

Aboriginal Cultural Heritage Act 2021

Aboriginal Cultural Heritage Management Code





Contents

Aboriginal Cultural Heritage Management Code.....	1
List of Tables.....	3
Overview	4
Acronyms and Definitions	4
1. Introduction	4
2. Purpose.....	5
3. Legislative context.....	6
4. Document structure	6
PART A – Undertaking a Due Diligence Assessment	7
5. Background to the Due Diligence Assessment.....	7
5.1 What does a DDA achieve?	7
5.2 Who should undertake a DDA?.....	7
5.3 When should a DDA commence?	7
5.4 DDA is not an approval to harm ACH.....	7
6. Due Diligence Assessment.....	8
6.1 DDA 1 – Determining whether the proposed activity is located within a Protected Area.....	8
6.2 DDA 2 – Determining whether an activity is exempt or the tier of an activity	8
6.3 Exempt activity – steps to undertake a DDA	9
6.4 Tier 1 activity – DDA requirements.....	10
6.5 Tier 2 activity – steps to undertake a DDA	10
6.6 Tier 3 Activity – Steps to undertake a DDA	13
PART B – Due Diligence Assessment Considerations.....	16
7. Due Diligence Considerations –Definitions	16
7.1 Harm to ACH	16
7.2 Definitions and activities within the context of ground disturbance	16
7.3 Conditional activities within Protected Areas.....	18
8. Tools to Assist Due Diligence	18
8.1 Searching the Directory	18
8.2 Does the activity intersect with ACH?	20
8.3 Other considerations when undertaking activities that may harm ACH	20
9. Engagement with interested Aboriginal parties as part of a DDA.....	20
9.1 Persons to be notified or persons to be consulted about activities or proposed activities	21
9.2 Notification to Aboriginal parties.....	21
9.3 Consultation with Aboriginal parties	21
9.4 Conducting ACH investigations.....	21
9.5 Related agreements may be used to satisfy some due diligence requirements.....	22



Appendix 1 – About Aboriginal Cultural Heritage	25
10. Information about ACH	25
10.1 Legislative Context	25
10.2 Aboriginal Cultural Heritage	25
Appendix 2 – Flow Charts	27
.....	30
11. Social surroundings.....	33
11.1 Social surroundings and ACH	33
11.2 DDA and social surroundings.....	34
11.3 Considering impact to ACH as part of social surroundings.....	35

List of Tables

Table 1 – DDA 1 – Overview of DDA process	8
Table 2 – DDA 1 – Determining whether proposed activity is within a Protected Area.	8
Table 3 – Authorisation process for Exempt Activities and the three Activity Tiers	9
Table 4 - Steps for Undertaking a Due Diligence Assessment for a Tier 1 Activity (s110)	10
Table 5 - Steps for Undertaking a Due Diligence Assessment for a Tier 2 Activity (s111)	13
Table 6 - Steps for Undertaking a Due Diligence Assessment for a Tier 3 Activity (s112)	14
Table 7 – DDA consideration of existing ground disturbance and risk of harm to ACH	17
Table 8 - Using the Directory for undertaking a DDA	19
Table 9 – Whether ACH is present	24



Overview

Acronyms and Definitions

ACH	Aboriginal cultural heritage
ACH Report	Report associated with an investigation associated with the identification of ACH that may be present in a defined area.
Act	<i>Aboriginal Cultural Heritage Act 2021</i>
CEO	The Chief Executive Officer of the Department of Planning, Lands and Heritage
Code	Aboriginal cultural heritage Management Code
Council	Aboriginal Cultural Heritage Council
Directory	Aboriginal cultural heritage Directory
DDA	Due diligence assessment
Department	Department of Planning, Lands and Heritage
EIA	Environmental Impact Assessment
EPA	Environmental Protection Authority
EP Act	<i>Environmental Protection Act 1986</i>
Harm	Harm to ACH includes to destroy or damage the ACH
Investigations	<p>Aboriginal cultural heritage investigations Research to identify any ACH within an area. ACH Investigations will determine, as far as reasonably possible, the presence of ACH. This may include one or all of the following:</p> <ul style="list-style-type: none"> • desktop assessment (including assessing whether any existing heritage survey reports completed over the proposed area); • undertaking archaeological and/or anthropological surveys (with an interested Aboriginal party and suitably qualified professional); and undertaking consultation with interested Aboriginal parties and/or knowledge holders.
Permit	ACH Permit
Plan	ACH Management Plan
Proponent	<p>A person who —</p> <p>(a) intends to carry out an activity that may harm Aboriginal cultural heritage; or</p> <p>(b) carries out an activity authorised under Division 4</p>
Proposed activity	An activity that a proponent intends to carry out
Regulations	<i>Aboriginal Cultural Heritage Regulations 2022</i>
Serious harm	<p>Section 91 defines serious harm to Aboriginal cultural heritage if the harm is –</p> <p>(a) irreversible, of a high impact or on a wide scale; or</p> <p>(b) to Aboriginal cultural heritage located in a protected area.</p>
TIER 1	Tier 1
TIER 2	Tier 2
TIER 3	Tier 3

1. Introduction



The *Aboriginal Cultural Heritage Act 2021* (Act) recognises the fundamental importance of Aboriginal cultural heritage (ACH) to Aboriginal people and Aboriginal communities and that Aboriginal people have ongoing connection to ACH. The Act recognises, protects, conserves, and preserves ACH. The Act also includes provisions for managing activities that may harm ACH in a manner that provides clarity, confidence and certainty, and balanced outcomes for Aboriginal people and the wider Western Australian community.

Section 294 of the Act defines the ACH Management Code (Code) as guidelines about the undertaking of a due diligence assessment (DDA) for a proposed activity.

Section 105 states that it is the **responsibility of a proponent to undertake a DDA**.

2. Purpose

This Code sets out how a DDA is to be undertaken by a proponent proposing to undertake an activity other than an exempt activity.

Completing a DDA will result in one or more of the following outcomes:

- work proceeding lawfully as planned;
- altering of work plans to avoid harming ACH;
- the requirement to engage with interested Aboriginal parties;
- the requirement to undertake an ACH investigation (Investigations) as set out in this Code;
- the requirement to lodge an application under Part 6 of the Act for the grant of an ACH Permit (Permit) or for the approval or authorisation of an ACH Management Plan (Plan) so as to lawfully carry out the planned activity;
- the works not proceeding.

The Act requires proponents to undertake a DDA in relation to a proposed activity other than an exempt activity. The purpose of a DDA is to ensure proponents comply with the Act by making an assessment, as per Part A [Section 6](#) of this Code.

Under section 98 of the Act, completing a DDA may be used as a defence to a charge if ACH is harmed by an activity.

Situations will arise where a proponent will propose to undertake activities that have the potential to harm ACH. Part 6 of the Act includes provisions for the management of activities that may harm ACH.

In addition to the requirements set out in the Act, [Appendix 3](#) of this Code outlines the considerations for proponents whose projects may have a significant environmental effect in relation to the ACH component of “social surroundings” (as defined in section 3 of the *Environmental Protection Act 1986* (EP Act)). Proponents who may be referred to the EPA’s Environmental Impact Assessment process (EP Act Part IV Divisions 1 and 2) are encouraged to incorporate the processes and considerations set out in Appendix 3 when undertaking a DDA in order to address EPA requirements relating to social surroundings. It should be noted that these processes and considerations are not mandatory in order to meet the requirements of the Act. Undertaking them where EPA requirements relating to social surroundings need to be met will, however, doing so will reduce duplication of processes and increase efficiency for both proponents and Aboriginal parties.



3. Legislative context

The DDA is a key mechanism for protecting and managing ACH. Section 102 of the Act states that a DDA, undertaken in accordance with this Code, is an assessment about:

- (a) whether the area of the proposed activity includes any area that is part of a protected area;
- (b) whether the proposed activity is a —
 - (i) a tier 1 activity (no or minimal ground disturbance);
 - (ii) a tier 2 activity (low ground disturbance);
 - (iii) a tier 3 activity (moderate to high ground disturbance);
- (c) whether ACH is located in the area of the proposed activity;
- (d) whether there is a risk of harm being caused to ACH by the proposed activity;
- (e) in relation to 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.

This Code sets out the steps required to be undertaken for a DDA.

4. Document structure

This Code is structured to ensure users have the necessary background information prior to undertaking a DDA and also the necessary knowledge on any steps required following the completion of a DDA. This document comprises:

[PART A – Undertaking a Due Diligence Assessment](#)

Steps required to complete a DDA.

[PART B – Due Diligence Assessment Considerations](#)

Information necessary to complete a DDA by including the key considerations and tools to assist persons completing a DDA.

