Aboriginal Cultural Heritage Act 2021

Cultural Heritage consultations review Phase 2

Draft Report

Compiled by IPS Management Consultants

September 2022

Acknowledgement of Country

This document was created on Wardandi Noongar Country.

The Government of Western Australia acknowledges the traditional custodians throughout Western Australia and their continuing connection to the land, waters and community. We pay our respects to all members of the Aboriginal communities and their cultures; and to Elders both past and present.

We are grateful to the Aboriginal and Torres Strait Islander people and communities we have the privilege of working with, and thank them for sharing their stories, values, beliefs, and culture.

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Executive Summary

The Department of Planning, Lands and Heritage (Department) engaged IPS to synthesise and analyse Phase 2 consultations of Department's *Aboriginal Cultural Heritage Act 2021* (the Act), and develop a comprehensive table based on the submissions, capturing trends and/or divergent views across the table.

Table 1: Acronyms and Definitions

Acronyms and Definitions	
ACCC	Australian Competition and Consumer Commission
ACH	Aboriginal cultural heritage
ACH Council	Aboriginal Cultural Heritage Council
ACH Directory	Aboriginal cultural heritage Directory
ACH investigations	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: Desktop assessment (including assessing whether any existing heritage survey reports completed over the area are to a standard as set out in XXX); Archaeological and/or anthropological surveys (with an interested Aboriginal party and suitably qualified professional); Consultation with interested Aboriginal parties and/or knowledge holders; Historical aerial imagery; and Other research as necessary.
ACH Management Code	Aboriginal cultural heritage Management Code
ACH management plan	Aboriginal cultural heritage management plan
ACH permit	Aboriginal cultural heritage permit
ACH Regulations	*Aboriginal Cultural Heritage Regulations 2023*
Act	*Aboriginal Cultural Heritage Act 2021*
AP	Approvals process
BAM Act	The Biosecurity and Agriculture Management Act 2007

CATSI	The Corporations (Aboriginal and Torres Strait Islander) Act
CEO	The chief executive officer of the Department of Planning, Lands and Heritage;
Cth	Commonwealth
DCCEEW	Department of Climate Change, Energy, the Environment and Water
DDA	Due diligence assessment
Department	Department of Planning, Lands and Heritage
DMIRS	Department of Mines, Industry Regulation and Safety
DWER	Department of Water and Environmental Regulation
EPA	Environmental Protection Authority
EPBC	Environment Protection and Biodiversity Conservation Act
EXMT	Exempt activity
Harm	Harm to Aboriginal cultural heritage includes to destroy or damage the Aboriginal cultural heritage.
KPCA	Kimberley Pilbara Cattlemen's Association
KUA Agreement	Unknown
Pastoral Land Act	Northern Territory legislation
PBC	Prescribed Body Corporate
Proposed activity	An activity that a proponent intends to carry out
Proponent	Section 100. Terms used A person who — (a) intends to carry out an activity that may harm Aboriginal cultural heritage; or (b) carries out an activity authorised under Division 4
Serious harm	Section 91 defines serious harm to Aboriginal cultural heritage if the harm is – (a) irreversible, of a high impact or on a wide scale; or (b) to Aboriginal cultural heritage located in a protected area.
Taphonomic	The study of decomposition, and how organic remains pass from the biosphere to the lithosphere (**source**)
T1	Tier 1

T2	Tier 2
T3	Tier 3
WALGA	Western Australian Local Government Association

CONTEXT

Phase 2 consultations centred around stakeholder feedback on work done so far to develop ten themes:

- Draft Activity Categories
- Draft ACH Management Code
    - Educational
    - Due Diligence
- Draft Consultation Guidelines
- Draft knowledge holder Guidelines
- Draft ACH management plan Overview
- Timeframes
- Draft LACHS Fee for Service Guidelines
    - What is a service people can charge for?
    - Is this fee reasonable?
- Draft State Significance Guidelines
- Draft Outstanding Significance Guidelines
- Draft Determining Substantially Commenced

METHODOLOGY

IPS reviewed DPLH's consultation documents to gain background understanding and context. Following this, IPS reviewed and synthesised stakeholder feedback contained in 55 submissions and summarised notes from 34 workshops, into:

- An Activity Category Table, updated from Round 2 with stakeholder feedback
- De-identified feedback per stakeholder group for nine consultation themes.

Emerging themes were identified in both documents for inclusion in this report.

OVERVIEW

A broad range of viewpoints emerged from the submissions, with all stakeholders seeking to clearly define how the Act would impact their business operations or cultural heritage.

Emerging Themes

The strongest themes to emerge from the submission were as follows:

- *Funding for LACHS* – all stakeholders agreed that LACHS would need more funding, resourcing and staff than is currently committed to carry out the work required under the Act. The subject of the administrative load created by the act was raised throughout the ten themes.
- *Distrust of the Heritage Register* – the Heritage Register was a subject of extensive discussion, with all stakeholders generally agreeing that it was not reliable. From there opinion was divided, with proponents wanting it to be a resource they could rely on as part of their due diligence assessment, and Aboriginal stakeholders reluctant to share sensitive cultural information.
- *Consultation* – All stakeholders agreed that they needed certainty around proponents being able to consult with the right people
- *Doing the right thing* – All stakeholder groups seemed to share a genuine appreciation of the need to consider their impact on Aboriginal Cultural Heritage (ACH)
- *Aboriginal voice* – All stakeholder groups agreed that Aboriginal people should be the ones making decisions about their country.

Divergent views

The most prevalent difference of opinion throughout the submission came down to the different agendas of the stakeholder groups. Aboriginal stakeholders seek to protect their cultural heritage, and maintain a leading voice in decisions about what happens on their land. Proponents seek to maintain their access to resources needed to continue business and project activities. There are a range of issues within this spectrum which those differences extend to, including:

- *Cost* – Proponents seek to limit the costs of permits and consultation. Aboriginal stakeholders want to ensure they are fairly paid for work carried out, and properly funded to put the LACHS infrastructure in place.
- *Time* – Proponents seek limits on the timeframes of consultation to ensure minimal disruption to business processes. Aboriginal stakeholders seek to raise awareness of cultural obligations, technology, distance, geographical and weather factors that can impact availability of Aboriginal stakeholders and knowledge holders.
- *Progression of applications* – One point of difference which seemed critical in the submissions centred around what happened if a proponent received no response within the allocated timeframes to attempts to contacts LACHS or knowledge holders. Some proponents advocated for this silence to equate to consent. Aboriginal stakeholders took the opposite stance, saying this could not be the basis for an application to the Minister for approval of an ACH Management Plan.

Trends

General trends to arise from the submission are reflective of the respective cultural influences of the stakeholders.

Proponents, mostly working through a European cultural lens that favours clearly delineated boundaries and consistent structures, sought to clarify and quantify elements of the frameworks wherever possible. They wanted to know how much time it would take, what it would cost, clearly quantified thresholds for activities throughout the tiers, solid indicators for what constituted ACH, and accessible, responsive databases of heritage and contact details. They sought a level of certainty that would allow them to proceed with their business as usual while complying with the Act.

Aboriginal stakeholders generally approached the themes through a cultural lens that prioritised ensuring they maintained a voice in decisions about their land and the ability to protect their cultural heritage and continue to meet cultural obligations. They too sought certainty – that their voices would be heard, their culture respected, and that relationships that have long held power imbalances would not unduly influence the outcomes of the process.

Gaps

Stakeholders identified a few gaps within the frameworks for further exploration. These included:

- How the Act interacts with and impacts on native title legislation and agreements
- How the Act interacts with other legislation, such as the *Environmental Protection Act 1986* (EP Act) and the *Land Administration Act 1997* (LAA).
- Whether there is room for flexibility to adapt the structure of permits and management plans to different contexts, such as pastoralists and emergency services.
- Costs and funding for activities that are not associated with the development of ACH management plans.

The following report outlines stakeholder feedback on each of the ten themes. It includes relevant comments from the submissions. All comments have been de-identified and edited where needed for clarity.

Draft Activity Category Tables

Consultation Questions:

- What other activities should be included in the activity category list – where do they belong?
- Which activities should be moved to a different category?
- Any other comments?

Submissions received paid close attention to this theme, and provided extensive feedback. The bulk of this feedback was applied directly to the Phase 2 draft Activity Table for Department consideration.

Further feedback that was not able to be applied directly, but which raised a number of questions, concerns and recommendations, is outlined below.

Appendix A contains verbatim comments from which the below information was drawn.

Aboriginal Stakeholder Feedback

Aboriginal stakeholders gave comprehensive general feedback about the Activity tables, expressing a strong desire to maintain a voice and decision-making power in determining and protecting cultural heritage. Emerging themes included:

- Exemptions may result in damage to Aboriginal Cultural Heritage
- Cultural obligations involve taking responsibility for impacts to Country, therefore identification and assessment of impacts should rest with Aboriginal people whose responsibility that Country is.
- The nature of impacts changes regionally – what may not impact in one place, will in another
- LACHS should be funded appropriately
- Ground disturbance and heritage impacts are not directly related
- Cultural Heritage management plans should be in use
- The principal of informed consent should apply when there are impacts to Country

Table 1 below summarises the feedback around these themes. The feedback is copied in full in Appendix A.

Table 1: Emerging themes from Aboriginal stakeholders

Theme	Feedback
Exemptions may result in damage to Aboriginal Cultural Heritage	All ground disturbance can affect ACH values. Aboriginal stakeholders expressed concerns over potential impact or harm to ACH posed by tier 1 and Exempt activities. They felt these should be determined on a case-by-case basis by Traditional Owners Feedback included: • "We acknowledge that some exempt categories are probably needed for emergency groups to be able to do things when there is an emergency situation, however we are still concerned that these activities may cause large impacts to ACH or bring culturally inappropriate practice to some areas. We strongly recommend that emergency cultural contacts are set up for LACHS or native title groups and knowledge holder groups and that if an emergency situation is happening then these contacts are called and included in discussions to help advise on how to do the emergency works in the best way to still avoid heritage impacts and so that they are done in appropriate ways where possible, such as including emergency monitoring near sacred places or advising that a place is a men's or women's only area. Otherwise, we will stay very concerned that important places can be impacted without our appropriate input into management of that heritage during the emergency."
The nature of impacts changes regionally – what may not impact in one place, will in another	Impact to ACH cannot be determined in a "one size fits all" model – an activity perceived to be exempt of low impact in one place, may significantly interfere or damage ACH in another. Cumulative impacts must also be considered as they apply in each region, and potentially cause damage or destruction.
Cultural obligations involve taking responsibility for impacts to Country, therefore identification and assessment of impacts should rest with Aboriginal people	Cultural obligations to look after country involve taking responsibility for all impacts and access to country. Aboriginal Stakeholders have obligations in keeping traditional law and custom / native title rights and interests. Stakeholders advise that: Only Aboriginal people to whom ACH belongs can determine the level of impact

whose responsibility that Country is.	Impact should be determined on a case-by-case basis Absence of records or existence of works should not be used to fast-track land-use or to avoid consultation, or to indicate the absence of ACH
LACHS should be funded appropriately	The administrative burden will be significant. LACHS should be resourced and funded appropriately for: • Tier 2 activities - due diligence process including assessment, consultation, and heritage survey • Ongoing positions / GIS database for maintaining the location of ACH • Specific ACH management plans by proponents, to be developed.
Ground disturbance and heritage impacts are not directly related	Activity 'harm' depends on context and heritage value, not just the activity. Different kinds of ACH are affected in different ways by a given activity – ground disturbance may bear no relation to adverse impacts. Further, potential harm and impacts to intangible ACH are not reflected in the activity categories. In some cases, activities like walking close or photographing areas can cause harm to heritage places. Stakeholders requested further considerations include: • A more detailed definition of ground disturbance • Consultations should be carried to out with knowledge holders and native title groups or LACHS to determine where there may be these regional variations and include these in the table • The Activity Categories should emphasise the ways that different activities may or may not cause harm to ACH • The Due Diligence Assessment Guidelines should prioritise understanding the ACH as a first step before deciding the level of harm • The existence of previous ground disturbance does not indicate that approval has been given or that ACH will not be significantly further damaged or destroyed as a result. For example, even if heavily disturbed, sites still exist in towns and need to be recognised as such i.e., not just the physical characteristics • Ground disturbance can include just walking over country – for example, spreading dieback • Road reserves – need to recognise that any disturbance is only to the depth of the road and base material and

	there may be sites underneath; ancestral remains have been discovered under already disturbed land.
Permission not in perpetuity	An Aboriginal Cultural Heritage management plan (ACH management plan) should be a requirement for all tier 3 activities, and clarify: • Permission for disturbance/use under a heritage agreement should not be linked in perpetuity to the disturbance itself and become dissociated with the terms of the agreement or the Aboriginal Stakeholders who gave permission. • Permission should not automatically be given in future based on the existence of the initial impact – i.e., based on reference to database of previous impacts.
The principal of informed consent should apply when there are impacts to Country	The principle of informed consent should apply now and into the future and in circumstances where existing disturbance has occurred: • Information must be presented to Aboriginal Stakeholders in a manner that is clearly understandable, that the implications of decisions are clearly articulated and recorded accordingly. • Aboriginal Stakeholders must have the final approval status.
Other	• The joint submissions made by the KLC, Nyamba Buru Yawuru Ltd, Karajarri Traditional Lands Association Aboriginal Corporation RBTBC and Walalakoo Aboriginal Corporation RNTBC on 15 April 2020 provides a non-exhaustive list of activities that must be allocated to tier 3.
Further Questions	• Can categories change once they are set? • What is the weighting of Aboriginal views versus other views? • What happens when the ACH is not recorded? • Do Aboriginal people need to develop a management plan for T3 activities? • How easily can sites be moved within the ACH directory? Renaming of sites should not occur without consent of knowledge holders. • Why shouldn't the PBC be notified in tier 1?

Proponent Feedback

Proponents provided extensive feedback around the activity categories, with a particular focus on the practicalities of the system, and how it would impact business as usual. Table 2 outlines the themes that emerged from their submissions about the Activity Categories.

