- Intellectual property and knowledge of knowledge holders and Aboriginal people ought to be recognised by fair remuneration as per other experts such as anthropologists etc
- Quality of information provided by proponent ought to be considered in timeframes
- Fee for service will be influenced by resources provided by DPLH to support LACHS as capacity and capability are risk/success factors
- Proponents ought to acknowledge there are times when cultural obligations will adversely impact ability to process applications, e.g., December to March each year in Kimberley region
- PBC meeting schedules will also impact timeframes noting PBCs only meet every couple of months, and they often have a role in both cultural and corporate governance practice

Proponents

- Establish a baseline, non-differential fee structure and existing agreements should be recognised
- Transparency of costs to justify fees is critical. Charging of different fees for same work undertaken by LACHS is not supported

- Concern fees may be used inappropriately to make profit and/or to subsidise other PBC functions. Costing and Pricing Government Services could be used to guide price setting
- Fees ought to reflect the work required and LACHS should not charge differently for same work
- Given the importance of LACHS, centralised support to ensure they have the necessary capability and capacity is recommended
- LACHS ought to charge fees commensurate with complexity of consultation and geographic location shouldn't be a factor in fee setting
- Costs should be logical, defensible and transparent - fee structure should not vary between proponents
- LACHS fees ought to consider size type of proponent
- Distinction required for fee structure between commercial and not-for-profit proponents taking into account the reason for the activity
- Fees ought to be legislated through Salary Allowance Tribunal or similar entity
- LACHS fees be removed from co-design until assessment process has been finalised
- Different fees for different scenarios
- LACHS at risk of becoming monopolies, therefore Government should set fees
- LACHS to be subject to the Public Sector Act and Dept Treasury guidelines
- Economic regulation Authority to be engaged to audit LACHS
- Fees should be set after testing the ACH Regulatory Framework to ensure it works (PGA)
- Workability of the Act ought to be established before fees are considered

State Government Agencies

- LACHS to set fees based on complexity of project and their engagement AND fees for specialist skills (e.g., engineers, urban planners) ought to be included in funding model
- Balance required to ensure LACHS sustainability and project feasibility - use progressive payments to assist cashflow and encourage timeframes
- Fees for services ought to reflect time/work required
- LACHS capability development requires support of DPLH via training and funding

Service Providers

- LACHS must be adequately recompensed for their time and resources - including responding to Tier 1 and 2 activities
- LACHS should be able to set their own fees recognising economies of scale, mediation to be provided by ACHC if fees are disputed
- LACHS ought set their own fees and should be totally funded by State and/or proponents with mediation State funded

Other

- Adequate funding is essential for power imbalance between proponents and Aboriginal people/LACHS to be addressed

Theme eight: State Significance Guidelines

State significance guidelines will outline the factors, to be used by the ACH Council, to determine whether ACH should be determined to be of State significance, which is defined by the Act to be “of exceptional importance to the cultural identity of the State”. The following are the items raised by stakeholder category:

Aboriginal Representatives

- Only Aboriginal people can determine significance
- Burra Charter a potential reference point for State Significance
- Aboriginal people ought to be consulted regarding matters of significance

Proponents

- Local Aboriginal people ought to be engaged in the process with other stakeholder views sought
- Utilising the 5 values of the Burra Charter presents a benchmark
- Clear thresholds ought to be used to trigger assessments of State Significance
- Utilise criteria as per State Register of Heritage Places - *Heritage Act 2018*
- Aboriginal people ought to be the primary voice on significant site guidelines

State Government Agencies

- Inconsistencies in 'protected order' and how emergency situations apply is required

Service Providers

- Process of Minister making decisions across diverse landscape is flawed - especially in lieu of arbitration function
- Final decision for State Significance should not sit with Minister - needs broader consultation
- national native title tribunal site of 'particular significance' and burial sites ought to be protected areas as a matter of course

Theme nine: Outstanding Significance Guidelines

A protected area order offers the highest protection under the Act. It ensures that harm as defined in the Act cannot occur to ACH of outstanding significance. In determining whether ACH should be declared to be a protected area, the ACH Council needs to be satisfied the ACH is of outstanding significance having regard to the factors set out in guidelines established for this purpose. The outstanding significance guidelines are intended to assist knowledge holders to provide evidence in support of their applications for ACH of outstanding significance to be considered as a protected area. The following are the items raised by stakeholder category:

Aboriginal Representatives

- Only Aboriginal people can determine significance

Proponents

- Protected areas ought consider the views of Aboriginal people, knowledge holders and anthropologists.
- Terms such as 'exceptional', 'outstanding' and State Significance need to be clearly graduated and the process for determining 'outstanding' defensible
- Guidelines ought to be aligned to existing *Aboriginal Heritage Act 1972* section 19 areas to enable access and work to be undertaken as required
- Consider Burra Charter as a benchmark
- Adequate resourcing required to ensure site are maintained
- Aboriginal people ought to be the primary voice on significant site guidelines

State Government Agencies

- Aboriginal people and knowledge holders to be consulted

Service Providers (legal, archaeologist, anthropologists)

- Protected Areas are the exclusive domain of Aboriginal people
- Due to cultural significance, waterways should be reinstated as Protected Areas and Intellectual Property ought to be considered as per UNDRIP

Theme ten: Defining Substantially Commenced

Throughout Western Australia there are existing valid consents to impact ACH that have been issued by the Minister for Aboriginal Affairs under section 18 of the *Aboriginal Heritage Act 1972*. These section 18 consents are for projects that are in varying states of progress, from being completed to not yet being commenced. Section 18 consents only expire if time limited, including being granted for the life of the project or a discrete part of the project, or unless otherwise stated in the conditions. Under the Act, section 18 consents will expire at the end of 10 years from transition day unless they are determined to have been 'substantially commenced'. The Act also mandates that section 18 consents granted for notices that were given after Royal Assent are limited to a maximum of five years. The following are the items raised by stakeholder category:

Aboriginal Representatives

- If purpose of section 18 hasn't been triggered, the activity should not be considered as 'substantially commenced'
- Potential definition of 'substantially commenced': 30% or more of activities which will harm ACH have been completed

Proponents

- Scale of project and level of investment ought to be considered
- Definition of 'substantially commenced' requires further workshopping in next round of codesign process
- Project scale and purpose ought to be considered in assessment of 'substantially commenced'
- 'Substantially commenced' should be consistent with other State Government uses of the term
- 'Substantially commenced' depends on the nature and purpose of the work authorised as well as the portion of the project that has been undertaken
- 'Substantially commenced' should be consistent with other existing planning and environmental legislation
- 'Substantially commenced' could be benchmarked against the definition *Planning and Development Regulations 2015*

State Government Agencies

- 'Substantially commenced' ought to consider degree of planning approvals obtained not ground disturbance
- Establishment of key infrastructure (not just preliminary ground disturbance) and quality of consultation ought to be a criteria in determining 'substantially commenced'

Service Providers

- 10 years is too long for approvals and will lead to unnecessary harm to ACH - 'substantially commenced' ought to be regarding in terms of future impacts - definition used by town planners could be a guide
- Utilise similar process to EP Act - LACHS assess if project is substantially commenced after five years