[Appendix 1 – Acknowledging ACH](#)

Information relating to:

- protecting ACH;
- ACH that is protected under the Act;
- harm; and
- principles for managing ACH.

[Appendix 2 – Approvals Process Flowcharts](#)

Flow charts for each DDA process

[Appendix 3 – Interaction with the EPA’s Social Surroundings Environmental Factor](#)



PART A – Undertaking a Due Diligence Assessment

5. Background to the Due Diligence Assessment

5.1 What does a DDA achieve?

The completion of a DDA is a fundamental process for protecting ACH and assists proponents to:

- understand whether the proposed activity is within a protected area;
- gain knowledge of where ACH is within their project area;
- understand the potential for ACH to be harmed by their proposed activity;
- assess whether an activity can proceed without an approval, or whether a Permit or Plan is required; and
- identify the Aboriginal parties who need to be notified or consulted in relation to the proposed activity.

5.2 Who should undertake a DDA?

A DDA needs to be completed by any person (proponent) that is proposing to undertake an activity other than an exempt activity.

5.3 When should a DDA commence?

A DDA should be undertaken at the earliest stage possible when preparing to carry out an activity, particularly when the activity forms part of a broader project or works program.

The earlier that a DDA is undertaken in the project planning stage, the more likely the activity will be able to be planned in a manner that avoids or minimises the risk of harm to ACH.

Critical to a DDA is knowledge of whether ACH is located within the area of the proposed activity. If the ACH is not located in the activity area, the activity may proceed without further assessment.

Under Part 6 of the Act, there is a requirement for an activity to be *authorised* if there is a risk the activity will harm ACH.

5.4 DDA is not an approval to harm ACH

A DDA carried out in accordance with the Code is part of the process for seeking an approval to harm ACH; it is not an approval to harm ACH itself. Where the DDA identifies that no ACH is present and/or that there is no risk of harm to ACH, however, if the undertaking of the activity ACH is identified and/or it becomes apparent there is a risk of harm to ACH, a proponent is required to take all reasonable steps possible to avoid or minimise the risk of harm being caused to the ACH. This may include ceasing the activity and seeking the appropriate authorisation under Part 6 of the Act.

Failure to cease the activity may result in an offence and prosecution under Part 5 of the Act and/or the issuing of a stop activity order or a prohibition order pursuant to Part 7 of the Act where ACH is being harmed or there is an imminent risk of harm to ACH.



6. Due Diligence Assessment

The five steps of a DDA are:

DDA Step	Description
DDA1	Confirm whether the activity is located within a protected area
DDA2	Confirm whether the activity is exempt or the activity tier of the proposed activity [s102(b)]
DDA3	Assess whether ACH is located in the proposed activity area [s102(c)]
DDA4	Assess if there is a risk of harm to ACH by the proposed activity [s102(d)]
DDA5	Identify the persons to be notified or consulted about a proposed TIER 2 or a TIER 3 activity

Table 1 – DDA 1 – Overview of DDA process

6.1 DDA 1 – Determining whether the proposed activity is located within a Protected Area

Section 70 of the Act provides special protection for ACH that has been declared a Protected Area. A proposed activity, regardless of whether it is an exempt, TIER 1, TIER 2 or TIER 3 activity, located within a Protected Area, is not permitted unless the Protected Area has conditions or regulations permitting that activity.

DDA1	Steps for determining whether a proposed activity is located within the boundary of a Protected Area [s102(a)]	Supporting information/required action
Step 1	Search the ACH Directory (Directory) to determine if the area for which a person is proposing to undertake an activity is located in an area that has been declared as a Protected Area.	Directory user guidelines (to be developed)
Step 2	If the activity is not located within a Protected Area, the person proposing to undertake the activity is to continue with the DDA.	
Step 3	If the activity is located within a Protected Area, the activity is not permitted unless there are conditions or regulations in place that permit the activity in question.	A person wishing to undertake the activity is responsible for assessing whether the proposed activity is permissible by any condition or regulation relating to the Protected Area. The Department of Planning, Lands and Heritage (Department) may be contacted for assistance.

Table 2 – DDA 1 – Determining whether proposed activity is within a Protected Area.

6.2 DDA 2 – Determining whether an activity is exempt or the tier of an activity

The Code has different requirements for exempt activities and each tier of activity. Once it has been established that the proposed activity is not located within a Protected Area, the **next step** is determining whether the activity is an exempt activity and, if not, the tier of the proposed activity.

Additional steps are required depending on whether it is an exempt activity or the particular tier the activity falls within:



- b) a tier 1 activity – see [section 6.4](#);
- c) a tier 2 activity – see [section 6.5](#);
- d) a tier 3 activity – see [section 6.6](#).

Activity tiers reflect that different activities are likely to cause different levels of harm to ACH. The **Activity Tiers** are set out in the *Aboriginal Cultural Heritage Regulations 2022* (Regulations).

Where there is a risk of harm to ACH from a proposed activity, **a proponent is required to follow the authorisation pathway corresponding to the relevant activity tier**. The DDA process applies to all activities involving ground disturbance (other than exempt activities). **Table 3** provides an overview of the authorisation process required for each tier where there is a risk of harm to ACH from the proposed activity.

For the purposes of a DDA, a proponent is required to determine the tier of their activity. The tiers are available via the Regulations or the Directory.

If a specific activity is not listed, a proponent is able to contact the Department for advice.

Activity Category	If no risk of harm to ACH	Authorisation requirements if risk of harm to ACH
Exempt activity	Able to proceed as planned provided it is not in a Protected Area	Activity authorised to proceed as planned. To be consistent with the Objects and Principles of the Act, it is recommended that proponents should undertake the activity to avoid or minimise harm to ACH wherever possible.
Tier 1 activity		Activity is authorised to proceed as planned as long as a DDA is undertaken, and the proponent takes all reasonable steps possible to avoid or minimise the risk of harm being caused to ACH.
Tier 2 activity		Activity will require the issue of a Permit.
Tier 3 activity		Activity will require an approved or authorised Plan.

Table 3 – Authorisation process for Exempt Activities and the three Activity Tiers

6.3 Exempt activity – steps to undertake a DDA

While exempt activities may have the potential to cause harm to ACH, a DDA is not required [s103]. However, a proponent is required to make an assessment as to whether the area where it is intended that the exempt activity be carried out includes any area that is part of a Protected Area [s109].

Exempt activities include activities that are **like for like or less on previously disturbed ground** under section 7.2 of the Code. If the proposed activity meets the criteria of **like for like or less on previously disturbed ground**, it is exempt and will not require a DDA.

Consistent with the Objects and Principles of the Act, proponents undertaking exempt activities are at all times encouraged to plan and undertake their activities in a manner that avoids or minimises harm to ACH should it be present.



A proposed activity that is a **like for like (or less) activity undertaken on previously disturbed ground**, as described in section 7.2 of the Code, is an exempt activity.

6.4 Tier 1 activity – DDA requirements

A tier 1 activity that may harm ACH is able to be carried out as long as:

- a) it is not within a Protected Area; and
- b) the proponent takes all reasonable steps possible to avoid or minimise the risk of harm being caused to ACH by the activity by:
 - I. undertaking a search of the Directory;
 - II. undertaking a visual inspection prior to carrying out the activity*;
 - III. actively considering any ACH that the proponent is aware of (irrespective of whether it is on the Directory); and
 - IV. actively considering whether there is an alternative way to carry out the activity that reduces the risk of harm to the ACH of which the proponent is aware, and undertaking the activity using the alternative approach where reasonable.

* a direct visual inspection (one that does not involve mechanical or electronic assistance) where reasonable or practicable.

	Steps for undertaking a DDA for a TIER 1 Activity	Supporting information/Required Action
DDA3 Tier 1 Activity	Assessing whether ACH is located within the area of the proposed tier 1 activity	
Step 1	a) Undertake a search of the Directory b) Undertake a visual inspection prior to carrying out the activity	Link to the Directory to be included <i>(Department to publish document on identification of ACH)</i>
Step 2	A person intending to carry out a tier 1 activity must take all reasonable steps to avoid or minimise harm to ACH.	A proponent who is aware of, or has been informed of, the presence of ACH in the activity area, needs to actively consider whether there is an alternative location or feasible alternative method to undertake the activity that will avoid or minimise harm to ACH. If there is an alternative location or feasible alternative method to carry out the activity that will result in harm to ACH being avoided or minimised, the proponent is required to undertake the activity using the alternative method.

Table 4 - Steps for Undertaking a Due Diligence Assessment for a Tier 1 Activity [s110]

6.5 Tier 2 activity – steps to undertake a DDA

In order for a tier 2 activity that may cause harm to ACH to be authorised a Permit will be required prior to commencing the activity.