Table 2: Emerging themes from Proponents

Theme	Feedback
Clarifications around the 1,100SQM item	Proponents sought justification and clarification on the exemption threshold for residential development on lots less than 1,100sqm. Questions and concerns included: • The lot size does not align with many lots zoned R10 • Lots larger than this may be on land that is disturbed/developed for urban purposes and not subject to a Registered Aboriginal heritage site. • If a lot exceeds the threshold size by virtue of amalgamation, then the exemption should carry over to the amalgamated parcel. Losing a perceived 'right' to an exemption may create a disincentive for amalgamation. • How does the Act apply to residential, freehold properties that are larger than 1,100 square metres and located in cities and towns?
Issues with exemptions	Proponents sought clarity over a wide variety of issues related to exemptions, many of these centring around concerns over red tape, and clarification over what kinds of “business as usual” activities would be impacted by the legislation. Questions, comments and concerns included: • Exemptions should allow for fast and accurate self-assessment, and cover broad classes of activities, allowing better targeting of activities with higher likelihood of impacting ACH. • Exemption should include development on land that has been previously cleared or developed in a manner similar to that proposed. This could be restricted to urban areas and townsites if needed. This would exempt most development on freehold land. • Exemption for ‘development of a prescribed type’ under the Planning and Development Act 2005 should be removed. This proposal adds unnecessary complexity and could be used to obscure exemptions for individual

	projects or entire categories of activity. In the interest of simplicity and accountability, all exemptions should be done under the ACH Act directly. • As it stands, the exemptions read like a lesser level of activity. This is not the case as many exemptions are for 'tier 3' type works. This would help make it clear to users that exemptions are different and if an activity is listed as exempt then it is not necessary to check tiers 1–3. It would also make it easier to provide explanations for exemptions to make this information more user-friendly. • Having 'proponents' check the ACH Directory to confirm if exempt activities are located within a protected area will not work on most occasions. For example, recreational photography is listed as an exempt activity so under the draft guidelines people would be required to search the ACH Directory before taking holiday snaps. Either these types of activities should not be countenanced under the guidelines or protected areas need to be conditioned to allow for most exempt activities to occur. • Obligation on volunteers e.g., volunteer firefighter clearing or burning – may be burdensome – on both volunteers & LACHS • Make it clear that a Permit is required for a tier 2 activity and a management plan for a tier 3 activity only where the activity is likely to or will impact Aboriginal cultural heritage.
Pastoral activities	Extensive feedback was provided from pastoralists, with many considering that all pastoral activities should be exempt and expressing concerns over the administrative load surrounding business as usual activities and emergency situations. Questions, comments and concerns included: • We consider that regulations should be developed to support the legislation which exempt all activities that are "Pastoral purposes as defined in the *Land Administration Act 1997*, including cultivation and grazing." • The undertaking of pastoral operations across hundreds of thousands of hectares, management of the rangelands in accordance with lease obligations, and ensuring the health, welfare and safety of livestock could all be placed under duress as a result of these new obligations. • In the current environment, there would almost be daily occurrences where an unplanned activity needed to occur

	that would trigger, at a minimum, due diligence obligations. • Our members acknowledge, respect and support improved outcomes for the protection of cultural heritage. This must be balanced with pastoralists legal obligations and responsibility to manage the rangelands. We support the concept of holistic heritage management plans between Traditional Owners and pastoralist that would offer certainty in managing heritage and maintaining pastoral leases. • We therefore suggest additional measures that encourage or incentivise pastoralists and Traditional Owners to prioritise execution of heritage agreements with Traditional Owners for their entire lease areas which would create a framework outside of the Act to properly care for and manage Aboriginal Cultural Heritage. This could include resourcing bodies such as KPCA to assist pastoralists. • Where relationships may be historically fractured or challenged between pastoralists and Traditional Owners, there is some risk the Act could be used to gain advantage or leverage in a dispute on the basis of an allegation that insufficient Due Diligence was undertaken and harm resulted to ACH. This will potentially generate significant compliance burdens for the State and also administrative and cost burdens to both Traditional Owners and pastoralists. • The nature of uses listed and their specificity can lead to gaps in the system where certain uses are not defined or missing from the list. A far more overarching approach to the nature of uses in each tier should be defined with activities associated linked back to their relevant legislation or approved program of works. We therefore consider the list of activities should actually be simplified. • The Pastoral Lands Board, which oversees the implementation of the Land Administration Act on pastoral leases requires us to maintain and develop infrastructure including buildings, sheds, yards, fences, water points, firebreaks and access tracks, as well as rehabilitating degraded areas and controlling plant and animal pests. All activities required of pastoral leaseholders under the LAA should be classified as tier 1 activities, requiring "due diligence" only.

Impact of emergency management	Proponents expressed concerns over potential unplanned and urgent emergency activities being placed in tiers 2 or 3. Questions, comments and concerns included: • Activities required in emergency situations are unplanned and usually conducted as needed to address the relevant emergency as a matter of immediate urgency. • Placement of such activities under a tier 2 or tier 3 category is taken as suggesting that organisations would need to obtain pre-emptive type Aboriginal Cultural Heritage (ACH) permits or management plans to account for all of these types of low level or moderate to high level ground disturbance activities over every Local Aboriginal Cultural Heritage Service (LACHS) area or equivalent area in the State. • Given the 5 month timeframes for obtaining ACH permits and 5 months to 1 year timeframe for finalising ACH management plans, as currently proposed, such a task is considered onerous and problematic given that most emergency based activities are already undertaken under other existing legislative mechanisms that provide for immediate action. • The current Activity Table categorises activities undertaken in compliance with section 33 Firebreak Notices as tier 1, which would place an obligation on private landowners to undertake due diligence to determine if Aboriginal heritage is present. Widening of firebreaks is currently categorised as tier 2, which requires private landowners to undertake due diligence and potentially apply for a Permit. This categorisation raises a number of issues: • Who will be responsible for educating private landowners about this obligation? • What if a private landowner uses this requirement as an excuse for non-compliance with a Fire Break Notice? • What if a private landowner applies for a Permit and due to the timeframe required, the window for undertaking the mitigation activity has passed before the activity is conducted? • Potentially, Local Governments (and/or DPLH) could receive thousands of enquiries annually from landowners seeking advice and information about how to undertake due diligence and whether there is Aboriginal cultural heritage on their property. This situation would be overwhelming for Local Governments and could decrease

	compliance with section 33 Notices/ hazard reduction notices. • Impact of Act on planned burning for the purposes of fire prevention (including under the Bushfire Notice) not within a protected area? • Confirm that the Environmental Protection Act schedule 6 items (as listed under the ACH exemptions) allows for clearing, burning or other fire management works by relevant agencies or local government?
Further definition of terms	Proponents requested further definition and explanation on a number of terms and concepts. These included: Definition of: • Ground disturbance • Minimal/low/moderate/high ground disturbance • Community utilities • Waterway - does it include the sea? • Already disturbed areas • Broader definition of mining activity • Natural ground level • Known Aboriginal Cultural Heritage • New or additional ground disturbances Further guidance needed on: • Determining levels of ground disturbance for excavation e.g., when is an excavation considered to be small open area excavation or test pitting vs large scale open area excavation? • What constitutes a 'developed' area? For example, are natural reserves that include BBQ's and benches classified as developed areas? • Thresholds that determine level of ground disturbance. • Water and environmental impacts (no direct disturbance but impacts of water level changes)
Inconsistences in table	Proponents identified some items in the table which may be inconsistent of impractical. These included: • The requirement for a tier 2 permit for the replacement of signage (creating an additional disturbance as the footprint of the signage is slightly wider and deeper to the ground) is done on an ad-hoc basis and is a road safety concern if signage cannot be moved, relocated. • Does not consider 'scale of activity' • Specify existing footprint? Many of the activities can be in many different tiers • Recommend that the listing and descriptions of activities and groupings be updated to focus on the activity in

	question to allow a broad range of industries to identify within the table, by reference of their proposed disturbance and risk of harm rather than the specific industry or end use. • Update to better reflect the range of scale of some activities, by reference to disturbance. This could be done by providing an empirical threshold of disturbance for an activity in each respective tier. This would assist with clarification for proponents where the same activities are listed in multiple tiers. For consistency, it is also important that this measure of scale is subsequently aligned across different activities. • An empirical / measurable indicator of ground disturbance should be specified to enable developers and Aboriginal parties to clearly understand the level of ground disturbance that applies in each circumstance. Note that the 'tonnage limits' imposed on tenements through the *Mining Act 1978* (WA) and associated Regulations are a good example of disturbance limits that could apply. • Rigid categories may be a problem • More examples could be useful • A definitive "catch-all" is required for each activity category. This catch-all should be: o Objective (i.e., quantitative, independently measurable and verifiable), so as to limit the opportunity for different interpretations and legal challenge; and o Prescribed in the Regulations for each activity category, to ensure that any potential land use activity (including future unknown activities) is capable of identification as an exempt, tier 1, tier 2 or tier 3 activity. o Linked to specified quantities of ground disturbance, for example: tier 1: 1km2 or less ground disturbance; tier 2: more than 1km2 and no more than 5km2 ground disturbance; and tier 3: greater than 5km2 ground disturbance. • Quantification for ground dust levels, m2, m3 or depth to quantify i.e., with buildings provide a size of disturbance metric. Buildings (extension or new) greater than XXm2
How do activity categories interact with existing	Proponents identified some areas in which the Activity Categories intersected with other legislations and approvals processes. These included:

legislation and approvals?	• Implications of tier 2 and 3 waterway and erosion control activities on existing port facilities and infrastructure that have already been established (and are regularly maintained) under existing approvals obtained under section 18 of the Aboriginal Heritage Act 1972 (AHA).
	• Ports are required to apply for and hold a valid Sea Dumping Permit for maintenance dredging activities under the Commonwealth Environmental Protection (Sea Dumping) Act 1981 and implement comprehensive Long Term Dredging Environmental management plan for these works. Consultation with port stakeholders through forums such as the Technical Advisory and Consultative Committees and Community Consultation Committees (which include community members and Traditional Owners) is also undertaken as part of the process for applying for a Sea Dumping Permit.
	• In 'Port Waters' who needs to undertake the due diligence?
	• Where does an existing miner's right (prospecting/fossicking) sit?
	• Cross reference other government Acts: e.g., DWER (State); EPA (State); EPBC (Federal); DMIRS Mining rehabilitation fund activity report
	• Interaction with Local Government Act? What is the impact on:
	  o Services Local government provide?
	  o Residential developers
	  o Local govt development: timelines and budget
	  o Are there residential property exemptions?
	  o Water licensing process and impacts.
	  o Water allocation planning
	• Greater clarity in relation to issuing of annual section 33 Firebreak Notices, which requires land occupiers to clear and maintain a firebreak. The ACH application process is potentially longer than compliance for firebreak control and may compromise safety.

Proscriptive or generic	Proponents had differing views on whether the Activity Categories should be broad and flexible, or proscriptive and attempt to capture every kind of land use. Comments included: • The Table is currently non-exhaustive. Because of the scheme of the Act, it is essential that all potential land use activities can be identified as exempt, tier 1, tier 2, or tier 3 with certainty. In the absence of that certainty, the following issues arise: o There will be no legal certainty that activities not expressly prescribed in the Regulations/identified in the Table are exempt, tier 1, tier 2, or tier 3 activities that may be authorised under the Act; and

	○ the allocation of activities not expressly prescribed in the Regulations/identified in the Table will be subjective and open to legal challenge. • The document tries to cover too many activities and should be condensed into a more generic form. The current prescriptive approach does not allow for the addition of new or changing activities. Rather than an exhaustive list, this guideline could include a matrixed approach with more general guidelines and include examples of well known, regularly occurring activities for each category. • The appropriate activity category should be determined not solely by what the activity is, but by the extent of impact and risk of harm. The model should be flexible enough that if there are factors which warrant an activity potentially fitting into a different category, final categorization can be agreed between the LACHS and proponent taking into consideration the proposed activity and the actual location.
Evidence of Aboriginal Cultural Heritage	Proponents sought certainty that there would be processes around the identification of Aboriginal Cultural Heritage. Comments and questions included: • Will there be a body that the LACHS need to report to terms of their performance and their interpretation on the level of investigations required? • What is the process for new areas of cultural significance? What are the guidelines, what's to stop someone with the wrong intentions creating an area of cultural significance over existing infrastructure? • Evidence of an ACH must be documented and available to the public. It must be all available to ensure no ACH areas are damaged. • It is noted that the ACH Directory may include information that contains spatial and other inaccuracies. Could the department flag those records where it is likely this is the case so that people searching the directory are immediately aware, such as older site recordings that have accuracy issues.
Funding	There was broad agreement across all stakeholder groups that LACHS would need to be adequately funded and resourced to carry out their function. Comments included: • LACHS need to have State financial backing, with full time teams/offices.

	• This can't be left to meander, contact with local Aboriginal Corporate Bodies can often be hard or non-existent. They need funding and support to ensure this works for all parties involved. To ensure that the ACH are protected, but to also ensure information/support is available for those requesting assistance. Otherwise this will lead to massive delays in the Local Government sector, and extreme costs to any project. To ensure this works for all involved, and is time/cost effective for all parties, ACH groups and ACH require state funding. • Huge burden on Aboriginal groups to resource doing appropriate engagement e.g., for workshop, plan land management, planning, negotiate agreements
Misunderstanding of requirements	Proponents expressed some concerns that people would not understand the requirements of the Act. Comments included: • It is apparent that there is a low level of understanding that a Proponent is only required to apply for a Permit or management plan if the activity is likely to impact Aboriginal cultural heritage. If a due diligence process is undertaken and it is determined that a tier 2 or tier 3 activity will not impact Aboriginal cultural heritage, the activity can proceed without a Permit or Management Plan. The Draft Activity Categories are contributing to this confusion because they state in the header row of the table that a Permit is required for a tier 2 activity and a management plan is required for a tier 3 activity. It is recommended that the Draft Activity Categories are updated to make this clear. • Update the Draft Activity Categories to make it clear that a Permit is required for a tier 2 activity and a management plan for a tier 3 activity only where the activity is likely to or will impact Aboriginal cultural heritage.
Imprecise language	The use of the word “could” in the Table (e.g., “this could include but is not limited to”). This uncertain language leaves the activities included in the lists that follow open to interpretation.
Further questions	• What happens if an activity is not covered or listed? • Is a separate management plan required for each activity? For example, we could have separate activities

	happening at the same time - tenement area; EPA license area; underground vs surface operations. • Who is responsible for access? • How the Activities will be updated, particularly in instances where an activity is not on the list and a proponent writes to the CEO to seek confirmation on that activity? • How/who signs off on the proponent's consultation for tier 2? • Can Activity Categories be changed after co-design is complete? • Can the database be updated if a survey is "in process"? • How does this impact on Local Government development approvals? • What ground disturbance requires ACH permit in metro area? • How should submission for mining deal with multiple activities? Could it be for "any activity related to mining"? • What is the base risk assessment criteria being used to determine tier level? • Can Aboriginal Cultural Heritage Areas be pre-determined for improved assurances regarding what is a Known Aboriginal Cultural Area? • Clarity in relation to how the Act will affect projects that are part-way through planning or completion when the legislation becomes enforceable (such as construction of a community facility or playground). • Clarity on clearing soil and materials deposited in accessways or drains after storm events, and whether these can be cleared for safety/access without the need for application (even if they are in a known ACH area). • Clarity in relation to the need for works which are not specifically listed as an activity or in the category table, but may be proposed in an uncertain or known area for Aboriginal cultural heritage. • Clarity in relation to obligations for compliance on private property or commercial property (by local government, commercial developers or individuals). • Clarity on the role and function of local government. It is anticipated proponents may contact the city for advice.

Draft ACH Management Code

Questions

- What else should be considered in the ACH Management Code for the proposed due diligence assessment process?
- Any other comments?

Submissions relating to the questions about the ACH Management Code were organised into two categories:

- Feedback on what kind of education is needed about the Management Code
- Feedback on the due diligence assessment process.

Educational

Table 3 below shows emerging themes from the submissions about education needed around the management code, through the lens of Aboriginal stakeholders, proponents, and other (inclusive of State Government, service providers, archaeology and heritage consultants, and general community).