A person intending to carry out a tier 2 activity that may harm ACH is required to notify:

- a) if there is a LACHS for the area or a part of the area – the LACHS;
- b) if there is not a LACHS for the area or part of the area:
 - I. each native title party for the area or the part of the area; and
 - II. each knowledge holder for the area or the part of the area;
- c) if there is not a LACHS, native title party or a knowledge holder(s) for the area or part of the area – the Native Title Representative Body for the area.

	Steps for undertaking a DDA for TIER 2	Supporting information/Required action
DDA3 T 2 Activity	Assessing whether ACH is located within the area of the proposed tier 2 activity [s102(c)]	
Step 1	Search the Directory for any ACH that has been identified.	If there is identified ACH in the activity area, the proponent may be able to alter the activity so as to avoid the risk of harm to the ACH, thereby removing the need for an approval.
Step 2	If there is no ACH listed on the Directory, search the Directory to determine if any previous ACH reports exist over the activity area.	
Step 3	<p>If previous ACH reports exist, assess whether any associated surveys:</p> <ul style="list-style-type: none"> a) were an archaeological and/or anthropological survey conducted by a qualified heritage profession and with the involvement of an appropriate Aboriginal party and/or knowledge holders, refer to section 9.1; b) comply with the Survey Guidelines (to be drafted), including the purpose of the survey and whether the appropriate Aboriginal party and/or knowledge holders were involved in the survey; and c) employed a robust methodology (as per the Survey Guidelines – to be drafted) that also indicated the level of survey coverage and included conclusive statements about the presence or absence of ACH that is backed up by evidence outlined in the associated ACH report. 	<p>Survey Guidelines (to be drafted)</p> <p>If reviewed ACH reports identify ACH in the activity area, the proponent may be able to alter the activity so as to avoid the risk of harm to ACH, thereby removing the need for an approval.</p>



DDA4 TIER 2 Activity	Assess whether there is a risk of harm being caused to ACH by the proposed activity [s102(d)]?	<p>In assessing whether the proposed activity can cause harm to ACH the proponent will need to consider whether ACH is present and also consider matters set out in section 7.2 in Part B of the Code.</p>
Step 4	Based on a review of the Directory, including any ACH reports on the Directory, the proposed activity can be assessed as not resulting in a risk of harm to ACH.	The activity may proceed without a Permit.
Step 5	The proposed activity has been assessed as located within known ACH and may result in a risk of harm to ACH.	a) The proposed activity should be altered to avoid harm to ACH; or b) The proposed activity will require a Permit or an approved or authorised Plan.
Step 6	The proposed activity is assessed as being in an area where it is not known whether ACH is present and may result in a risk of harm to ACH should it be present.	a) The proponent may commence the process to apply for a Permit; or b) The proponent may engage with the interested Aboriginal party to further assess whether ACH is present within the activity area. If the proponent engages with Aboriginal party and it is determined that ACH is present, the proponent will need to either: a) apply for a Permit for the proposed activity or commence the process for a Plan; or b) alter the proposed activity to avoid harm to the ACH
DDA5 TIER 2	How to identify the persons to be notified about a proposed tier 2 activity [s102(c)]	
Step 7	Search the Directory to identify the person(s) to be notified about the proposed activity. Where an activity is proposed to be undertaken in an area or part of an area where a LACHS has not been appointed, the proponent will also need to consider the Knowledge Holder Guidelines.	The Directory contains information on: a) LACHS; b) native title parties; c) knowledge holders (where known) for an area.
Step 8	The person intending to carry out an activity must notify the interested Aboriginal party and/or knowledge holders	



Table 5 - Steps for Undertaking a Due Diligence Assessment for a Tier 2 Activity [s111]

6.6 Tier 3 Activity – Steps to undertake a DDA

In order for a tier 3 activity that may cause harm to ACH to be authorised, an approved or authorised Plan will be required prior to commencing the activity.

	Steps for undertaking a DDA	Supporting information/Required Action
DDA3 TIER 3 Activity	Assessing whether ACH is located within the area of the proposed tier 3 activity [s102(c)]	
Step 1	Search the Directory for any ACH that has been identified.	If there is reported ACH in the activity area, the proponent may alter its work plan to avoid harm to ACH.
Step 2	If there is no ACH listed on the Directory, search the Directory to determine whether the activity area has been the subject of previous ACH reports.	
Step 3	If previous ACH reports exist, assess whether any associated surveys: <ul style="list-style-type: none"> a) were an archaeological and/or anthropological survey conducted by a qualified heritage professional and with the involvement of an appropriate Aboriginal party and/or knowledge holder(s), refer to section 9.1; b) comply with the Survey Guidelines (to be drafted), including the purpose of the survey and whether the appropriate Aboriginal party and/or knowledge holder(s) were involved in the survey; and c) include a robust methodology (as per the Survey Guidelines – to be drafted) that also indicated the level of survey coverage and included conclusive statements about the presence or absence of ACH that is backed up by evidence outlined in the associated report. 	Survey Guidelines (to be drafted) If it remains unknown whether ACH is present in the activity area, then following an assessment under DDA 4 below, it may also be necessary to conduct Investigations.
DDA4 TIER 3 Activity	Assess whether there is a risk of harm to ACH by the proposed TIER 3 activity [s102(d)]	In assessing whether the proposed activity may cause harm to ACH the proponent will need to consider whether ACH is present and also consider matters set out in section 7.2 in Part B of the Code.



Step 4	Based on a review of the Directory, including any ACH reports on the Directory, the proposed activity can be assessed as not resulting in a risk of harm to ACH.	The activity may proceed without a Plan.
Step 5	The proposed activity has been assessed as located within known ACH and may result in a risk of harm to ACH.	<ul style="list-style-type: none"> a) The proposed activity should be altered to avoid harm to ACH; or b) The proposed activity will require an approved or authorised Plan.
Step 6	The proposed activity is assessed as being located in an area where it is not known whether ACH is present and may result in a risk of harm to ACH.	<ul style="list-style-type: none"> a) The proponent will need to undertake Investigations in accordance with the ACH Investigations Guidelines (to be drafted) in order to assess whether ACH is located within the proposed activity area. b) If the Investigations do not identify any ACH the activity may proceed without an approved or authorised Plan. If ACH is identified while undertaking the activity, work will need to cease and a DDA undertaken. Part 7 orders (stop activity and prohibition) apply to new information about ACH. c) If the Investigations identify ACH, the proponent will need to: <ul style="list-style-type: none"> i) alter the proposed activity to avoid harm to ACH; or, ii) undertake the necessary steps to apply for a Plan.
DDA5 TIER 3 Activity	How to identify the persons to be consulted about a proposed tier 3 activity [s102(e)]	
Step 7	<p>Search the Directory to identify person(s) to be consulted for the area of the proposed activity.</p> <p>Where an activity is proposed to be undertaken where a LACHS has not been appointed, the proponent will also need to consider the Knowledge Holder Guidelines.</p>	<p>The Directory contains information on:</p> <ul style="list-style-type: none"> a) LACHS; b) native title parties; c) knowledge holders (where known) for an area
Step 8	The person intending to carry out an activity must notify the interested Aboriginal party and/or knowledge holders	

Table-6 - Steps for Undertaking a Due Diligence Assessment for a Tier 3 Activity [s112]





PART B – Due Diligence Assessment

Considerations

7. Due Diligence Considerations –Definitions

This part of the Code outlines the key factors a proponent will need to address when conducting a DDA.

7.1 Harm to ACH

Harm is defined in the Act as - to destroy or damage ACH [s90] comprising Aboriginal places, objects, ancestral remains and ACH (including cultural landscapes) located within Protected Areas [s89].

An act carried out by an Aboriginal person in accordance with their traditional rights, interests, and responsibilities in relation to ACH is not considered harm to that ACH.

ACH may have previously been harmed by an activity; however, the values of the ACH may continue to be present and may be harmed by future activities.

7.2 Definitions and activities within the context of ground disturbance

In undertaking a DDA, a proponent needs to assess whether the proposed ground disturbing activity risks harm being caused to ACH. This includes areas of previous ground disturbance where there may continue to exist:

- previously unknown or undisturbed subsurface material (particularly ancestral remains);
- intangible ACH as associated with sacred beliefs, ritual and ceremonial use and social values which continue to be protected by the Act (subject to those areas of prior ground disturbance that are exempt under the Regulations).

The below definitions will assist proponents to determine if an activity risks harm being caused to ACH. If the activity won't risk harm, the activity may proceed as planned without requiring an approval.

Disturbance is any activity that will physically cause a disturbance to the ground such as:

- the digging, excavation, removal, damage or alteration of topsoil, subsoil, or rock layer including impact to any flora;
- inserting any object into, or placing on top of, the ground;

which causes a temporary or permanent impact during the activity or after the activity.

Ground includes natural, modified or rehabilitated environments.

New or Additional Ground Disturbance is any disturbance that is not consistent with the existing extent of surface or subsurface disturbance at the time the activity is proposed to take place. This will include disturbing adjacent ground that is undisturbed, or disturbing subsurface ground up to and including 10 m below current ground level where not previously disturbed.

Rehabilitated Areas are areas of previously disturbed land which have since been repaired with an aim to reinstate the landscape to its previous function or appearance (to the extent practicable).

Like for like activities are exempt under the Regulations. **Like for like** activities which do not cause new or additional ground disturbance provided that the proposed activity is a **like for like** activity or is a disturbance (that is not a new or additional ground disturbance) that is less than that caused by a **like for like** activity.



If the proposed activity will not cause any new or additional ground disturbance but exceeds a **like for like** activity, the proponent should undertake the relevant approval process where it may result in a risk of harm to ACH.

Like for like activities are activities that result in a development that in essence is the same type, kind or form and is comparable in the context of:

- I. scale;
- II. structure;
- III. profile; and
- IV. extent.

Table 7 outlines considerations for proponents when undertaking a DDA with regard to assessing whether there is a risk the proposed activity may harm ACH. **Table 7** needs to be considered when undertaking a DDA under Part A Section 6 of this document with regard to DDA 4 for tier 2 and tier 3 activities – assessing whether there is a risk of harm to ACH by the proposed activity.

Ground Disturbance type	Description	DDA consideration of risk of harm to ACH
New or additional ground disturbance	Any disturbance that is not consistent with the existing extent of surface or subsurface disturbance at the time the activity is proposed to take place. This will include disturbing the adjacent ground that is previously undisturbed, or disturbing subsurface ground at a depth where cultural material may exist.	May result in a risk of harm to ACH where it is present.
No additional ground disturbance and the activity exceeds a like for like disturbance	Ground disturbance activities that do not create any new or additional disturbance, however, will result in development that exceeds the current type, kind or form and is not comparable in the context of: <ol style="list-style-type: none"> I. scale; II. structure; III. profile; and IV. extent. 	May result in a risk of harm to ACH where it is present.
No additional ground disturbance and the activity is like for like or less	Like for like activities are proposed ground disturbance activities that will result in development that in essence is the same type, kind or form in the context of: <ol style="list-style-type: none"> I. scale; II. structure; III. profile; and IV. extent. 	Exempt from requiring an approval (pursuant to the Regulations)

Table 7 – DDA consideration of existing ground disturbance and risk of harm to ACH



7.3 Conditional activities within Protected Areas

Persons are not able to access, nor undertake activities within, a Protected Area other than:

- an Aboriginal person undertaking their traditional rights and responsibilities; or
- where the conditions or regulations of the Protected Area allow otherwise.

8. Tools to Assist Due Diligence

8.1 Searching the Directory

The Directory is a tool that will assist with undertaking a DDA.

The Directory will contain prescribed information about ACH that is located throughout the State. This will include information about ACH previously held on the Register of Aboriginal Sites throughout the administration of the *Aboriginal Heritage Act 1972*, as well as records of new ACH as they are submitted.

The Council seeks to have the Directory as accurate and up to date as practicable, however, it *will not* contain records for all the ACH that is located within Western Australia. Aboriginal people have lived on this land for over 65 000 years and in doing so have developed a living culture bound in tradition that is manifested through, among other things, familial connections, languages, stories, songs, religious beliefs and practices, knowledge, art, sentiment and through the skilled adaptation of resources provided by the land and water which are represented throughout Western Australia as ACH.

The tangible manifestations of this living culture are widespread throughout the State. Large sections of the State have not yet been surveyed, or not surveyed comprehensively, and therefore there may be no record of the ACH that exist in these areas.

The table below demonstrates how the information in the Directory will assist with the DDA:

Information and documents on the Directory		Section 102. Due diligence assessment
Protected Areas	DDA1	(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.
List of activity categories	DDA2	(b) whether the proposed activity is — (i) a tier 1 activity; or (ii) a tier 2 activity; or (iii) a tier 3 activity.
Information about ACH of the State, including, where relevant — I. a description of the characteristics of the ACH; and II. description of the location of the ACH; 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 ACH — recordings (including photographs, films, audio, video, digital and other recordings);	DDA3 DDA4	(c) whether ACH is located in the area where it is intended that the proposed activity be carried out and (d) whether there is a risk of harm being caused to ACH by the proposed activity



V. any other information and documents, including historical information and documents, relevant to ACH.		
ACH protection agreements	DDA3 DDA4	(c) whether ACH is located in the area where it is intended that the proposed activity be carried out and (d) whether there is a risk of harm being caused to ACH by the proposed activity
LACHS for an area	DDA5	(e) in relation to a proposed activity that has been assessed as a tier 2 activity or a tier 3 activity — identify the persons to be notified or the persons to be consulted about the proposed activity
Native title party for an area	DDA5	(e) in relation to a proposed activity that has been assessed as a tier 2 activity or a tier 3 activity — identify the persons to be notified or the persons to be consulted about the proposed activity
Knowledge holders for the following — I. a particular area; II. particular ACH.	DDA5	(e) in relation to a proposed activity that has been assessed as a tier 2 activity or a tier 3 activity — identify the persons to be notified or the persons to be consulted about the proposed activity

Table 8 - Using the Directory for undertaking a DDA

Important information to consider when using the Directory

If a search of the Directory for a given area returns no ACH listed, it must not be presumed that ACH is not located in the area nor that a proposed activity will not result in harm to ACH. The DDA process in Part A of the Code outlines the steps to be followed in circumstances where a search of the Directory does not return any records of identified ACH.

Certain ACH listings considered as being culturally sensitive will be masked by the application of a dithered boundary. A dithered boundary provides the general locality of the ACH, rather than its specific location. The harm provisions apply only to the location where the ACH is actually located and not to the entirety of the area covered by the dithered boundary. The Directory will clearly articulate which ACH entries contain a dithered boundary.

The Department should be contacted where there is a query as to specific locations and boundaries. Due to historical factors, it is possible that some ACH listings may not represent the precise ACH location or associated boundary. Persons accessing the Directory should contact the Department if there exists any doubt as to the accuracy or completeness of information displayed on the Directory.

The best way to be certain of whether ACH is located within a proposed activity area is to discuss with the relevant Aboriginal persons. This includes LACHS, where established, or otherwise the native title parties and knowledge holders.



8.2 Does the activity intersect with ACH?

For the purpose of the DDA, the presence of ACH has been categorised into three groups for any given area:

- a) ACH is present;
- b) ACH is absent; or
- c) it is uncertain if ACH is present.

[Table 9](#) provides more information as to whether or not it is known that ACH is present within an activity area.

If the DDA confirms that there is no ACH in the activity area, the activity may proceed without requiring any authorisation.

8.3 Other considerations when undertaking activities that may harm ACH

To facilitate meeting the Objects and Principles of the Act as well as achieving positive outcomes for all parties and to assist in meeting statutory obligations, it is recommended that proponents undertake the following steps:

- develop a positive and respectful relationship with the relevant Aboriginal organisation(s) (including LACHS) and/or Aboriginal community;
- be well informed as to where ACH may be located and its importance to Aboriginal people;
- ensuring the Aboriginal organisation and Aboriginal community are well informed of land use proposals and their potential impacts to ACH at the earliest possible stages;
- be well informed of statutory responsibilities associated with ACH and land use;
- undertake early planning and engagement in order to understand the benefits and opportunities to modify proposals to avoid or minimise harm to ACH, including potentially avoiding the need for any authorisation under the Act;
- undertake the DDA process as early as possible to determine whether a Permit or Plan will be required.

9. Engagement with interested Aboriginal parties as part of a DDA

Undertaking a DDA may require engagement with an Aboriginal party in circumstances where it is unclear whether ACH is at risk of being harmed by a proposed activity.

On completion of a DDA a proponent may also need to either notify or consult with Aboriginal parties should an authorisation under Part 6 of the Act be necessary for the activity to lawfully proceed.

The engagement required under Part 6 includes notification of the proposed activity for a tier 2 activity, or undertaking a consultation with the LACHS, or an Aboriginal party, or knowledge holder or undertaking an Investigation with the LACHS, or an Aboriginal party/parties/person(s) for tier 3 activities, or for tier 2 activities that will be part of an application for a Plan.