Table 3: Emerging themes about Education around the Management Code

Aboriginal Stakeholders	Proponents	Other
We educate our young people and the wider community through cultural traditions	Consultation summaries of the workshops are required for consideration prior to drafting further replies	Education needed around the different Acts
Government to engage with cultural community to be better informed about the process	It would have been helpful for Government to explain why particular decisions have been made in the "co-designed" process.	Education for Hobby Farmers, clarity in South-West
Reports to be sent to ACH to confirm results prior to commencement of work.	Practical examples needed	Properties over 1100SQM
Keep public informed of responsibilities	Materials needed for navigating Act	Online Training and Workshops

Invite businesses on Country to learn about Code	More information needed in Code	
	Guiding documents for local government dealing with public	
	Flowchart for due diligence documents	
	Visual marketing	
	Wider awareness raising of code	

OVERVIEW

The general trend around education about the Management Code was for more information and more detail to help people understand it.

Aboriginal stakeholders would like to be directly involved at all stages of the process to ensure the right information is being used. Recommendations included ensuring the education process around Aboriginal Cultural Heritage (ACH) was thorough, and inviting proponents on Country to take part that education.

Proponents wanted practical assistance with understanding ACH and the Code. They requested practical examples like case studies, flow charts and guiding documents, industry-specific training, and more detailed advice and guidance. Visual advertising around the appropriate local people to speak to was also suggested. Local government expressed interest in guiding documents for sharing and distribution when receiving public inquiries. Online training and workshops were also mentioned.

Other stakeholders raised that education was needed around:

- The difference between Native title and the Aboriginal Cultural Heritage Act
- For hobby farmers, especially in the South West, around their responsibilities under the Act

The main themes to arise included:

- Process
- Guidance Materials

The following section explores these themes at a high level, and includes relevant comments from the submissions for consideration.

PROCESS

Submissions identified a range of points for inclusion in the education program. Some Aboriginal stakeholders further recommended that education programs be carried out on Country.

Comments included:

- We asked for Government people to come and discuss things with our cultural community directly so that we could be better informed, but they did not come.
- You need to invite the businesses on country: tourism, developers and LGA to take part in the education program.
- Education process must be thorough to make sure people know what ACH includes.
- Concern for people in residential areas about doing activities such as building sheds on land and, the grey area of clear blocks and if there is ACH still there.
- These reports should be sent to the Aboriginal people who were involved in those investigations and consultations to give confirmation on the results before they start being used by people to confirm that no ACH is present.
- Shire should inform people of their notification process.
- Private blocks that are no longer than 1100m squared.
- More education about codes for general public and youth.
- More awareness about when surveys need to be conducted.
- Some confusion between native title and Act.
- Misconceptions within the community that the Act does not apply to freehold land holders of blocks larger than 1100sqm and people believe that in the South West, because native title was extinguished under the South West Settlement, they don’t need to seek any approvals under the ACH Act.
- It would aid future submissions if the Government explained why decisions have been taken and certain suggestions ignored. Greater commentary on the policy lens, priorities, and values framework that the Government is using to identify which elements have been ‘codesigned’ and thus included, and which have not would be helpful.

GUIDANCE MATERIALS

Submissions suggested a range of guidance materials to be developed.

Comments included:

- To support interpretation of the Code, scenarios or practical examples of how the Department expects the Code to be applied in practice would be helpful in the next round of consultation, and as the PBCs prepare for resourcing and setting up governance structures for the LACHS.
- A flowchart guiding proponents through the various documents when undertaking a DDA process be developed.
- Guidance materials for public distribution directed at the general community and developers to inform them of their obligations under the Act should be developed.
- The ACH Management Code does not provide as much advice and guidance as the current Due Diligence Guidelines, and requires the development of additional guiding content.
- Department develop a guiding due diligence document that Local Governments can refer to when receiving public enquiries.
- Department develop advice and guidance materials for the general community and small-scale property developers that Local Governments can share and distribute, as well as an appropriate Advice Note that Local Government can include on development and subdivision approvals.
- A flowchart be developed to guide Proponents through the process of considering the various documents when undertaking a due diligence process.
- As part of educating people on what process to follow and who to contact- could we do visual advertising; “These are the appropriate local people to speak to”
- Request industry specific training be made available to assist and enable proponents to be compliant
- Online training and ongoing workshops to facilitate understanding and application of the ACH Act to be developed by DPLH, beyond the road-show educational campaign.

- Would like to see more opportunities to educate non-Aboriginal landholders about the Act, as there are many hobby farms well over the 1100sqm.

Due Diligence

Table 4 below shows emerging themes from the submissions about the due diligence process, through the lens of Aboriginal stakeholders, proponents, and other (inclusive of State Government, service providers, archaeology and heritage consultants, and general community).

Table 4: Emerging themes around the due diligence process

Aboriginal Stakeholders	Proponents	Other
Current management code does not recommend consultation with knowledge holders and native title groups as a reasonable due diligence step in tier 1 activity	ACH directory important to undertake due diligence assessment. There are concerns with the reliability.	Investment needed in Directory
Thorough consultation prior to determining the level of impact	Review and update list of knowledge holders for registry	More clarity around land disturbance for Ports
Consultation is critical across all tiers. Knowledge holders and due diligence is being side-stepped.	Clarity on process - who consults with knowledge holders?	Clarity in flow charts - confirmation no ACH is present
Management code must include tier 1 due diligence check with knowledge holders	Central registration of sites and contacts	Timeframes - what happens if no response?
Consultation with native title party or LACHS to engagement with appropriate parties as part of the due diligence process.	Proponent access to database	Add previous survey information into ACH Register Accessibility of Register
Provision of advice should be conducted initially in due diligence stage. Surveys can be conducted and advise given to proponents on how to minimise damage.	Practicalities of timeframes/due diligence for certain activities, considerations around proportionate to potential harm.	Consistency of due diligence assessment and activity categories

Increased risk of danger if flowchart is not followed and cross referenced with Traditional Owner groups Proponent to advise of planned activities in a work plan as part of the due diligence process.	Practicalities of due diligence/timeframes for emergency services	Consider activities for public value separately to commercial activities
Interactive flow chart to include a step on how to confirm no ACH is present.	Due Diligence process is critical	Surveys should consider levels of harm consistent with Code
Consider why exempt activities are still continuing in places of State significance. How to ensure protection from large impacts over time.	Consistency of guiding documents across the state? Public review of documents prior to finalisation Legal status of guidance	Update to flow charts
Consideration of state significance to be included in the applications for permits. Also, to include places to be considered of state significance without needing to be part of due diligence process.	Clearer guidance is required regarding what “all reasonable steps” entails. For example, if there are Aboriginal places or objects located in the activity area identified on the ACH Directory, could it be considered reasonable to proceed to harm that ACH if the cost of altering the activity is prohibitive?	Funding for Traditional Owner groups to set up LACHS
Reasonable due diligence steps must be included in the process	More certainty sought around process	Ongoing accuracy of ACH Register
Proponents are to engage with Aboriginal stakeholders prior to due diligence being carried out	Directory will need to be accessible, and cope with, a high traffic volume	Investment in Directory
Aboriginal people should be making decisions	Inconsistencies between the code and the act around due diligence for exempt category	Clarity around methods, obligations and minimum standards
Assessment can only be carried out by relevant Traditional Owners or knowledge holders. Exempt and tier 1 may still harm heritage	Interaction with other legislation/bodies - pastoral leases	Inclusive representation

Place-based processes needed	Due diligence process inconsistent with code	Additional advice and support for proponents around identifying ACH
Adequate funding for LACHS	Inconsistencies in legislation Accuracy of register	Cultural heritage management qualifications
Process and resourcing	Greater clarity needed around related agreements	Flagging accuracy issues in register Photography issues
Adequate funding needed, Due Diligence problematic	Reliability of ACH Directory	Reliability of ACH Register
Legal status/accuracy of information	Clear guidance needed for veracity of historical surveys	Additional survey requirements Blanket approach is problematic
Reliability of information, concerns over cost and complexity	Suggested guidelines for veracity of historical surveys	Certainty over policy and procedure
Surveys - funding and accessibility	Impact on smaller proponents	Confusion with Code
Clarity on definitions and process	Define minimum standard for a reasonable attempt at Due Diligence	Clarity on additional disturbance, potential conflict of interest in determining this
Economic considerations for Aboriginal community, involvement in decision making	Fund and resource the ACH Directory to ensure reliability	Reliability of existing surveys
Privacy of site information	impact of dust emissions on cultural heritage values	
Consultation before LACHS can be agreed to	Reducing the load on LACHS by keeping the system simple	
Consulting with LACHS or relevant Aboriginal parties only way to ensure accuracy of information	Due Diligence assessment should determine Tier	
Any new activity can lead to damage	Physical and biological impact of activities -	

	interaction with heritage, environmental and social surrounds legislation	
All due diligence should require engagement	Management code is too complex. Could it be drafted with a stepped approach?	
All tier 2 and 3 activities need to be processed	Protection/certification of due diligence assessment process	
Accountability of LACHS	Further clarity around previous disturbance, additional ground disturbance, existing ground disturbance, references to water quality	
Reliance on ACH Directory will cause further harm	Sub-surface considerations	
Independent oversight; cultural considerations; what happens when land was previously disturbed unlawfully?	ACH Register - sacred sites	
Limitations on what is considered disturbed	Accessibility of templates and register	
Changing definitions of sites	Further clarity required in Code, definitions, and process	
Distrust in ACH register	Clarity around who to contact and how	
LACHS ability to object	Confidence and clarity in process, critical activities, adequate funding	
Adequate resourcing	Clarity around process, confirmation of due diligence. Integrity of data	
Clarity on additional disturbance, sub-surface material Inclusion for workflow slide	Reliability of ACH Directory; maintaining existing infrastructure; pastoral uncertainty; proof of diligence; changing landscape	

Best practise should equate to full compliance	Clarity on ground disturbance, investigations for tier 2 activities	
Accessibility of act and process	Legal standing of advice, inconsistency with Activity Table Inconsistency with Code and Act Consistency of language	
Reluctance to place sites on Directory	Single term to describe harm to heritage	
Focus on cultural values in flow chart	Templates outlining information requirements for consultation	
	Interactive assessment tool	
	Interaction with existing structures	
	Determining Cultural Values	
	Inconsistent statements in Code	
	Representation of pastoralists	

OVERVIEW

Submissions relating to Due Diligence Assessments in the Management Code were probably the most numerous of all the themes. Stakeholders identified many potential updates, and raised some points about inconsistencies between the code and the Act. There was broad agreement on the need to properly fund LACHS, and conflicting views on when and how often to consult.

The main themes to arise included:

- Management code process
- Management code flowcharts
- Due diligence
- Self-determination

- Adequate funding for LACHS
- Legal considerations
- Accuracy of heritage register
- Surveys
- Further clarification and definition needed
- Clarifications around ground disturbance
- Governance and accountability
- Interaction with other legislation
- Pastoral
- Use of language

The following section explores these themes at a high level, and includes relevant comments from the submissions for consideration.

MANAGEMENT CODE PROCESS

Feedback about the ACH Management Code focussed around the process, with stakeholders seeking certainty around what they need to do, when they need to do it, and how they can obtain evidence that they have done it.

One of the main points of divergence was around when consultation happens. Aboriginal stakeholders urged that consultation be recognised as critical due diligence from tiers 1-3, and be done prior to determining the level of impact. Proponents sought ways to streamline the process and reduce the need for consultation by determining if ACH was present before reaching out to LACHS or knowledge holders.

The need for more detail in the Code, and a stepped approach to guide proponents through the process, was an area where all stakeholder groups were in agreement.

Further comments about the management code included:

- Provision of surveys and advice should be conducted in due diligence stage, and advice given to proponents on how to minimise damage.
- Place-based processes are needed for each region and area
- Recommend there be a mechanism through which proponents can seek certainty at the DDA stage. For example, the proponent could get an DDA

'certified' or similar by a LACHS or other qualified body. Timeframes and costs for certification should be prescribed.

- Recommend a step-by-step approach, providing guidance on how to undertake a DDA, as well as factors to be considered along the way. This could include:
    - The development of easy-to-follow templates for each activity category, outlining information and minimum documentation requirements including required documentary evidence of consultation undertaken.
    - Develop templates for each activity category, outlining information requirements including any required documentary evidence of consultation
    - Consideration to be given to how to acknowledge existing engagement structures and mechanisms with a guideline developed to assist Proponents to engage successfully with both existing engagement structures and LACHS.
    - What to do if not enough is known about ACH in an area - when should heritage surveys be conducted and how extensive and detailed should they be?
    - What undertaking a heritage survey may involve and what steps are required to go about facilitating them.
- The Draft Code states that the “Department will develop guidance documents to assist proponents undertaking a DDA to recognise different types of ACH”. The proposed guidance should be published in draft with an opportunity for public review prior to the finalisation of the Co-Design process and full implementation of the Act. The legal status of the guidance should also be confirmed (i.e., will it form a subset of the statutory guidelines developed under s 294 of the Act?)
- The Act provides that steps taken under related agreements may be used to satisfy the requirements of the due diligence process (s 106). However, Part B, section 2.7 of the Draft Code states that related agreements may be used to satisfy some due diligence requirements (i.e., a subset of the entire due diligence process may be satisfied, rather than the whole).

The distinction in language is important, as there must be greater clarity provided that some related agreements can satisfy the expectations of the due diligence process and thus be considered valid.

- A key step in the due diligence assessment process should include consideration of any existing agreements that may include steps relevant to the due diligence assessment. The Draft Code should be amended to:
    - Reflect the Act (i.e., steps taken under related agreements may satisfy the requirements of the due diligence process); and
    - Consider any existing agreements at an early stage of the due diligence assessment process.
- Part B Section 2.4 of the ACH Management Code be further refined to improve clarity and simplicity of the guidance on consideration of previous disturbance. This section must include acknowledgement that in some circumstances previous disturbance will be the primary determining factor in a due diligence assessment, and that there are circumstances where this will indicate no risk of harm to ACH.
- Section 113 of the Act requires a proponent who intends to carry out a tier 2 activity in an area that may harm Aboriginal cultural heritage to notify certain persons about the proposed activity. The Draft Code provides that, if a proposed tier 2 activity is located within an area with known ACH but will not result in new or additional ground disturbance, it can proceed without an ACH Permit. There is no consultation requirement included in the Draft Code for these circumstances, despite the requirements of s 113.
- Develop appropriate mechanisms and risk assessment matrices to ensure risk is adequately managed should prescribed periods not be achieved, but activities to mitigate risks against disasters are still required.
- Assessment of the existence of ACH, and whether an activity 'intersects' with ACH, should explicitly include the following considerations:
    - Has any attempt been made in the past to identify ACH in the area? i.e., have there been any surveys or other assessments undertaken?
    - If so, what is the coverage and quality of these previous assessments? Are they sufficient and appropriate for the current planned activities? i.e., what is the quality, comprehensiveness of previous heritage

surveys or assessments? how appropriate are they for the planned works?

- The ACH Management Code should also specifically state that the ACH Directory is not 'one source of truth' and that LACHS and potentially other organisations (Representative Bodies, museums, libraries, historic associations, proponents or consultants) may be sources of additional information. It should provide guidance on how to identify ACH beyond that included in the ACH Directory.