The most effective way to manage an activity so that it avoids or minimises the risk of harm to ACH is to engage early and meaningfully with the relevant Aboriginal persons. This includes LACHS where they have been established or otherwise the native title parties and knowledge holders for specific ACH for the area where the activity is proposed.



9.1 Persons to be notified or persons to be consulted about activities or proposed activities

Section 107 of the Act sets out the order of persons to be notified or the persons to be consulted about an activity that a proponent is carrying out, or a proposed activity that the proponent intends to carry out, in an area as follows —

- a) each LACHS for the area or a part of the area;
- b) if there is not a LACHS for the area or a part of the area —
 - I. each native title party for the area or part of the area; and
 - II. each knowledge holder for the area or part of the area;
- c) if there is not a LACHS, a native title party or a knowledge holder for the area or a part of the area — each native title representative body for the area or the part of the area.

9.2 Notification to Aboriginal parties

A proponent intending to carry out a **tier 2 activity** is required to notify the person to be notified as required by s107. During the process of notification, the Aboriginal party will have the opportunity to provide a statement about any ACH located in the area and if there is a risk of harm to the ACH by the proposed activity.

On review of the response received from the Aboriginal party, the person intending to undertake the activity may be able to amend their plan to avoid or minimise risk of harm to ACH located in the area.

In deciding whether to grant a Permit, the Council needs to be satisfied that the applicant will take all reasonable steps possible to avoid or minimise the risk of harm being caused to ACH by the activity.

9.3 Consultation with Aboriginal parties

A proponent intending to carry out a tier 2 or tier 3 activity that is the subject of a Plan will be required to consult with the Aboriginal party. Consultation will need to be in accordance with the Consultation Guidelines.

9.4 Conducting ACH investigations

An Investigation may be required in relation to a **tier 3 activity** where it is not known whether ACH is located in an activity area or if adequate ACH reports or studies are not available to confirm the presence or absence of ACH.

The purpose of an Investigation is to directly seek the views of the Aboriginal party, Aboriginal persons and/or knowledge holder(s) in order to:

- a) confirm whether ACH is located within an activity area;
- b) evaluate whether ACH may be harmed by the activity;
- c) determine the level of impact on that ACH; and
- d) identify alternative ways to undertake the activity to avoid or minimise harm to ACH.

How an Investigation is conducted may vary depending on the type of activity proposed, previous research and investigations conducted in the area, the type of ACH that may be present as well as the view of the Aboriginal party regarding how the Investigation should be undertaken¹. What a proponent needs to do to achieve this will vary. It could include visiting the activity area or conducting an ACH survey with interested Aboriginal persons or identified knowledge holder(s).

¹ The Council will publish ACH Investigation Guidelines.



An Investigation may vary between simply establishing the presence of ACH in order to plan the proposed activity to avoid the ACH, to identifying a higher level of detail to inform the impact statement required for a Plan.

9.5 Related agreements may be used to satisfy some due diligence requirements

A related agreement under the Act is an agreement that contain provisions about the management of ACH and the carrying out of an activity to which authorisation under Part 6 is required.

Section 106 of the Act provides that related agreements can be used to satisfy some due diligence requirements if the related agreement includes steps that are consistent with the DDA assessment process outlined in Part A of this Code to:

- identify whether ACH is located within an activity area; and
- assess whether there is a risk of harm being caused to ACH.



Presence of ACH	Definition	Comments
<p>ACH is known to be present</p>	<p>The activity is being conducted within an area where ACH is known to be physically present.</p>	<p>Physically present means ‘the actual physical expression of the ACH as it occurs in-situ’ and not any dithered boundary associated with the mapping of the ACH on the Directory.</p> <p>It applies to all ACH whether or not it has been previously recorded or reported and whether or not it is listed on the Directory.</p> <p>A proponent should contact the Department should any doubts exist regarding the mapping of ACH on the Directory and whether mapped boundaries accurately represent ACH.</p>
<p>Uncertain whether ACH is present</p>	<p>It is unknown whether the activity is located within an area where ACH is physically present as:</p> <ul style="list-style-type: none"> • The Directory does not list any ACH in the area. • There are no reports or studies available that conclusively determine whether ACH is present. • Existing reports and studies do not allow a determination as to whether there is a reasonable possibility that ACH is present. • Previous consultations with Aboriginal parties and/or identified knowledge holders did not conclusively determine whether ACH is present. 	<p>Not all ACH that exists in the State has been reported and/or added to the Directory. Countless examples of ACH across all landforms exist throughout the State that have not been reported or even identified. All of these are protected under the Act.</p> <p>In instances where a search of the Directory does not reveal any listing of ACH over a given area, it should not be presumed that ACH is absent unless:</p> <ul style="list-style-type: none"> • there is an existing report or study that allows a determination that ACH is not present or that there is not a reasonable possibility that ACH is present; • the area has been the subject of an Investigation undertaken in accordance with this Code which did not locate any ACH nor identify the reasonable possibility of ACH being present; • reports of past ACH investigations, conducted with Aboriginal parties and/or knowledge holders for the purposes of the Act, that did not locate any ACH nor

		<p>identify the reasonable possibility of ACH being present;</p> <ul style="list-style-type: none"> • consultation undertaken with Aboriginal parties and/or knowledge holders in accordance with this Code identifies that ACH is not present nor that there is a reasonable possibility of ACH being present.
Confirmed that ACH is not present	<p>One of the following exists which has led to the reasonable view that ACH is not present in the area:</p> <ul style="list-style-type: none"> • there is an existing report or study that allows a determination that ACH is not present or that there is not a reasonable possibility that ACH is present; • the area was subject to an Investigation undertaken in accordance with this Code that did not locate any ACH nor identify the reasonable possibility of ACH being present; • reports of past Investigations, conducted with the Aboriginal parties and/or knowledge holders that did not locate any ACH nor identify the reasonable possibility of ACH being present; • consultation undertaken with interested Aboriginal parties and/or knowledge holders in accordance with this Code identifies that ACH is not present nor that there is a reasonable possibility of ACH being present. 	<p>The Act and DDA process support an ACH protection system where activities that do not cause harm to ACH are able to proceed without any approval.</p> <p>If it can be demonstrated there is no ACH present within the area where a proposed activity will have a direct impact, the activity may proceed.</p>

Table 9 – Whether ACH is present

Appendix 1 – About Aboriginal Cultural Heritage

10. Information about ACH

10.1 Legislative Context

ACH is of fundamental importance to Aboriginal people and its value is also recognised by the wider Western Australian community. A key object of the Act is to recognise, protect, conserve and preserve ACH. This applies to all ACH in Western Australia, whether or not it has been identified and placed on the Directory.

Meaning of ACH and related terms

In this Act —

Aboriginal cultural heritage —

- a) means the tangible and intangible elements that are important to the Aboriginal people of the State, and are recognised through social, spiritual, historical, scientific or aesthetic values, as part of Aboriginal tradition; and
- b) includes the following —
 - I. an area (an Aboriginal place) in which tangible elements of Aboriginal cultural heritage are present;
 - II. an object (an Aboriginal object) that is a tangible element of Aboriginal cultural heritage;
 - III. a group of areas (a cultural landscape) interconnected through tangible or intangible elements of Aboriginal cultural heritage;
 - IV. the bodily remains of a deceased Aboriginal person (Aboriginal ancestral remains), other than remains that are buried in a cemetery where non-Aboriginal persons are also buried or remains that have been dealt with or are to be dealt with under a law of the State relating to the burial of the bodies of deceased persons.

10.2 Aboriginal Cultural Heritage

The Act recognises that ACH is:

- either an area (*Aboriginal place*), object (*Aboriginal object*), a group of objects or places (cultural landscape), or the bodily remains of a deceased Aboriginal person (Aboriginal ancestral remains);
- important to Aboriginal people;
- may have tangible or intangible elements; and
- important for its social, spiritual, historical, scientific, or aesthetic values.

Aboriginal Places

An *Aboriginal place* is an area in which tangible elements of ACH are present. The tangible representation of an Aboriginal place is broad and includes, but is not limited to:

- an area where Aboriginal persons have left cultural material such as artefacts, artwork, a tree displaying modifications, shell material, stone arrangements;
- elements such as landscape features which include waterways and topographic features associated with intangible elements such as sacred beliefs; and
- areas designated for a specific purpose such as ceremonial grounds and places where rituals are conducted.



Aboriginal Objects

An *Aboriginal object* is an object that is a tangible element of ACH and includes, but is not limited to, objects associated with:

- traditional activities such as hunting, tool manufacture and maintenance, and food preparation; or,
- ceremonies, ritual activities, and sacred associations.