Other questions about the Management Code:

- Who is the final authority to sign off on a management plan?
- Can projects be grouped like a yearly submission of projects/activities?
- Is there recourse to object or respond to a decision?
- Clarify who has the obligation to consult with other knowledge holders when preparing and negotiating ACH permits and management plans – proponent or LACHS?

MANAGEMENT CODE FLOWCHARTS

Feedback around the flow charts focused on inconsistencies and gaps. Aboriginal stakeholders recommended that the flow charts include considerations around cultural values and more visibility of knowledge holders. Proponents sought clarifications to make the flow charts easier to follow and progress.

Comments about the flow charts included:

- The flowchart seems to assume compliance with the due diligence requirements. There is a danger this will be neglected or forgotten by people merely following the flowchart, so there needs to be a clear cross-reference to the due diligence requirements in the ACH Management Code.
- Flowcharts 2 and 3 are problematic when stating the action can proceed if it is confirmed that no ACH is present. However, no guidance is given as to how this can be confirmed. This can only be done if the LACHS and relevant group confirm no ACH is present - and this vital step needs to be listed in the flowchart.

- Flow charts should be interrogating whether cultural values could be impacted by the activity (rather than focussing on ground disturbance). If there is any ambiguity whether cultural values are present, or not, then the relevant parties need to be consulted (for any tier).
    - Suggestion: set out assessment steps as a separate workflow to assist with ascertaining the likely presence of cultural values in relation to the proposed activity.
- Department to ensure the activities identified in the Activities Categories be identical to the process outlined in the DDA flowchart to alleviate ambiguity. Should this be unachievable, a description of which takes precedence.
- For the new Flowcharts produced for tier 2 and 3 activities to include the phrase “Activity does not result in new or additional ground disturbance, Activity may Proceed.” This wording will cover the ‘maintenance or re-establishing of any disturbance works i.e., vegetation modification, firebreaks, etc., that occur in previously disturbed sites/areas. Widening or new works will require a DDA, which is good practise to ensure any potential ACH is avoided.
- T3 workflow slide – should identify at the very start (first box) that the proponent needs to have a conversation with the Traditional Owners/LACHS"

DUE DILIGENCE

Aboriginal stakeholders advocated for all due diligence processes to require engagement. This point proved key throughout the stakeholder groups, with a number of stakeholders questioning inconsistency between the Act and the Code around whether consultation was required for exempt and tier 1 activities. Some key points around this question included:

- The ability of Aboriginal stakeholders to maintain the privacy of certain sites by not including them on the register
- Compliance with “all reasonable steps have been taken to avoid or minimise harm.”

Further comments about the due diligence process included:

- Define a minimum standard for a reasonable attempt at due diligence
- Make it clear that a due diligence assessment is required for all activities

- The due diligence process is inconsistent with the statement in section 2.5 of the ACH Management Code (p 18) that “undertaking of a DDA will require engagement with the Aboriginal party and/or knowledge holders in relation to tier 2 and tier 3 activities, particularly where there is uncertainty whether an activity is likely to harm ACH.”
- Proponent to advise of planned activities in a work plan as part of the due diligence process
- Public notification needs to be a part of the requirement
- Due diligence is based on honesty system, but penalties / fines are more significant
- We notice pages 12 and 13 of the Management Code does not currently recommend consultation with knowledge holders and native title groups or LACHS activities as a reasonable due diligence step when someone is looking to do a tier 1 Activity. Just having someone check the ACH Directory will mean that all Aboriginal people have to give their site information to the Government and cannot have control of that information.
- Make it clear at the outset that the foremost way of assessing whether ACH is present (and will be damaged) is by consulting with and engaging the relevant LACHS or alternative Aboriginal parties.
- Tests on page 17, highlighting ways to confirm ACH is not present. The second column suggests one of the four dot points would lead to a reasonable view that ACH is not present. However, only the last dot point - consultation with interested Aboriginal parties or knowledge holders who identify that no ACH is in the area - would be sufficient to lead to a reasonable DDA.
- On page 17, the reference in relation to ACH being physically present is said not to include buffer zones or masked boundary areas. However, buffer zones or boundary areas may, in fact, be a sphere of influence or power around a particular feature. The buffer area itself forms part of the ACH and intrusion into such a buffer area could be damaging to ACH.
- On page 18, at point 2.5, the suggestion is that a DDA in relation to tier 2 and tier 3 activity will require engagement with Aboriginal parties. However, as noted above, that DDA is also required for a tier 1 activity. Any DDA, even that required at tier 1 level, should require engagement - otherwise it is not

proper due diligence but an avoidance of facts that could easily be ascertained. Mere notification to Aboriginal parties should not be regarded as sufficient engagement for a DDA. This section gives the impression of a token effort rather than a sincere attempt to establish whether the activity will damage ACH and how such damage could be avoided.

- At page 22 and 23, there are summaries of DDAs for different levels. All mention the need to take reasonable steps to minimise harm - note that it is not possible to work out how to minimise harm without speaking to Aboriginal parties, a requirement for all tiers of activities.
- The Act does not require due diligence assessment for exempt activities (s 103). However, the Draft Code includes a due diligence process to be followed for exempt activities. Similarly, section 4 of Part A of the Draft Code (p 4) includes broad statements regarding when a proponent is required to undertake a due diligence assessment, that do not address that no due diligence assessment is required for exempt activities and could be misleading.
- "By definition (s 102), a due diligence assessment requires a proponent to consider (among other things) whether ACH is located in the area of a proposed activity, and if there is a risk of harm to that ACH as a result of the proposed activity. The due diligence requirements for tier 1 activities in the Draft Code currently only require the proponent to consider the ACH Directory to determine whether the proposed activity is located in a protected area. If it is not, the proponent may proceed provided that all reasonable steps are taken to avoid or minimise harm to ACH by the activity.
- "The Draft Code provides that tier 1 activities may proceed without an ACH permit or approved or authorised ACH management plan provided that a due diligence assessment determines that:
    - The activity is not located within a protected area; and
    - All reasonable steps are taken to avoid or minimise harm to ACH by the activity.

  However, this guidance is inconsistent with the due diligence requirements for tier 1 activities outlined in paragraph [2.5] above (which do not require searches of the ACH Directory beyond -checking if the proposed activity is in

a protected area), and it remains unclear if these steps will satisfy the legal test required under the Act – i.e., are these “all reasonable steps that could be taken to avoid or minimise harm” to ACH by the activity?

- The due diligence process is also inconsistent with the statement in section 2.5 of the ACH Management Code (p 18) that “undertaking of a DDA will require engagement with the Aboriginal party and/or knowledge holders in relation to tier 2 and tier 3 activities, particularly where there is uncertainty whether an activity is likely to harm ACH”.
- Requirements are unworkable for smaller proponents such as prospectors – time and cost implications will put most out of business
- Clarity on consideration of previous disturbance in undertaking a due diligence assessment:
  Part B, Section 2.4 details the level of existing ground disturbance at an activity area but, is difficult to interpret. It is recommended that the guidance is amended to provide further clarity on how previous disturbance is considered, noting that it is not unreasonable for a proponent, in some instances, to rely on previous disturbance in an area as the primary basis, in a due diligence assessment, for determining there is no risk of harm to Aboriginal cultural heritage.
- Section 2.6 of the ACH Management Code describes the conduct of ACH investigations. It is recommended that the first paragraph is amended to make it clear that ACH investigations may also be required for tier 2 activities."
- The information included in Part B – Due Diligence Assessment Considerations includes broad commentary that exceeds the scope of the ACH Management Code and is arguably inconsistent with the Act at times. For example:
  - s 102 of the Act clearly defines the scope and intended outcomes of a due diligence assessment. The information included in section 1.1 of the Draft Code under the heading “What does a Due Diligence Assessment achieve” is broader than the stated outcomes of a due diligence assessment under the Act and conflates matters that are separately dealt with under different sections of the Act (e.g., approval and notification requirements)

- The “key factors to consider” for a due diligence assessment under section 1.2 of the Draft Code includes “the existing level of ground disturbance, if any” – this is not a requirement for due diligence consideration under s 102 of the Act
- The Act clearly states that “the proponent” is the person required to undertake a due diligence assessment (s 103). The definition of “proponent” in s 100 of the Act is broader than the description of who needs to undertake a due diligence assessment in section 1.3 of the Draft Code
- The definitions of tier 1, tier 2 and tier 3 activities in s 100 of the Act are broader than the definitions included in section 2.1 of the Draft Code

Recommend revising to:

- Remove information and commentary that does not directly address the issue of what is required for a due diligence assessment; and
- Ensure that all of the language in the Draft Code is consistent with the Act; and
- Ensure that all information and commentary in the Draft Code is consistent with the Act."

- Part 6 of the Act only requires a due diligence assessment to be undertaken for activities that may harm Aboriginal cultural heritage (ACH) (see definitions of “proposed activity” and “proponent”). “Harm” can only occur under the Act to intangible ACH in protected areas (ss 89, 90). As a result, there is no requirement under the Act for proponents to consider intangible ACH where an activity is not located in a protected area. The following statement in Part A, section 3 of the Draft Code is therefore inconsistent with the requirements of the Act:
    - For tier 3 activities requiring an ACH management plans [sic] that are proposed within cultural landscapes that are not located within protected areas, proponents will still need to consider ACH and potential impacts in a cultural landscape context (p 9).

  Recommend the inconsistent statement should be deleted from the Draft Code.

SELF-DETERMINATION

Aboriginal stakeholders clearly and unequivocally advocated that Traditional Owners or knowledge holders should be the ones making determinations about Aboriginal Cultural Heritage, not proponents.

Comments included:

- Exempt and tier 1 activities may still harm heritage
- Local groups should be involved in decision-making about their Country.
- How does this fit with Aboriginal empowerment strategy and Closing the Gap?
- Western legal constructs and perspective needs to work in with local Aboriginal cultural.

ADEQUATE FUNDING FOR LACHS

Ensuring that LACHS were adequately resourced and funded to carry out the services required were a point which was agreed on and advocated for by all stakeholder groups. Proponents and Aboriginal stakeholders alike recognised, in comments against multiple themes, that the Act will impose an administrative burden which could only be met by organisations with both funding and employees.

Other comments about how that funding could be sourced, and how Aboriginal communities might benefit from the work, included:

- Consider a tax from impacts to land
- Consider a portion of income to community from development
- Important to include economic considerations in ACH management plan
- Investment in training and capacity building, required resources from commencement of legislation.

LEGAL CONSIDERATIONS

Stakeholders raised some questions around the legal status of the Act, and the legal standing of work carried out under it. These included:

- Will LACHS/PBC be liable for being prosecuted if they say that there is no heritage in an area to a proponent but there turns out to be heritage?
- What happens when land was previously disturbed unlawfully?

- Existing and future heritage agreements, provided they reflect a best practice approach as warranted by the Aboriginal party to such agreements, need to be accorded the status under the Act and regulations as being a means of demonstrating full compliance with the Act and regulations.
- It is important that the legal standing of these documents is clarified for the reader. For example, if a reader were to follow the steps in these documents would they be fully protected from prosecution? Under Section C of the Aboriginal Cultural Heritage Management Code, the importance of the standing of this document is emphasised:
    - Dot point 4.1.2 suggests "If the proposed activity is located within an area with known ACH and will not result in new or additional ground disturbance, the activity can proceed without an ACH permit."

  A reader will need to understand how robust the standing of this Code is before relying on it as this contradicts the purpose of the Activities Table.

ACCURACY OF HERITAGE REGISTER

The ACH Heritage register is viewed by proponents as a vital tool in being able to comply with the legislation. They want it to be accessible, interactive, reliable, include maps and relevant contacts, and have the ability to document their efforts – potentially an app for assistance with managing land and ACH obligations.

However, concerns over the accuracy of information in the ACH Heritage register were universal across stakeholder groups. For Aboriginal stakeholders, there are issues of privacy at stake – some areas are secret, and it is not appropriate to have them recorded. Further, handing over information about such sites means a loss of control over cultural information. As such, the advice was that the only reliable way to find out if ACH existed in an area, was to consult with LACHS and knowledge holders.

For proponents, the issue is quite different – they seek certainty that they can rely on the information in the register to understand whether they need to proceed with consultation and potentially an Aboriginal Cultural Heritage Management Plan.

Opinion broadly ranged in a spectrum from "LACHS should always be consulted" to "if there's nothing on the Directory, work should proceed."

Comments and concerns on this issue included:

- Incorrect information on the register may lead to a wrong assessment
- The Part B section of this Management Code is a section on Due Diligence Considerations. We believe that this important part should have had its own period for consultation and not be included with all of the other information that we are being asked to consider in the small amount of time that is given to us.

  We notice on pages 12 and 13 of the Management Code does not currently recommend consultation with knowledge holders and native title groups or LACHS activities as a reasonable due diligence step when someone is looking to do a tier 1 Activity. Just having someone check the ACH Directory will mean that all Aboriginal people have to give their site information to the Government and cannot have control of that information.

  We were told very clearly that Aboriginal groups would be able to maintain our own Registers of sites and would not need to give all of that information to the Government. If the Management Code now only requires people look up the ACH Directory to see if there is ACH in an area, then we wonder if we were misled in the consultations on the Act before it was pushed through parliament.
- Consulting with LACHS or relevant Aboriginal parties is the only way to ensure accuracy of information
- Reliance on the register could lead to further harm, and an attitude of “if it’s not on the register, it doesn’t exist.”
- We need a decentralised system to overcome the lack of trust in the current register.
- Aboriginal people will be unlikely to place sites and other information on the Directory as once you do this you are inundated with requests from universities and academics
- Proponents need the information in the register to be reliable and effectively a “one stop shop” when they undertake their Due Diligence Assessment.
- Government should provide sufficient resourcing, funding and governance to ensure reliability
- We would like to see the State Government establish a central database where Indigenous stakeholders can register known sites of significance and

the names and contact details of those with a connection to these sites. Landholders can then contact registered Aboriginal stakeholders for consultation

- The Directory should be such that a proponent has satisfied due diligence by accessing it to identify cultural sites before proceeding in light of the information obtained. The draft documents are contradictory on this point. Of great concern, the notes from Department state (Overview, p.48) that if "...the ACH Directory reveals there is no listed ACH, it should not be presumed that ACH does not exist in the search area." In other words, a negative result from a search still requires the proponent to consult the LACHS or local knowledge holder - this is at variance with section C 2.1.3 of the ACH draft Management Code which simply requires tier 1 proponents to
    - ...check the ACH Directory to confirm whether the proposed tier 1 activity is located within a protected area."

  However, the departmental notes state that the Directory
    - ...will not contain records for all the ACH..."

  and further, that the Directory
    - ...may contain spatial and other inaccuracies..."

  It is surely unethical to penalise a proponent who consults the Department's directory and acts on the results in good faith when the information is subsequently found to be deficient or plain wrong. Surely it is incumbent upon the State to provide a comprehensive, accurate and up-to-date resource? Establishing the presence of ACH and entering it accurately in the Directory should be the responsibility of the guardians of the heritage, not proponents.
- Directory will need to cope with a high volume of traffic
- A proponent must be able to rely on searches of the ACH Directory in the due diligence assessment process, otherwise it is arguable that further steps are required to ensure that “all reasonable steps” have been taken to avoid or minimise harm to ACH.
- If there is no site on the directory, work should proceed
- The Directory needs to be able to print a time and date-stamped page to demonstrate when it was consulted and what the results were.