Aboriginal objects that are secret and sacred are further protected in Part 3 of the Act (*Rights and Duties in Relation to ACH*) which sets out specific requirements not dealt with in this ACH Management Code.

Aboriginal ancestral remains

Aboriginal ancestral remains are the bodily remains of a deceased Aboriginal person, other than remains that are buried in a cemetery where non-Aboriginal persons have been buried or have been dealt with or are to be dealt with under a law of the State relating to the burial of bodies or deceased persons.

The Act requires Aboriginal ancestral remains that are in-situ not to be disturbed. It also requires persons with Aboriginal ancestral remains in their possession to return these to their custodians.

Cultural landscapes

Cultural landscapes are a group of areas interconnected through tangible or intangible elements of ACH. This definition recognises that ACH, including places and objects, do not occur in isolation and are frequently linked and interconnected. Cultural landscapes include, but are not limited to:

- traditional habitation areas that comprise of Aboriginal places, each linked through the discrete activities associated with each Aboriginal place; and
- areas that are linked through a common narrative that manifests in natural features in a landscape, including, but not limited to, hills, water sources, or granite outcrops.

Protected Areas

Protected Areas are areas Aboriginal people consider to be of *outstanding significance*. Areas of outstanding significance are recognised to form part of Aboriginal traditional, historic, and living cultural heritage.

State significance

State significance is ACH that is of *exceptional importance to the cultural identity of the State*.