- The idea of not including sites on the Directory only leads to possible harm to sites and extra time delay in being informed.
- Needs to display who to contact and how
- An online, interactive Aboriginal heritage assessment tool, linked to the Aboriginal Heritage Directory be developed to assist proponents understand the potential for activities to impact heritage and the approval requirements. The ability to ensure platform operability with other tools (such as DFES Maps and Landgate tools via SLP layers) to allow for single viewer access.
- In terms of the future Aboriginal Cultural Heritage Directory (ACH Directory), it has been noted that there already is a backlog of sites to be registered and/or lodged under the current system. In theory, the information that is proposed to be provided through the ACH Directory appears to be comprehensive and extremely helpful in proponents' due diligence assessments. However, questions remain regarding who will update it and how often it is going to be updated to ensure accuracy of data. The Department of Planning, Lands and Heritage (DPLH) and/or the ACH Council will need to be appropriately resourced to ensure the ACH Directory is maintained, up to date, and accurate.
- It has been previously advised that the ACH Directory will be a key tool in protecting Aboriginal Heritage. For the new Act, Regulations and Management Code to be successfully implemented, investment is needed in the ACH Directory, to support due diligence, decision making and above all, outcomes supporting the protection of Aboriginal Heritage.
- It is noted that the ACH Directory may include information that contains spatial and other inaccuracies. Could the department flag those records where it is likely this is the case so that people searching the directory are immediately aware, such as older site recordings that have accuracy issues.
- There needs to be some responsibility taken to ensure that details relating to ACH are easily accessible by those that are working within the legislation, if they are hidden
- Access to the database to ensure that it holds the relevant information could be linked to existing state-run databases such as PLB, meaning that each proponent can see information relevant to their property

- State should ensure that all areas of concern are surveyed/study as part of the implementation of this process
- There also appears to be another step where by you not only have to speak to the knowledge holders but now also the native title parties for properties, where they have been determined

SURVEYS

Past surveys are viewed by stakeholders as potentially invaluable tools in understanding where ACH is present, which could potentially be uploaded into the ACH Register to make information available and streamline the process by avoiding duplication. However, there was widespread concern around the accuracy of the data in those surveys.

Comments included:

- Heritage surveys need to be logged and readily accessible to avoid duplication.
- Old survey information needs due consideration for accuracy and relevance
- Surveys (ACH Investigation) should be funded by government, to stop potential corruption of either party.
- It is unclear whether a proponent can rely on a historical survey report/ACH investigation without consultation with the Aboriginal parties/knowledge holders or where the Aboriginal parties/knowledge holders suggest that the report/investigation is unreliable. Survey reports are also not always comprehensive. For example:
    - A survey and subsequent report may have only considered the conduct of very specific activities in specific areas
    - An ethnographic survey may have been completed over an area, but not an archaeological survey

  These factors may give rise to reasonable doubt regarding whether such survey reports can be relied upon for different activities in the same area. It is critical that industry be able to rely upon historical survey reports in appropriate circumstances without risk of challenge. Industry has previously invested significant resources in conducting historical surveys that clearly identify ACH in areas of the State. If there is not clear guidance supporting the

veracity of these historical surveys in appropriate circumstances, this will undermine the reliability of these surveys in due diligence assessment under the Act and increase risk of legal challenge.

- Industry suggests that historical surveys that meet the following requirements should be clearly stated in the Draft Code to be considered reliable for the purposes of due diligence assessment under the Act:
    - Survey completed within the previous ten years
    - Survey conducted with the involvement of the appropriate knowledge holders (as identified in the knowledge holder Guidelines)
    - Survey considers the area of the new proposed activity
    - Survey assessment is relevant to the new proposed activity (i.e., considers either the same or analogous activities, or considers the existence of ACH in the survey area more broadly).
- Unless containing culturally sensitive information, ACH surveys should be uploaded into the ACH Directory map. Should culturally sensitive information be identified, the existence of such a survey is to be acknowledged, allowing this knowledge to be incorporated into the planning process and to alleviate inefficiencies. Knowledge can be anonymised for protection purposes, with broad cell identification used.
- An ACH survey be required if the proposed activity will cause moderate to high disturbance of an area that is in a natural state (not had any prior modification or disturbance), such as those outlined in tier 3.
- If proposed activity occurring in an area of prior modification or disturbance, engagement of an ACH Monitor to undertake the assessment (rather than a full survey team) will be suitable.
- Use of previous surveys will be acceptable should the nature of disturbance be similar.
- Surveys to be determined using the matrix identified in the development of the ACH Management Code, whereby level of harm for each activity is considered. (For example, fire – as a naturally occurring phenomena – may cause no harm to a particular area).

- Department to provide written clarity of a proponent's obligations if no ACH is found in the ACH directory, as 'a DDA may be used as a defence to a charge that ACH was harmed.'
- Include in code - whether the native title holders / claimants / knowledge holders think there is a requirement for additional survey. For example, if the previous survey was conducted a long time ago / for a different activity / with the incorrect participants.
- Guidance on what existing survey reports can be relied on

FURTHER CLARIFICATION AND DEFINITION NEEDED

Stakeholders requested further clarification on the following terms and concepts:

- Harm
    - Definition of harm
    - Impact on intangible sites?
- Existing ground disturbance
    - Does it vary depending on land use? (e.g., nature reserves, residential areas, sporting reserves)
    - What if extending on existing gravel pit/lay down by small amount? What if historical vegetation disturbance but regrown? What if surrounding areas has been 'bush-bashed'? One suggestion – copy aspects of native title agreement provisions regarding public works including adjacent and necessary areas for maintaining?
- Previous ground disturbance
    - There needs to be a statute of limitations on old works considered as already disturbed. For example, everything should be considered as new works, unless it has been maintained during the past 6 months.
    - This section must include acknowledgement that in some circumstances previous disturbance will be the primary determining factor in a due diligence assessment, and that there are circumstances where this will indicate no risk of harm to ACH.
    - The current draft does not capture the effect on ACH of extensive ground disturbance in (for example) mining operations. As drafted, the DDAC may require the development of an Aboriginal Cultural Heritage

management plan (ACH management plan) for the construction of infrastructure within an existing mining pit, or for increasing the depth of ongoing operations in an existing mining pit.
    - Consider cumulative impacts of past activity on site
- Considerations around the changing definitions of sites, and what is considered to be registered
- Sub-surface
    - Potential for sub-surface material, and addressing how deep existing disturbance is before any further disturbance isn't classified as "additional disturbance" and therefore not require an approval
    - Clarify to ensure that sub-surface due diligence assessment is only required in circumstances where evidence verifies the likely existence of sub-surface ACH.
- What does an ACH investigation entail?
- Quantify terms like enough, sufficient and appropriate
- Distinction between cultural sites vs protection areas
- Replicate the definition of ACH with that outlined in the Act
- New or additional ground disturbance
    - Quantify this term
    - Reclaimed land – parts of working ports include land that was reclaimed (e.g. via deposit of ocean dredge) which would not appear to have any real potential for Aboriginal cultural heritage material to exist. There would be logic to a general acknowledgement that activity on such land is considered unlikely to constitute "new or additional disturbance" for the purpose of the legislation (and/or that the due diligence expected in respect of such land is minimal).
    - Port Channels – reference above is made to "the existing level of disturbance of the bed" – this should be clarified in our view to reflect the existing channel bed disregarding any recently deposited ocean silt etc. that is to be removed during routine maintenance dredging activity.

CLARIFICATIONS AROUND GROUND DISTURBANCE

Definitions and clarifications around ground disturbance were raised by stakeholders across all groups. Additionally, some factors other than ground disturbance were cited as being potentially harmful to Aboriginal cultural heritage.

Comments included:

- On page 18, at point 2.4, there is undue emphasis on physical ground disturbance. ACH can be damaged by non-physical activities or effects and a failure to consider this in a DDA is inappropriate and can mislead people into committing offences. In addition, while there is a good discussion on how past disturbance does not necessarily mean new disturbance will not be damaging, it can be confusing as to what amounts to new or additional disturbance. It should be made clear that a repeat of the same type of disturbance in the same footprint is nevertheless a new or additional disturbance. In other words, any new activity could amount to damage.
- Flowcharts 2 and 3 are incorrect in saying that, if there is no new or additional ground disturbance, then the action may proceed. There is nothing in the ACH Act that specifies this. Non-ground disturbing activities can still damage ACH. Ground disturbance, even if it is of the same kind that has happened before, can still cause additional damage. All tier 2 and 3 activities that may cause damage to ACH need to be processed through the ACH permit under ACH management plan processes in Part 6 (unless the relevant LACHS or other Aboriginal groups confirm the activities will not cause any damage).
- Consideration should be given to the practical implications of considerations of water quality in the DDAC and due diligence assessment process. It is not clear whether ‘water quality’ refers to quality at the site of the activity, downstream, or elsewhere. It is not clear what threshold of assessment is required to determine water quality, nor is it clear what level of studies would be required to demonstrate harm (or lack thereof) on water quality of the proposed activity.
- Wrack removal - removal of seaweed and the like from the ocean floor (Or alternatively expressly confirm in the ACH Management Code that these do not constitute "new or additional ground disturbance" that requires any ACH Permit or management plan relating to that activity. These activities are simply

removing "transient" ocean silt built up in recent years where there seems no possibility of heritage disturbance.)

GOVERNANCE AND ACCOUNTABILITY

Reciprocal accountabilities of LACHS is a topic that gained considerable attention in other themes, and will be explored further there. With reference to the Management Code, stakeholders provided the following feedback:

- The ACH council should also have accountability to ensure they are overseeing LACHS correctly.
- Governance is important-what can council or Department do to oversee governance of LACHS?
- One LACHS per area will risk creating a monopoly
- Clear reciprocal obligations need to be defined

INTERACTION WITH OTHER LEGISLATION

Stakeholders raised a few items around pastoral and Environmental legislation, as follows:

- The Pastoral Lands Board, which oversees the implementation of the Land Administration Act on pastoral leases requires us to maintain and develop infrastructure including buildings, sheds, yards, fences, water points, firebreaks and access tracks, as well as rehabilitating degraded areas and controlling plant and animal pests.
- The Codes should demonstrate that a due diligence assessment of an activity that gives rise to dust should consider:
    - The impact of those dust emissions on cultural heritage values, including alongside pre-existing dust impacts and cumulative impacts.
    - Assessing and managing the harm that might arise to heritage values when water features and flows are disturbed.

  This is important for enabling harm to cultural heritage to be considered and fully regulated through the ACH Act, only, and not through the separate environmental impact assessment process in the Environmental Protection Act. The current duplication is giving rise to substantial inefficiency, confusion, and inconsistent outcomes.

- Management Code should provide guidance on how a due diligence assessment should consider harm arising to ACH from the physical and biological impacts of an activity. This will enable the EPA to refer to the ACH Act decision-making processes as mitigating environmental impacts and removing duplication and inconsistency between the heritage and social surrounds processes.

PASTORAL

Extensive feedback from pastoralists indicated this stakeholder group have some concerns over how the Act will impact their business as usual activities. Comments about the Management Code included:

- All pastoral areas potentially include ACH
- Given the vast area of pastoral leases and the growing scale of some cultural sites, progressing a DDA process and then managing/ mitigating impacts of pastoral activities on huge tracts of land could become unfeasible for pastoralists.
- Pastoral activity is typically not targeted or localised, but involves continuous broadscale use of a landscape.
- Greater detail and guidance needed for pastoralists.

USE OF LANGUAGE

A few stakeholder comments identified a need for specific and in some cases strengths-based language to reduce uncertainty around definitions and obligations. Comments included:

- Part B, section 2.3 of the Draft Code states that “if it is confirmed that ACH is not located in the activity area, the activity may proceed without further assessment”.
  Industry has observed the legal and practical difficulties with knowing a negative. The subsequent table refers to “a reasonable possibility that ACH is present’’, “a reasonable view” and a document has “confirmed that ACH is not present”. Each of these phrases is subtly different and give rise to potential inconsistency.

    - Recommend the standard of assessment that should be adopted here is “reasonably considers that ACH is absent”.
- Part B, section 2 of the Draft Code refers to “Impacts to ACH”. This language is inconsistent with the Act, which is based on the concept of “harm”, and not “impacts”. “Impact” and “harm” are not synonymous.
    - References to “impacts” to ACH should be amended to “harm” to ACH throughout the Draft Code.
- The ACH Management Code (the Code) uses multiple terms to describe interference with ACH, for example, harm, disturbance, interference. Recommends that a single term should apply and that, given it is defined under the Act, ‘harm’ would be appropriate."

Draft Consultation Guidelines

Questions

- Are there any other considerations for the Consultation Guidelines?
- Any other comments?

Table 5 below shows emerging themes from the submissions about the Draft Consultation Guidelines, through the lens of Aboriginal stakeholders, proponents, and other (inclusive of State Government, service providers, archaeology and heritage consultants, and general community).

Table 5: Emerging themes about Draft Consultation Guidelines

Aboriginal Stakeholders	Proponents	Other
Consider “as early as possible" in overall project design development to mitigate project impacts	Clarity on what happens when contact is challenging, and existing relationships Guideline should contain a minimum documentation method that is culturally appropriate and inclusive	Documentation of consultation process
Preferred method of consultation should be decided by Aboriginal people	Duplication in Code	Impact of pre-existing agreements
LACHS should guide consultation	Exemptions for pastoralists	Adequate funding for LACHS to respond to engagement requests
Clarify undue influence or interference from other parties	Adequate funding needed for LACHS	Reference tools of heritage assessment developed by Anthropology and Archaeology
Concerns that Aboriginal people's words may be intentionally misinterpreted or misunderstood	Urban considerations	Culturally appropriate material

Consultation must happen earlier than a trigger for tier 3 activities	Availability of archaeologists and anthropologists How to ensure financial considerations do not compromise heritage outcomes?	Simpler process needed
Aboriginal Stakeholders should be first point of contact for any proposal	List of designated knowledge holders needed Timeframes should be set	Inclusions for genuine attempt to contact
What culturally appropriate engagement constitutes should be established with LACHS at outset of process, as a part of that process.	Involvement of government agency in process Concerns that proponents may not have skills needed	How to mediate conflict?
Advice in this section inconsistent with the Act - implies proponent can determine whether or how to consider input from consultation	What to do when knowledge holders are not represented by LACHS? Availability and accessibility of knowledge holders	
Aboriginal Stakeholders must have the ability to say no.	Further detail on permit process needed	
Aboriginal Stakeholders must be able to maintain secrecy of particular sites and cultural information.	Invest in building capacity of LACHS staff to ensure proper consultation	
Minimum information standards should be included in guidelines	Amend inconsistent language	
Informed consent is not consistent with lack of provision to say no	Clarify who funds consultation costs	
Deeply personal nature of this work should be acknowledged in guidelines.	Reciprocal consultation obligations for Aboriginal stakeholders	
Guidelines should include that an absence of	Clarify communication protocols	

response may be due to an absence of funding		
Lack of response should not be the basis for approval of an ACH Management Plan	Onus on LACHS to communicate preferred method of consultation in the Directory; Onus on LACHS to make it clear when people are unavailable for cultural reasons	
Proponents should fund reasonable costs of travel on Country	Clarity around what is appropriate consultation for scenarios other than tier 3.	
Consultation should start before planning	Documentation of process	
Cultural conventions should be mandated, and timeframes take them into account	Clarity on right people to speak for Country	
Supporting documentation should be submitted to LACHS prior to meetings, and be in plain English	Clear end-to-end process; interaction with existing frameworks; Further guidance and tools needed for proponents	
Feasibility should not be tied to time or cost.	Further guidance needed, including case studies and examples.	
Consultation should be ongoing, and include reporting progress and compliance to LACHS	Further guidance - how to find correct people, zoning Resourcing needs	
Guidelines for ongoing consultation and new information requirements	Reciprocal obligations of LACHS Further guidance around demonstration of reasonable time	
Resourcing of PBCs	Council to get consultation process started?	
Better communication, consultation start early	Keep it simple for smaller operators	

Face to face to ensure integrity; more details around minimum requirements	Emergency Situations	
"Provide support to manage consultation, including industry liaison officer, LACHS funding, checklist for proponent	Accessibility of contacts Administrative burden - people seeking help	
Process for dispute resolution	What to do if LACHS and knowledge holders are not connected? Clarity around consultation process and getting an outcome	
Knowledge holders before LACHS	Building on/maintaining past and current working relationships	
Multiple contact methods	Early engagement considerations: Cost, time, business needs	
Need for travel	How to consult where native title has been extinguished?	
Considerations around Lore time	What happens if someone new comes forward after consultation?	
Demonstrate contact efforts		
Document consultation		
No capacity to handle pastoralist requests		
Funding for LACHS community engagement		
Culturally appropriate gender representation		
Clarity of terms		
Consider power dynamics		
LACHS to drive process		
Keeping details up to date, include multiple contacts		

Secondary knowledge holders		
Relevant expertise - place-based consideration, local structures		
Discussion of veto power		
Complexity of process		
Consider consultation fatigue and resourcing		
Building capacity, economic benefits - include in Guidelines		
What happens if it's not clear whose land you are consulting on?		
Remove ambiguity in wording		
Consider intangible heritage		
Clarify timely manner		
Consider interactions between cultural protocols and consultation guidelines		
PBCs are not appropriately funded to meet their obligations - creates problems for timely responses		
LACHS will have to consult with community, which requires further time commitments.		
Engage as early as possible - should start when exempt, tier 1 or tier 2 activities are happening		

OVERVIEW

Submissions relating to the draft consultation guidelines explored the functionality and process in some detail. Stakeholders identified some gaps around details like when to engage, and who makes certain decisions. There was broad agreement on the need to fund and resource LACHS to meet consultation obligations. There were no significant areas of disagreement, so much as uncertainty around detail, and an ongoing tension between the need for Aboriginal Stakeholders to maintain their voice and care for Country, and proponents to have certainty around cost and timelines for their activities or projects, expressed through questions about communication and resourcing.

The main themes to arise included:

- Early contact
- Method of consultation
- Existing agreements
- Culturally appropriate consultation
- Funding for LACHS
- Relationship between LACHS and knowledge holders
- Who makes the decisions?
- Suggested amendments
- Documenting consultation
- Risks
- Reciprocal obligations
- Role of archaeology and heritage assessment

The following section explores these themes at a high level, and includes relevant comments from the submissions for consideration.

EARLY CONTACT

The Phase 2 Consultation Guidelines make the following references to early engagement:

- *The Act promotes early engagement by proponents with Aboriginal people. In addition to ensuring appropriate approvals are obtained in a timely manner, early engagement can create long-term and positive relationships.*

- *1.2 Early engagement*
  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 local ACH services (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.
- *Early engagement with Aboriginal parties is strongly recommended. The earlier Aboriginal parties are engaged in the process, the earlier that the need to avoid ACH can be identified and the ability to make alternative decisions in relation to the proposal can be made.*

The guidelines also reference that first point of contact with Aboriginal stakeholders is for a tier 2 activity where it is uncertain whether ACH is present.

This aspect of the consultation guidelines drew considerable attention. Aboriginal stakeholders advocate for early consultation to happen as part of due diligence, preferably in the early stages of planning, so that early advice could be provided on minimising heritage impacts and appropriate locations for major works. Proponents wanted to know what early engagement would look like, and whether LACHS would be resourced to respond.

Comments on this included:

- Initiate contact as early as possible to ensure sufficient time and to allow for any potential delays in consultation.
- It is disappointing that this part does not also provide advice on engaging with Aboriginal groups/people as early as possible in the project design development process so that heritage impacts can be minimised before it is too late. This is a common issue and impacts can often be avoided if early advice can be provided.
- We strongly recommend that the Consultation Guidelines include advice on early and meaningful engagement (similar to section 1.2 of the draft ACH Management Code) and refer people to the Engage Early Guidelines.
- The scope of the draft Consultation Guidelines is expressly limited to consultation obligations regarding the ACH Management Plan, triggered by tier 3 activities. Consultation must be mandated at an earlier stage, including

as part of a proponent's due diligence process. The input of the relevant native title party is critical to the determination of what level of "impact" an activity may have on Aboriginal cultural heritage. This decision cannot be made by the proponent in the absence of consultation. Traditional Owners are best, if not singularly, placed to assess the impact of a particular activity on their cultural heritage and they should be the first point of contact for any proposal."

- The only solution in the draft Guidelines to circumstances in which a delay may arise, is to encourage proponents to engage as early as possible. This suggestion is anathema to the failure to require consultation at an earlier phase in the project life, such as when exempt, tier 1 or tier 2 activities are taking place. The best approach would be to require consultation to take place earlier than is presently mandated.
- The consultation guidelines only start at the ACH management plan stage. This is very late in the process, often after plans have already been made about the type of works and where they occur. There should be a recommendation that consultation start as early as possible to ascertain where to best locate projects and infrastructure to avoid damage to ACH. By encouraging consultation before planning has substantially commenced, this would better support the stated objective of protecting and preserving ACH
- Proposals are often worked up inside companies, so need to ensure consultation begins early. Communication - especially from government and big organisations - is currently insufficient
- What does early engagement look like? p. 46 1-2
    - Issues of costings?
    - Time pressures
    - Business Needs
- Whilst it is appreciated that "early engagement" is set out as one of the guiding principles for the implementation of the Act 2021, a continued concern is the lack of funding available to Traditional Owner and knowledge holder groups to set themselves up as the Local Aboriginal Cultural Heritage Service (LACHS) – should they wish to do so – and to empower them to be able to engage appropriately with proponents.

It is a well-known issue that Prescribed Body Corporates (PBCs) and land councils are already very resource constrained, and in our experience attempts to engage early are often not realised due to the groups having other, more urgent, issues and projects to deal with. This in turn means that by the time they are able to engage with us, it can no longer be considered "early engagement".

METHOD OF CONSULTATION

Comments around the method of consultation generally focused on the details of who, what and how. Aboriginal stakeholders generally advocated for face-to-face, on-Country engagements, while proponents felt some of the requirements were onerous. The advice to make contact first to ask how the LACHS/knowledge holder would like to be consulted drew some attention, with proponents seeking to push the accountability for that back to the LACHS, and make such information available up front.

Other issues raised included guidelines for consulting about different tiers and project contexts, the need for a clear and simple process, provisions for ongoing consultation, and keeping contact data current.

Comments around methods of consultation included:

- Part 5b of the Consultation Guidelines advises that "*once initial contact has been made, face to face meetings are the preferred method of consultation*". This is a bit of an assumption to make and sometimes will be misleading. It is Aboriginal people who decide and advise on what preferred methods of consultation will be for us and they may vary at times for different projects and depending on different circumstances.
- Cultural heritage is at risk if the necessary people have not been involved in due diligence processes. Culturally appropriate consultation involves face-to-face, and where possible, on country meetings with appropriate Traditional Owners/ knowledge holders in order to provide context and time to discuss proponent's activities. Proponents need to be guided by the LACHS in relation to consultation for each proposal
- Who/how/what to be consulted? Need to ensure detail is included

- The ‘preferred method’ should always be face-to-face meetings. When meeting face-to-face, honesty and integrity are at their highest level.
- Reasonable consultation is face-to-face, outdoors, and respectful
- Who do mining companies need to consult? It’s not clear.
- In negotiations under the Aboriginal Cultural Heritage Act 1972, some groups issue a ‘communication protocol’ as a first step before any further consultation. These protocols restrict access to Traditional Owners and binds proponents to only speak through certain parties and in certain forms. Such protocols narrow the channel of communication. Such practices do not satisfy S 101 (a) and (e).
- The Draft Guideline requires that a proponent seek advice from a person to be consulted on their preferred method of consultation. However, it would be more streamlined if this onus was reversed so that LACHS and other Aboriginal parties to be contacted are identified on the ACH Directory, together with their preferred method of consultation. This will assist in reducing the administrative burden on LACHS and other Aboriginal parties.
- The proposed consultation guidelines only apply to consultation in the context of agreeing an ACH management plan for the purpose of undertaking a T3 activity. There is no guidance on what constitutes appropriate consultation in other situations including, for example, where a proponent is conducting a DDA to determine whether ACH exists in an area and/or whether there is a risk of harm to the ACH by the proposed activity.
  Recommend greater guidance be given to proponents as to what constitutes an appropriate level of consultation in various scenarios and/or whether the extent of consultation can reasonably vary depending on the size of the area, type of activity, resources of the proponent and type and nature of ACH.
- The consultation guidelines should provide a clear end to end process including the alternate consultation pathway through the Department where a response is not received with a specified timeframe.
- What can proponents do to look up correct organisations/people etc?
- How do you know if you need to consult in greenfield areas?
- How do you know who to consult? Need assistance and specific advice for under resourced proponents

- Simplified process for small operators?
- How to develop a correct list of who to contact to ask when is enough, enough? And what are the thresholds?
- The best way to make it easy for people who are doing it for the first time- a red hot website, fast with easy search options?
- Unrealistic to expect proponents to make contact to ask what the preferred method of contact is. This should be set out, even noted against each LACH or knowledge holder in the database to ensure a smooth process.
  Pointing out that the coordinated consultation process can be time/resource intensive doesn't acknowledge the time on the proponent (which is at their cost) and will be harder without a smooth contacting process or a realistic timeframe for all parts of the process
  These now include a requirement for a face-to-face meeting between the proponent and the ACH party as the preferred method of consultation. This theme is unrealistic and also concerning as to who will be bearing any associated costs with this.
- Providing of 'sufficient' information is a loose term. Some information is business in confidence and there needs to be a way for this to be recognised
- The requirement of the proponent to make multiple initial attempts to make contact over an extended period of time is onerous when it is on the proponent only to make the contact and continue to record these attempts
- Auditing process needed to assist with keeping data current and up to date.
- Need to have multiple contacts over varied communication points - e.g., emails and phones
- The Draft Guideline also encourages proponents to consider delays in consultation arising from cultural conventions and commitments. This is a reasonable and well understood reality of working on country that is understood and accepted across most of Industry. However, it can be difficult to ascertain if an Aboriginal group is uncontactable due to a cultural commitment or because they have decided to not answer the correspondence. This misunderstanding can be easily overcome if the onus is placed on LACHS to make it clear when they are not available due to cultural commitments.

- The guidelines should also provide for consultation to be ongoing. There should be a requirement for the reporting back of progress and compliance to the LACHS with the possibility for LACHS to evaluate and respond to this feedback.
- As ACH management plans require processes to be followed if the parties become aware of new information, there needs to be guidelines to address the need for ongoing consultation requirements. The process for the management of new information should be included in the guidelines, rather than left up to individual ACH management plans to ensure consistency and fairness for the LACHS.
- Need clarity on process for consultation beyond and if that is even needed - need to avoid a never-ending loop of consultation

EXISTING AGREEMENTS

Some proponents raised questions about how to acknowledge existing agreements within the framework of the act.

Comments included:

- The Consultation Guidelines should address instances where there are existing Aboriginal engagement frameworks to ensure that these frameworks and relationships are maintained and to avoid duplication of process.
- Does reference to s.106 of the legislation in the Consultation Guidelines appendix confirm that established Aboriginal Heritage Agreements, and process and activities listed within those, satisfy due diligence requirements?
- Consultation guidelines in their current form are largely geared to first time consultations rather than existing relationships. As above, we would also welcome further clarity as to the kind of assistance that the Department will provide and within what timeframes, where making contact has been challenging.
- We consider that existing agreements, and consultation processes under those existing agreements, should also be acknowledged in the context of consultation obligations under the ACH Act. The guidelines appear to focus on first or early consultation engagement with no contemplation of existing

relationships and established consultation processes. These existing agreements and processes should be expressly recognised in the guidelines.

CULTURALLY APPROPRIATE CONSULTATION

There were a wide range of comments, questions and suggestions from Aboriginal stakeholders about ensuring that consultations were culturally appropriate. These included considerations around information about secret sites, trust, the deeply personal nature of the work, and the importance of self-determination.

Comments included:

- On Country, Face to face
- We are very concerned that Part 5c of the Consultation Guidelines advises that “all statements provided need to be authentic, delivered in the words of the consulted person and free from undue influence or interference from other parties”. In the past, the wide variations in Aboriginal people’s traditional ways and experiences, understanding of non- Aboriginal ways and technical things and capabilities of reading, writing, and talking in English have been taken advantage of. People say something in Aboriginal way and it is taken in a certain way and twisted by non-Aboriginal people, usually to help get what they want. A nod taken as a yes when it is not, or a yes taken as agreeing when it is not.

  It is up to individual people how they want to express their views, not for Government to dictate that. We are concerned that requiring that people provide comments without ‘undue influence or interference from other parties’ is a step backwards and may end up with people being taken advantage of without understanding and giving proper informed views and advice.

  These words ‘undue influence or interference from other parties’ needs to be properly explained to Aboriginal people so we are clear on what is being suggested here.
- The draft Consultation Guidelines do not address the requirement for culturally appropriate consultation, although proponents are encouraged to “consider” cultural conventions, which are also cited as a possible reason for delay. Traditional Owners are the only people who can determine what constitutes culturally appropriate consultation in the relevant circumstances.

This will differ depending on the area of the proposed activity and the nature of the proposed activity. The draft Consultation Guidelines should clarify that it is crucial that the standards for culturally appropriate consultation are established with LACHS at the outset of the consultation process.