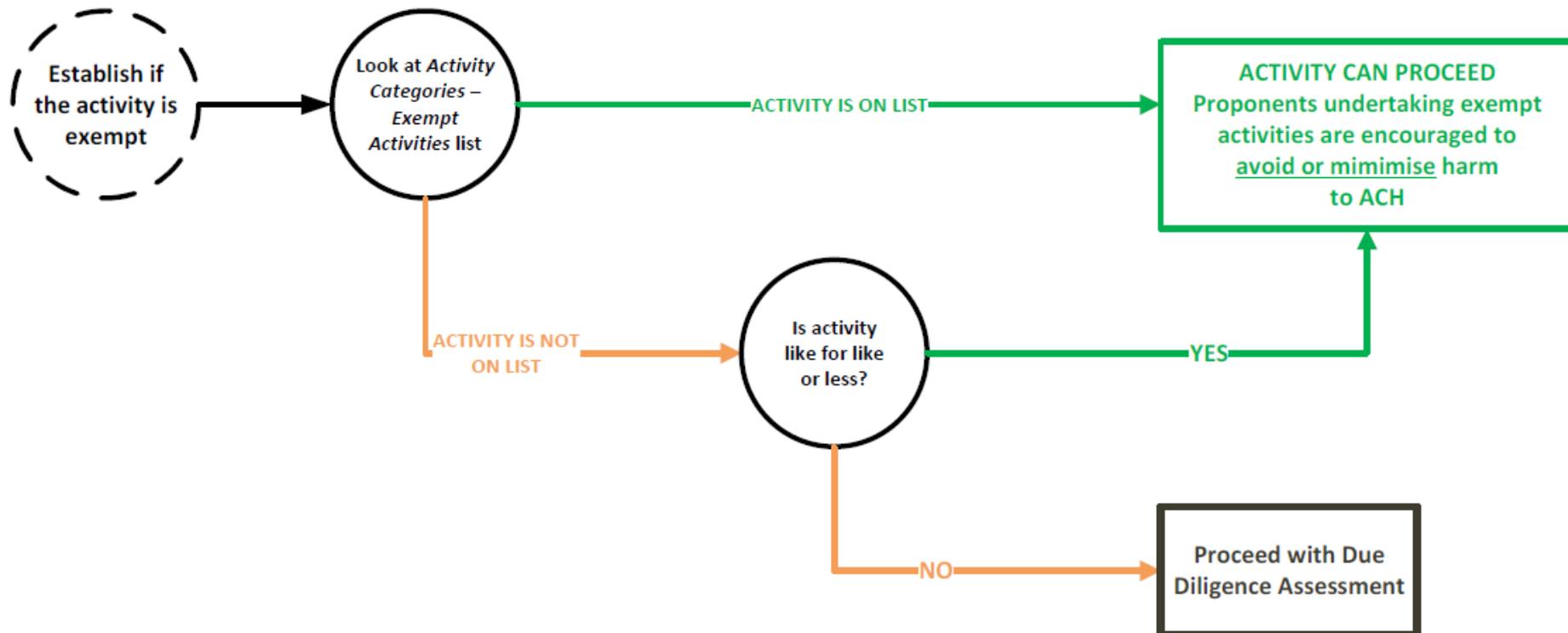
Appendix 2 – Flow Charts

Flowchart 1 – Overview



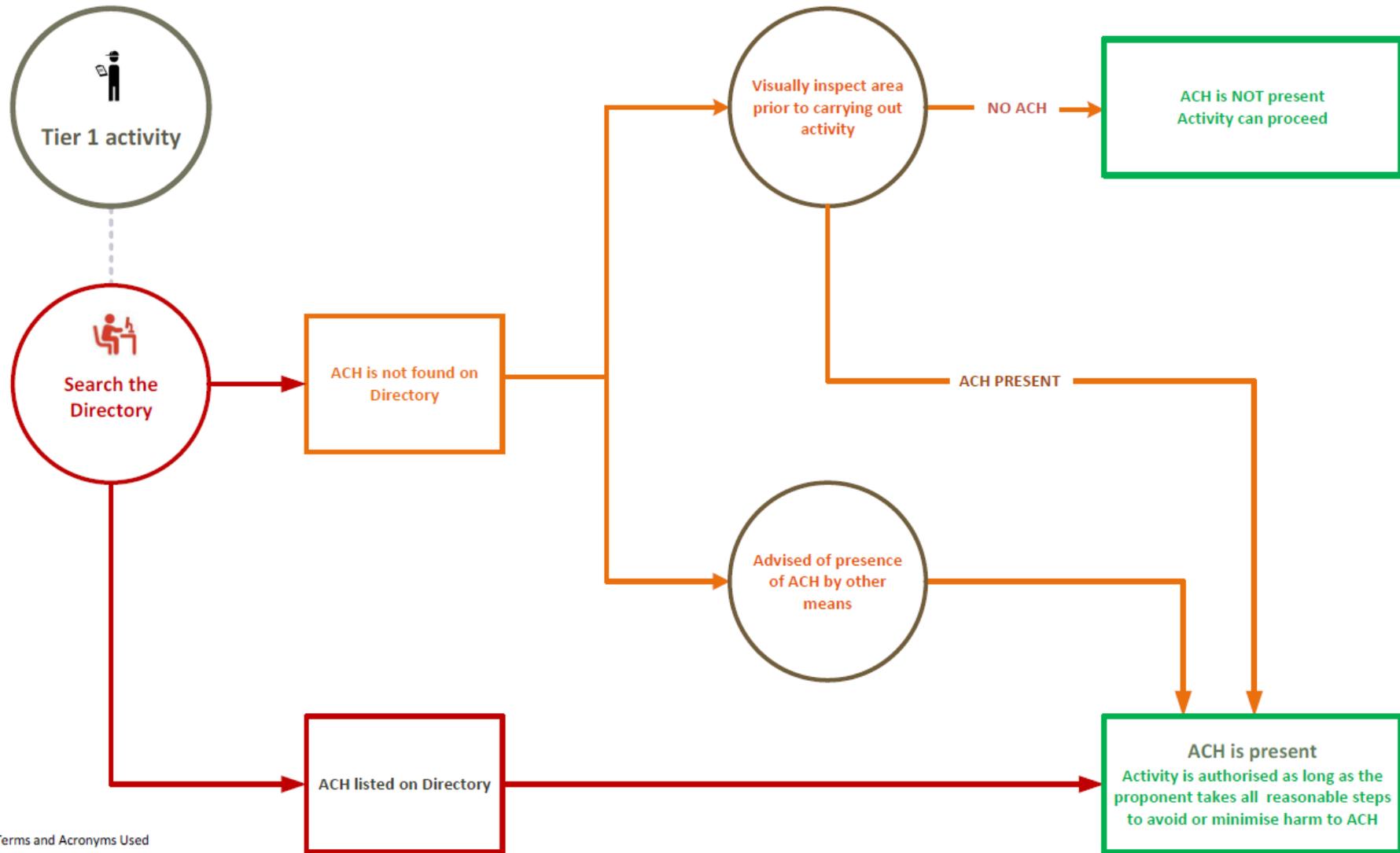


Flowchart 2 – Exempt Activities





Flowchart 3 – Tier 1 Activities



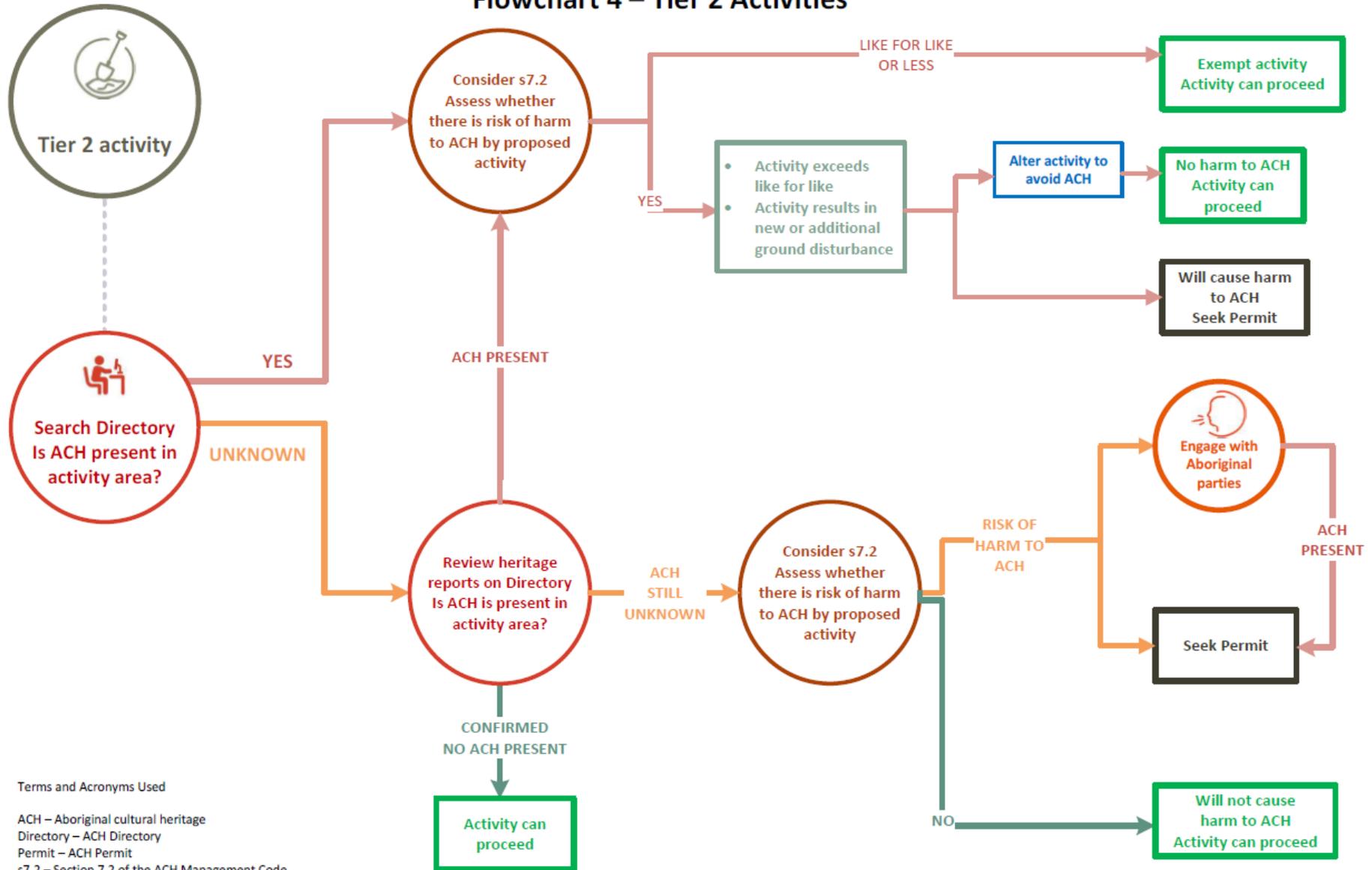
Terms and Acronyms Used

ACH – Aboriginal cultural heritage
Directory – ACH Directory



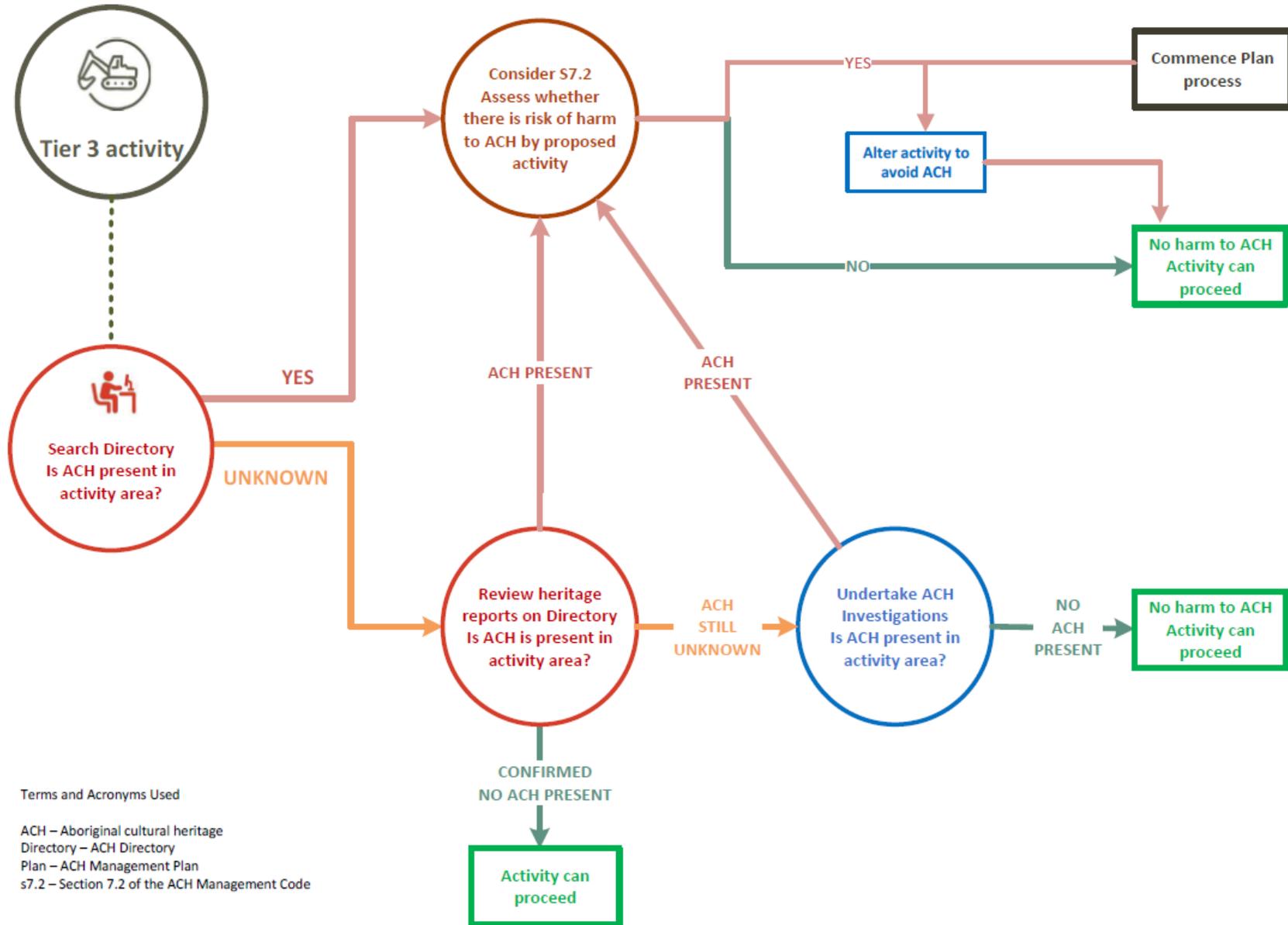


Flowchart 4 – Tier 2 Activities



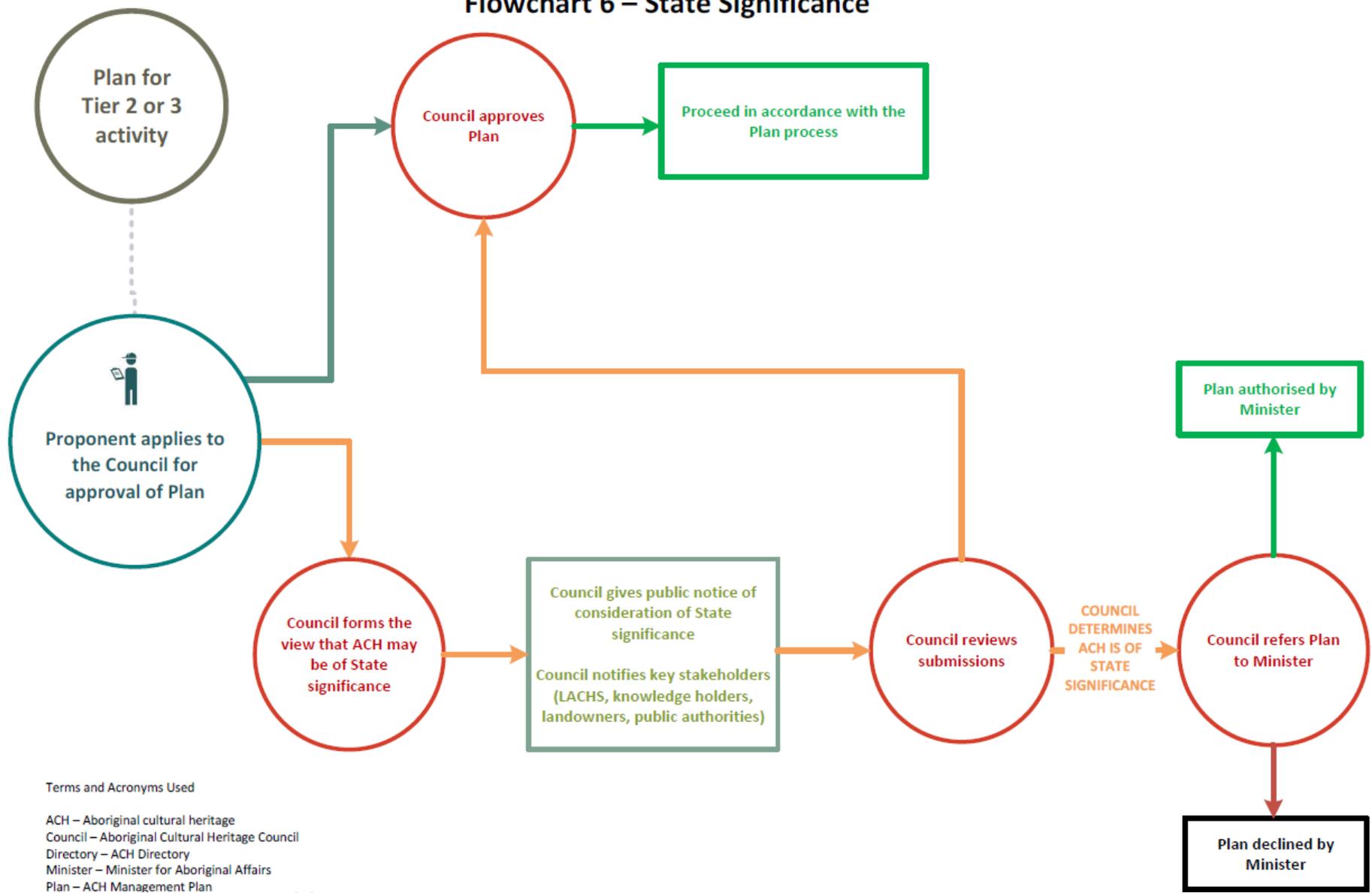
Terms and Acronyms Used
 ACH – Aboriginal cultural heritage
 Directory – ACH Directory
 Permit – ACH Permit
 s7.2 – Section 7.2 of the ACH Management Code

Flowchart 5 – Tier 3 Activities





Flowchart 6 – State Significance



Terms and Acronyms Used

ACH – Aboriginal cultural heritage
 Council – Aboriginal Cultural Heritage Council
 Directory – ACH Directory
 Minister – Minister for Aboriginal Affairs
 Plan – ACH Management Plan





Appendix 3 – Interaction with the EPA’s Social Surroundings Environmental Factor

The *Environmental Protection Act 1986* (EP Act) allows the Environmental Protection Authority (EPA) to take into account other statutory decision-making processes that can mitigate the potential impacts of the proposal on the environment.

The Department of Planning, Lands and Heritage (Department) recognises that some activities that may require an ACH Management Plan (Plan) will constitute a “significant proposal” that are likely to have a significant environmental effect on the environment as defined in the EP Act. Such proposals will require referral to the EPA for an assessment under the environmental impact assessment (EIA) process set out in Part IV of the EP Act. Upon receiving the proposal, the EPA is required to decide on whether or not to assess the referred proposal.

Part IV makes provisions for the EPA to undertake an EIA of significant proposals, proposals of a prescribed class, strategic proposals and land-use planning schemes. The EPA’s process assesses the effects of a proposal (including its alternatives) on the environment and the mitigation of those effects. The assessment process extends from the initial concept of the proposal through implementation to completion, and where appropriate, decommissioning.

The EPA uses environmental principles, factors, and associated objectives as the basis for its assessment. The definition of environment includes **social surroundings**, which includes consideration of impacts to ACH where relevant.

Where the processes required under the Act for a Plan can complement the EIA process, there is an opportunity for proponents to increase efficiency and reduce duplication of process by addressing social surroundings in the preparation, development and negotiation of the Plan with the interested Aboriginal party.

Proponents undertaking a due diligence assessment (DDA) for activities which may form part of a significant proposal as defined in the EP Act are encouraged to address the factors below.

11. Social surroundings

The EP Act defines “environment” as “living things, their physical, biological and social surroundings, and the interactions between all of these”. For the purpose of this definition, the EP Act specifies that:

- the social surrounding is the aesthetic, cultural, economic and social surroundings to the extent that those surroundings directly affect or are affected by the physical or biological surroundings.

The EPA’s objectives with respect to social surroundings are to:

- recognise the importance of social surroundings; and
- to protect social surroundings from significant harm as a result of the implementation of the proposal.

11.1 Social surroundings and ACH

The social surroundings assessment of ACH may be better considered as part of the Plan process because:

- a) the Act requires proponents, and each interested Aboriginal party to use their best endeavours to reach an agreement about the terms of a Plan;
- b) the parties to a Plan can include, should they choose to do so, measures to avoid, minimise and manage the physical and biological harm to ACH by considering the aesthetic, cultural, economic and social surroundings impacts including in regard to:



- waterholes and watercourses where water flow quantity and quality form part of ACH values;
 - an amenity which may impact ACH values by:
 - visual obstructions
 - air quality
 - noise;
 - tangible elements within a culturally significant landscape or a place which contains culturally significant:
 - vegetation
 - fauna
 - landforms;
- c) if agreement is reached between the proponent and each Aboriginal party, the Aboriginal party is required to give informed consent to the Plan, as defined in the Act.

11.2 DDA and social surroundings

A DDA and subsequent development of a Plan may be taken into consideration by the EPA that the Act's statutory decision-making processes can sufficiently mitigate the potential impacts of the proposal on the EPA's environmental factor of social surroundings, and that this factor is not a key environmental factor for EPA assessment decisions.

When undertaking a DDA of the proposed project area, proponents who wish to address the assessment of social surroundings as part of the development of a Plan should consider and address the effects of the activity on the physical and biological surroundings, including those matters listed above and below, as they relate to aesthetic, cultural, economic and other social surroundings. Proponents should consider the physical and biological surroundings when identifying:

- ACH;
- risks to ACH; and
- risk of harm as a result of the activity including outside the area of the activity.

Proponents will also need to demonstrate:

- that consultation with the relevant Aboriginal people has included all areas where the activity has an effect on physical and biological surroundings;
- that cumulative impacts as a result of the activity have been considered;
- disturbance to ACH is considered from a holistic Aboriginal persons view of country which may not separate heritage and environment into separate processes where they both relate to ACH; and
- that impacts to physical and biological surroundings are in scope by considering the EPA's environmental factors which include land, sea, water, air and people.



11.3 Considering impact to ACH as part of social surroundings

This section must be read in conjunction with [section 7](#) of this Code.

Impacts from activities should consider the effect of the activity on the physical and biological surroundings, both within and outside the area of the activity. These may include, but are not limited to:

- drawdown of culturally significant waterholes;
- material changes to culturally significant watercourse flow (increase or decrease) or water quality;
- dust affecting the amenity of a culturally significant place;
- visual impacts of or from a culturally significant landscape;
- disturbance of culturally significant vegetation;
- disturbance of culturally significant fauna; and
- disturbance of culturally significant landforms.

If the EPA is not satisfied that a proponent's DDA or Plan sufficiently addresses its social surroundings objective, the EPA may decide to separately assess social surroundings, require a separate management plan to protect social surroundings, and could recommend a proposal not be implemented.