- *Each person to be consulted having an opportunity to clearly state and explain their position on the proposed activity*
  Respect for secret sites and an acknowledgement that cultural information may not be able to be shared with proponents or documented in a meeting record should be enshrined in the draft Consultation Guidelines
- *The proponent and each person to be consulted disclosing relevant and necessary information about their position as reasonably requested*
  A list of relevant minimum information standards should be included in the draft Consultation Guidelines.
  This section of the draft Consultation Guidelines includes a requirement for the proponent to provide evidence that the Traditional Owners have provided informed consent in respect of the activity being carried out. However, the process established by the ACH Act does not enable Traditional Owners to say no to the destruction of heritage with any confidence that the relevant approval will nonetheless be granted.
  For Aboriginal people, country and culture are not abstract or external, but instead are deeply personal and familial. When a community of Traditional Owners are asked for their permission to damage or destroy sites and country, their consideration of that request involves deeply personal issues for the community and senior individuals within that community. This should be acknowledged in the draft Consultation Guidelines.
- Proponents must be required to submit any supporting documentation to the LACHS in advance of any consultations, to give the LACHS time to consider matters before consultation meetings. These should be in plain English.
- Importance of gender, male and female representation on surveys
- LACHS should develop their own consultation process
- Sensitive and respectful consultation must be prioritised in the guidelines

- It must be recognised that there is an unreasonable power dynamic between the two parties – the onus is on the Aboriginal parties to come in and agree to activity.
- Closing the Gap, economic development, Statement of the Heart – how does it all fit in?
- Need to approach it with the view the land was stolen
- Concerns raised that the consultation guidelines may not work if they don't respect cultural protocols. For example, some knowledge holders may not / cannot comment until an Elder has provided their views first. There are too many variables in cultural protocols and the requirements will vary from region to region – guidelines should be place-based.
- Concerns about consultation fatigue
- Is there an opportunity to call upon a secondary Knowledge holder? This will assist with handling deceased contacts.
- What constitutes "relevant expertise"- can this include the Cultural Advice Committee as well as Heritage professionals and Knowledge holders?

FUNDING FOR LACHS

As with the feedback on the management code, support for adequate funding for LACHS to meet their obligations under the act was broad across all stakeholder groups.

Comments included:

- *Making a genuine attempt to contact and consult, in a timely manner, each person to be consulted*
  This section of the draft Consultation Guidelines provides advice to proponents in relation to contacting persons to be consulted (usually LACHS), and flags issues that may cause delay. The draft Consultation Guidelines touch on availability constraints on LACHS, but fail to elucidate the primary issue, being that LACHS are not appropriately funded to employ staff to manage the administration and coordination of the mandated consultation. Most PBCs do not have staff and rely on volunteers or support from external parties to meet their basic compliance obligations under the *Native Title Act 1993* and the Corporation (Aboriginal and Torres Strait Islander) Act. "

- *The proponent taking reasonable steps to follow up with a person to be consulted if there is no response to the initial contact or a reasonable request for further information*

  The responsiveness or otherwise of LACHS is likely to be directly dependent on the provision of adequate funding to LACHS to enable them to perform their statutory functions. It is unreasonable to expect responses from entities that are not funded to employ staff to undertake even basic administrative functions.

  There should be a presumption enshrined in the draft Consultation Guidelines that the absence of a response from a LACHS is due to the absence of adequate funding. In order to displace the presumption, the proponent should be required to demonstrate that it is willing and able to adequately fund a proper consultation process. In the absence of such proof, the failure to respond cannot be the basis for an application to the Minister for approval of an ACH management plan.
- Consider examples of small PBCs without staff (run by volunteers meeting only infrequently) – how would/could/should consultation be undertaken?
- Support the Aboriginal community to help them manage consultation. LACHS funding to manage their functions must come from government to a minimum standard.
- Knowledge holders, local groups don’t have capacity to handle requests for pastoralists.
- Need funding for LACHS so they can have a conversation as part of general consultation/engagement with Traditional Owners
- Aboriginal Heritage industry creating dependencies, build capacity, foundations for the mob. If independent and sustainable would be a better system
- Need economic benefits in guidelines (Act)
- ACBs and ACH groups (local Aboriginal representatives) often do not reply/act in a timely manner as it is. This can be due to a lack of funding, support, infrastructure. The state government is setting these groups up for failure if they are not state funded and aren't supplied assistance/support.

Such a massive and important Act cannot be passed and dumped in the laps of these small corporations. They need assistance.

RELATIONSHIP BETWEEN LACHS AND KNOWLEDGE HOLDERS

There were concerns and questions raised by both Aboriginal stakeholders and proponents around the relationship between LACHS and knowledge holders, and the specific obligations and role of LACHS in a consultation.

Stakeholders raised the point that consultation is complex, and involves time, travel on Country, and engaging with people who do not necessarily have the capacity to take time out of their day-to-day business. There were also questions around what to do in a situation where the LACHS and knowledge holder do not have a relationship, or there were conflicting native title claims and no LACHS.

Comments included:

- The draft Guidelines also fail to adequately acknowledge and express that LACHS will not be able to provide the required feedback without identifying and consulting themselves with the relevant Traditional Owners for the area in which the activity will take place. The draft Consultation Guidelines do not make the distinction between the LACHS and the Traditional Owners that have cultural knowledge of country. The relevant Traditional Owners will depend on the precise location within any given native title area that the proposed activity is taking place, and will be different for each activity. These individuals, aside from having “other consultation commitments elsewhere”, are also regular members of society who are not usually employed by LACHS, meaning they are also likely to have family, community, cultural, professional and other commitments that will need to be navigated, and may not necessarily be dropped at the whim of a proponent seeking to consult, particularly in circumstances where their involvement is on a voluntary basis.
- Consultation can include travel to multiple States/communities with distance/weather to consider. Need to account for Lore time, which is 2 weeks to 2 months.
- Effective consultation is reliant on the Local Aboriginal Cultural Heritage Services (LACHS) established under the Act being sufficiently resourced, guidelines being clear and comprehensive, and the identity of knowledge

holders known and undisputed. The Government funding provided for LACHS to date is insufficient for these organisations to engage the staff necessary to meet governance requirements and the expectations this legislative framework will place on them.
Consultation is not simple. The Government should invest in ensuring the staff of the LACHS have the appropriate skill sets to meet the administrative requirements prescribed in the legislative framework. So far, the Government has committed $10million to finance the creation of LACHS. If the Government were to appropriately resource the Department of Planning, Lands and Heritage they would have to expend many orders of magnitude more than $10million.

- Proponent should be able to go directly to a knowledge holder rather than a LACHS
- What if LACHS can't cope with the volume of inquiries? What can a proponent do to facilitate the process? When there is no LACHS if there are multiple claimants and there is disagreement, how is that settled about whose voice is correct?
- In between Country where consultation is not clear?
- The proponent is obliged under the proposed regulations to consult with a knowledge holder. In this instance it will be important for the Department to keep a list of designated knowledge holders, rather than have a situation where any person in a random sense can put their hand up and identify themselves as a knowledge holder. Identification of a knowledge holder should be underwritten by the State as opposed to potentially loose arrangement at the LACHS level. This will add integrity to the process. Naturally, if there is no knowledge holder then the proponent will follow the next step.
- Further guidance should be provided in relation to consultation and engagement with knowledge holders that are not represented by a LACHS.
    - Assist proponents to ensure that all appropriate Aboriginal stakeholders have been consulted.
    - In such situations, what level of consultation is expected with knowledge holders in relation to ACH management plans?

    - Consider the identification and registration of knowledge holders in key regions of the state, particularly in areas where native title processes and agreement making has had less influence in the heritage process
    - Review existing knowledge holders listed on the current register to ensure information is up to date and reliable.
- Issue leaving knowledge holder out of the process if they are left out of the LACHS
- How does someone engage with custodians/knowledge holder who do not cooperate with the local LACHS?
- Who do you consult when there is no LACHS and there are conflicting native title groups?
- Concerns expressed over how to engage with Aboriginal people where native title has been extinguished (no PBC).
    - Conflict within the local community as a result
    - Belief that knowledge holders do not hold accurate knowledge
    - Informants on Surveys in the area may not be the right people for particular areas.
    - Community anxiety as to how the appointment of a LACHS will play out within Badimaya country, and how the ACHC will manage these tensions
- Will LACHS act as one point of contact? Are there any issues if we did the right thing, got approval from LACHS but later on find out should have spoken to another group?

WHO MAKES THE DECISIONS?

Aboriginal stakeholders raised questions about the decision-making process, highlighting issues of informed consent, and asking if Traditional Owners had the power to say no to an activity under the Act.

There was only one proponent comment on this matter, taking the opposite stance and questioning the process of external input during a decision-making process.

Comments included:

- *Proponents should provide the person(s) to be consulted with a clear idea of how their input will be included in the decision-making process and consider*

how the input will be taken into consideration in relation to the preferred method of undertaking the activity and any other feasible alternative method of undertaking the activity.

This paragraph highlights that decisions regarding whether and how to proceed with the activity are made by the proponent, rather than Aboriginal people, and that the proponent exclusively is empowered to determine whether and how the input from consultation will be considered. This directly contradicts the “introduction” to the draft Consultation Guidelines, which states that the ACH Act puts “Aboriginal people at the heart of decision-making” and that the principles of informed consent are “enshrined by the Act in the process for agreeing an ACH management plan”. It is also inconsistent with the objects and principles of the ACH Act referred to above. In particular, it is inconsistent with the principle set out at s 10(d) which states that, “[a]s far as practicable, in order to utilise land for the optimum benefit of the people of Western Australia, the values held by Aboriginal people in relation to Aboriginal cultural heritage should be prioritised when managing activities that may harm Aboriginal cultural heritage”.

- It is unclear whether an Aboriginal party could reject an ACH plan on the basis of the author rather than content. It is noted that the "an ACH management plan must not include any details of commercial arrangements between a proponent and an Aboriginal party." What protections are in place to ensure that financial considerations do not compromise sound heritage outcomes?
- Prioritisation of the values held by Aboriginal people in relation to Aboriginal cultural heritage necessarily involves the inclusion of a mechanism in the ACH Act and its guidelines to ensure that heritage is not destroyed without the consent of Traditional Owners through, where available, the relevant native title party. Traditional Owners must have the ability to say no to activities that unacceptably interfere with or damage cultural heritage. This proposition is consistent with and mandated by the principles of the ACH Act, UNDRIP art 18, and well-established principles of free, prior and informed consent.
- Traditional Owners need a veto power. Consent = veto? Is absence of objection, informed consent?

- Decisions on works are related to the landholder/business and asking for input from the ACH party during a decision-making process is concerning

SUGGESTED AMENDMENTS

The following are amendments to the consultation guidelines suggest across stakeholder groups:

- Phase 2 Consultation Guidelines Page 15, Terms us, Proponent (b) – amend Division 4 to Part 6 division 4, consistent with page 19.
- Remove ambiguous words like should, may, reasonable. Make them definite.
- Section 2.8 of Part B of the Draft Code sets out the steps for confirming who is required to be notified or consulted in relation to proposed activities. This information is best included in the separate Consultation Guidelines to avoid duplication and potential inconsistency.
  Delete this section from the Draft Code and refer readers to the Consultation Guidelines as required.
- It is unclear what the content and form of an ACH Permit will be (S115 (2a)). The legislation is clear that a Permit is needed to authorise tier 2 activities. However, the Consultation Guidelines are explicitly focused on the process surrounding seeking an Aboriginal Cultural Heritage management plan and provide no explanation of the Permit process. Further detail on how the Permit process, the template etc, defined in S113 of the Act, will operate, and be satisfied would be welcome.
- "The Guidelines focus on the application s 101 of the Act to consultation required under s 139(1) of the Act. Section 139(1) of the Act requires a proponent who intends to carry out an activity under an ACH management plan to consult with each of the persons to be consulted about the proposed activity.
  The Draft Guidelines state (p 5) that “a proponent who intends to carry out an activity that will require an ACH management plan must consult…” (emphasis added). This is inconsistent with the language of s 139(1) of the Act, which refers to activities intended to be carried out under an ACH management plan."

- We recommend including a statement in section 5c that permission must be sought from knowledge holders or consultation participants to audio or video record them. This will ensure that such recording is not done without their knowledge or permission or used in adverse ways. This is in line with the National Statement on Ethical Conduct in Human Research (2018) and the AIATSIS Code of Ethics for Aboriginal and Torres Strait Islander Research (2020).
- Item 5(d) on page 7 - There is likely to be a difference of views as to what alternative methods are feasible. It should be made clear in the regulations that something is not to be considered unfeasible simply because it may cost more, take more time or result in lesser profit. Otherwise, proponents could argue the only feasible options are those that maximise time and profitability, which will defeat the purpose of the requirements in s146 ACH Act. What is feasible must be determined objectively, not simply in the view of the proponent. To enable a proper understanding of all alternatives and relative feasibility, proponents must be prepared to disclose and discuss other possibilities raised. This includes any they do not believe are feasible, explanations of the relative time and costs and why, in their view, such alternatives are not feasible. Proponents should also provide reasonable funding for Aboriginal groups to obtain expert advice on the options and relative feasibilities of these to redress the imbalance of power and knowledge of such technical matters.

DOCUMENTING CONSULTATION

Extensive discussion across the submissions raised suggestions of the best ways to document the consultation process. Stakeholders generally agreed that a defined documentation process was needed.

Comments included:

- Send the person consulted with, the notes to confirm they are accurate.
- Contact should be made by multiple methods – mail, text, phone, multiple phone numbers.

Proponents must take every step to contact Traditional Owners /knowledge holders, for as long as it takes; they must demonstrate this by documenting consultation when applying for a permit.

- We note that the guidelines provide that the proponent and person to be consulted are required to agree to the method for documenting the consultation. Suggest that the guideline contain a minimum documentation method (such as capturing meeting minutes, presentation decks, maps, report). The minimum method needs to be culturally appropriate and inclusive. This is important to ensure that the proponent can satisfy its consultation obligations if agreement is not reached.
- The Consultation Guidelines seem to focus on best practice approaches when attempting to consult with Aboriginal parties. However, there is a lack of guidance around how to conduct meaningful engagement and the tools required to document discussions. It is acknowledged that this is difficult information to convey. Case studies and examples are helpful.
- For consultation could we not provide one standardised form to the council. The council then becomes responsible to LACHS, individuals etc. then the consultation can begin.
- Record of face-to-face meetings
- Clearly articulated recording process to be identified to ensure that a nil response in terms of consultation can be communicated and captured.
- Further guidance and tools to support proponents undertaking meaningful engagement and documenting discussions should be developed.
- Genuine attempt to contact may include:
    - Clear English project plan
    - Clear maps. Diagrams etc of works proposed
    - Identified contacts list
    - May meet via phone/online both parties should keep records of attempts to contact.
    - Suggest follow up such as a summary of the conversation via email/mail to all parties to ensure any ambiguity is cleared up.

RISKS

There were two comments identifying potential risks in the process. These were:

- The draft consultation guidelines are likely to be more ambiguous than formalised agreements between parties that may take some time to reach. We consider an appropriate way to manage consultation would be via government agency in lieu of agreements between proponents, or at least validation from the government, prior to an action occurring, that adequate endeavours have been made to consult if consultation efforts are unsuccessful.

  There are risks that during a consultation process an unreasonable level of detail will be demanded that is difficult or costly for a pastoralist to procure. The guidelines are unclear on what should occur in these situations. For example, it will be expected in many cases, Shape Files will be required to be provided for areas of proposed activities. This is not a skill or resource pastoralists readily have on hand, or necessarily understand.
- LACHS representing views of people who may have conflicting views to those of the majority - how will the Council manage/mediate conflict?

RECIPROCAL OBLIGATIONS

Proponents sought greater certainty throughout the process through the inclusion of reciprocal obligations for LACHS to engage with them in consultation. This feedback was also seen in other themes.

Comments included:

- We note that the Draft Guideline is limited to the consultation that must be carried out by a proponent under s 139(1) of the Act. Accordingly, the Draft Guideline focusses extensively on the expectations of the proponent in that consultation process.

  However, the capacity for the proponent to successfully consult will be reliant upon the persons to be consulted participating equally in the consultation process. This necessitates those obligations around consultation participation also be imposed on the persons who are required to be consulted (i.e., Aboriginal parties).

Section 294(b) of the Act provides that Guidelines may be made about "the carrying out of consultation for the purposes of this Act". This allows for statutory guidelines to be made in relation to the obligations of Aboriginal parties (including but not limited to LACHS).
Statutory guidelines should also be made outlining consultation obligations for Aboriginal parties in relation to consultation on ACH management plans.

- To meet the intent of the Act, the Consultation Guidelines must also explicitly acknowledge the reciprocal obligations on a LACHS to engage in consultation. Section 48 sets out the obligations of the LACHS with regard to ACH management plans and proposed activities to be undertaken in an area. This includes the requirement to engage and negotiate and provide information and advice to proponents. Each of these functions has a best endeavours obligation under the Act, as far as practicable. It is therefore critical for the Consultation Guidelines to acknowledge these obligations to frame the intent of the Act more accurately with respect to the process of consultation.
  Strongly recommend the Consultation Guidelines specifically address the obligations of the LACHS to engage in consultation, as required by s48 of the Act.

ROLE OF ARCHAEOLOGY AND HERITAGE ASSESSMENT

Stakeholders in the fields of archaeology and heritage assessments raised some points around the inclusion of existing resources from their field into the Act.

Comments included:

- There is an assumption implicit in the Act that consultations will be on an equal footing and local knowledge of ACH is perfect. The Draft Consultation Guidelines do recognise that consultations may require considerable time and effort to achieve representation for Aboriginal parties and meet principles of free prior and informed consent. However, consultations also often require field assessment and on-site meetings to identify ACH and understand any proposed impacts. Due to the considerable social changes since the European colonisation of Western Australia, some ACH has been lost or forgotten. ACH is constantly being re-discovered through field surveys – this

does not make it less significant to Aboriginal Peoples. The essential tools of heritage assessment developed in the disciplines of anthropology and archaeology should be referenced in the Consultation Guidelines.

- One would assume that there will be far fewer anthropologists and archaeologists available than the number required to conduct surveys, prepare reports and engage with Aboriginal parties under the Act. The State government has rightly committed resources to Aboriginal parties, what resources are being directed to strengthen the quality and availability of anthropologists and archaeologists? Delays in obtaining heritage clearances for reasons out of the control of someone wishing to develop freehold land, is inconsistent with the State's Planning Reform agenda.

Draft Knowledge Holder Guidelines

Questions

- Are there any other considerations for the knowledge holder Guidelines?
- Any other comments?

Table 6 below shows emerging themes from the submissions about the Draft knowledge holder Guidelines, through the lens of Aboriginal stakeholders, proponents, and other (inclusive of State Government, service providers, archaeology and heritage consultants, and general community).

Table 6: Emerging themes about Draft knowledge holder Guidelines

Aboriginal Stakeholders	Proponents	Other
Clarity needed around process, who is a knowledge holder, their relationship with the LACHS, dispute resolution, who has responsibility	Accessibility of information about knowledge holders	Accessibility of information about knowledge holders
Areas of more than one system of lore and culture - complexities of LACHS and knowledge holders	Inconsistency in draft guidelines	Aboriginal people should identify knowledge holders
Keep knowledge holders informed throughout the whole process	What happens if there is no clarity or no response?	Administrative burden of keeping information up to date
Aboriginal people of that area should determine who the knowledge holders are	Stronger provisions needed to ensure the right person is found	Burden on knowledge holders; compensation for knowledge holders
Include knowledge holders in due diligence process	Registration of knowledge holders	Relationship between LACHS and knowledge holders
Concerns over the role of knowledge holders, and role of native titleholders.	Accessibility/contactable knowledge holders	Engage knowledge holders in the consultation process
Identification of knowledge holders to come from community, not state records	Inclusion of knowledge holders details in ACH Directory	Gender considerations native title party should be primary source of information

Risks for PBCs who become LACHS	Interaction of LACHS with existing cultural/advisory groups, guidelines around dispute resolution	Who is responsible if there is no LACHS in an area?
Check with relevant local bodies to verify registered knowledge holders	Up to date list, identification of knowledge holders for Directory	Accessibility of knowledge holders
Accuracy of previous information	Record keeping and accountability	Map of knowledge holders
Clarification of local organisations	Risk identification	Accessibility of knowledge holders when no structure in place
LACHS using existing processes to determine knowledge holders	Certainty needed around access to knowledge holders	Statutory Requirements for LACHS
Balancing inclusivity with cultural obligations, overlapping claims	Dispute Management	Fees for knowledge holders, admin burden
Dispute resolution	Accessibility of knowledge holders, potential for conflict of interest	
Ensuring the right people specified	Efficiencies in system, Northern Territory model	
Risks around use of term knowledge holders	Old information may not be reliable	
Who to contact	Inconsistency between guidelines when there is no LACHS	
Local people should determine who knowledge holders are	Department assistance in identifying knowledge holders	
Border considerations	Clarity of process to ensure valid approvals	
Accessibility of information	Conflicting native title claims - how to get a single, clear response?	
Accuracy of information		
Further consultation needed with Aboriginal communities		

Potential for conflict; determining right people, right place		
Importance of cultural considerations around gender		
Accountability for LACHS		
Further consultation with Cultural Advice Councils in South-West		
Accountability process for LACHS		
Need to connect cultural and bureaucratic processes		
Recommended amendments		
Knowledge holders can also be identified by local organisations, native title claimants		

OVERVIEW

Submissions relating to the draft knowledge holder guidelines discussed a range of issues around finding the correct people to speak for Country, the relationships between knowledge holders and LACHS, and the implications of maintaining Knowledge Holder's contact details in a central register. Stakeholders identified some questions and concerns around situations where native title claims overlapped, and/or there was no LACHS or clearly defined boundaries to work within. There was broad agreement on the need to identify the correct people to speak for Country, and conflicting views on maintaining a central register of contact details.

The main themes to arise included:

- Risks
- LACHS and knowledge holders
- Who can speak for country?
- Involvement of knowledge holders
- Database of knowledge holders
- Suggested amendments

- Overlapping native title claims
- Identifying knowledge holders
- Process considerations
- Registration of knowledge holders
- Availability and accessibility of knowledge holders
- Existing engagement structures

The following section explores these themes at a high level, and includes relevant comments from the submissions for consideration.

RISKS

Stakeholders identified a number of risks within the knowledge holder guidelines. For Aboriginal stakeholders, these centred around knowledge holders not being consulted correctly, the consequences of the wrong people being consulted, local conflicts over who the knowledge holders were, and liability of LACHS if they got it wrong. For proponents, the risks were more weighted toward potential conflicts of interest and the administrative burdens on both parties of extended consultation.

Comments included:

- There is concern that knowledge holders are not being consulted correctly, or at all.
- There have been many situations where PBC's and Councils have appointed Chairpersons or knowledge holders who in fact do not possess the correct information for that area and as such make wrong decisions in regard to allowing or not allowing activities.
- PBCs have voiced their concerns that the introduction of knowledge holders through this statutory scheme will create a number of risks for PBCs who become LACHS. PBCs need more information in relation to their exposure to liability for claims made in relation to exercising their functions as LACHS. Claims may be made against LACHS by purported knowledge holders and others. The extent of this exposure is relevant to PBCs developing an informed view as to whether or not they become LACHS. Resources should therefore be made available to PBCs to obtain specialist advice in relation to these issues.

- Concern around short-cuts being taken and the wrong people feeding back or advising (due diligence should be specified)
- Not knowing the right people or Knowledge holders can cause conflict and mixed opinions within the community.
- Potential for local disputes of who is a knowledge holder.
- Conflict of interest: Many knowledge holders have prospecting interests. Can't have confidential information passed on to the detriment of the proponent
- It is likely that proponents will feel uncertain for some time under the new legislation and as such there may be an uptake in advice sought from Department which may or may not create a bottle neck depending on resourcing.
- There is a requirement to consult with all knowledge holders. Not only does this beg the question of how proponents can be sure that all knowledge holders have been contacted or attempted to be contacted, but it also has the potential of placing a significant administrative burden on proponents where there are no LACHS. In turn, it also has the potential to place a significant and undue burden on knowledge holders who appear to be expected to respond to consultation requests without the ability of being able to be compensated for their time and knowledge, and as such risks proponents and knowledge holders not being able to engage in a meaningful way.

LACHS AND KNOWLEDGE HOLDERS

Feedback from all stakeholder groups indicated a high level of uncertainty about the relationship between LACHS and knowledge holders. Issues raised included managing disputes between LACHS and knowledge holders, and the nature of statutory requirements for LACHS.

Comments included:

- There is a risk that if knowledge holders aren’t contacted by a LACHS, then they might not be able to meet their own cultural responsibilities.
- Is there a mechanism to raise problems between LACHS and knowledge holders?
- There may be gaps between LACHS and Knowledge holders- there must be accountability for LACHS

- The Guidelines needs to set out how disputes on knowledge holders can be managed for LACHS
- It would be helpful to understand the obligation of the LACHS to consult with other knowledge holders when preparing and negotiating ACH permits and management plans or whether this obligation sits with the proponent.
- The knowledge holder guidelines doesn't complement the development of a management plan where there is not a LACHS.
- LACHS should be established with statutory requirements for the conduct of their business.

WHO CAN SPEAK FOR COUNTRY?

The issue of who can speak for country received a significant amount of attention in submissions. Aboriginal Stakeholders discussed the importance of gender when speaking for Country, the different terms that are in use and how they needed to be distinguished in some cases, and the role of native titleholders. Proponents sought clear guidelines, and wanted accountability to lie with LACHS for this.

Comments included:

- It's really important that gender is recognised, for example: Men are not asked or allowed the opportunity to speak for women's secret business places.
- Informants on surveys may not be the right people
- There is concern that informants will be confused with Knowledge holders.
- The cultural advice committees (CACs) are the most appropriate people to speak with in the South West
- Recognised native title holders should determine and advise who are the relevant knowledge holders. Again, these concerns do not appear to have been factored into phase two of the co-design process.
- The knowledge holder Guidelines should acknowledge that, where there are recognised native title holders, these are the Aboriginal persons who have, in accordance with Aboriginal tradition, traditional rights, interests and responsibilities in relation to places and to Aboriginal cultural heritage located within their native title determination area. The cultural responsibilities of Aboriginal people are contingent on the authority of the community of native title holders. It is not appropriate to encourage individual knowledge holders to

register their interests independently with DPLH, separate to the community of native title holders who have the authority to make decisions about who should hold, share, or be consulted regarding traditional knowledge.

- There is a risk of using the term knowledge holders, there will be issues with this. People will not trust knowledge holders to speak for country. It should be the representatives of country under Native Title.
- If there are knowledge holders for WA sites but they are in native title, they must be consulted by the LACHS or PBCs
- Consideration must be given to non-Aboriginal knowledge holders. There are many areas that the surviving Traditional Owners have no knowledge of whereas the non aboriginal person that has had generations in the area had the knowledge passed onto them by Traditional Owners at the time.
- The purpose of the knowledge holder Guidelines is clearly stated in s294 of the Act to be for “The identification of persons who are knowledge holders for an area”. The following statement in the Draft Guidelines is fundamentally inconsistent with this purpose:

  “It is important to note that these guidelines are not about determining who is or isn’t a knowledge holder, but rather outlining the practical steps that are to be followed to be able to get in contact with knowledge holders and notify and consult as required under the Act.”

  The Draft Guidelines will not meet the requirements of the Act in the absence of guidelines regarding identification of knowledge holders (i.e., determining who is or isn’t a knowledge holder).

  Defining who speaks for country is a difficult question to answer, but crucial for the entire legislation to work. Clear guidelines are needed to ensure that a proponent can rely on the authorisations and defences in the Act if it has consulted where required under the Act with knowledge holders. The responsibility for identifying knowledge holders should lie with LACHS or, in the absence of a LACHS, with Government. knowledge holders for each area of the State should be recorded on the ACH Directory. The purpose of the Draft Guidelines should be to outline the processes/considerations for LACHS (or Government, where required) in identifying knowledge holders."

INVOLVEMENT OF KNOWLEDGE HOLDERS

The role of the knowledge holder throughout the larger process raised some questions, particularly from Aboriginal stakeholders, who wanted more oversight throughout for the knowledge holders, more information about their roles, and resources to support them.

Comments included:

- The knowledge holder does not seem to be notified if the preliminary view is that the place is of outstanding significance. All other Aboriginal parties affected landholders and public Authorities are notified and given opportunity to provide a submission, but knowledge holders are not notified at this point. We strongly believe that the knowledge holders must be notified if the preliminary view is that the place is of outstanding significance so that they are kept informed and updated on the preliminary view.
- Specific workshop about knowledge holders and the responsibilities of knowledge holders should be undertaken with the local Aboriginal community prior to proclamation
- Knowledge holders must be included in reasonable due diligence steps when people are considering tier 1 (and exempt where possible) categories. Otherwise, this process under the Act must be considered inadequate heritage protection and we will have to consider that our rights under the UNDRIP will remain unprotected by future heritage management of the WA Government.
- This discussion should be happening with the new Cultural Advice Councils
- Considerable resources must be invested to ensure that the appropriate knowledge holders of the Traditional Owners impacted are included and engaged in the consultation process.
- Potential fees for knowledge holders? Would there be a fee structure? Significant workload.

DATABASE OF KNOWLEDGE HOLDERS

The concept of a database of knowledge holders gained considerable attention. Proponents were largely in favour of an up to date and accurate directory as a resource that would assist their compliance with that act. Aboriginal stakeholders

held significant concerns over privacy, over the integrity of information, and over the state essentially having control of this information.

Comments included:

- There should be an accurate list of knowledge holders who are appointed as LACHS officers not by PBC's or Councils but by the Aboriginal people of that area.
- The information regarding knowledge holders contained in the ACH Directory should in no way be considered comprehensive. Interests of individual knowledge holders do not need to and should not be registered with DPLH. Information about relevant knowledge holders for particular areas and for particular Aboriginal cultural heritage should come from Aboriginal communities themselves, not from DPLH. Each native title party for the area, where there is one, should assist to identify and consult the relevant knowledge holders. If there is no native title party, then this role should fall to LACHS. If there is no LACHS and no native title party, the native title representative body can assist to identify the relevant knowledge holders. Where there is information regarding knowledge holders for areas on the former register transferred to the ACH Directory, this information should be verified with one of the aforementioned representative institutions before consulting with any individuals so registered.
- Where the knowledge holder Guidelines outline the steps to identify knowledge holders, the first step should be to contact the relevant native title party if one exists. Proponents should not be directed, in the first instance, to search the Directory or to review ACH reports through DPLH. The relevant native title party and their representatives should be enabled to use this resource to inform their advice to proponents if necessary. The identification of knowledge holders must always come from the Aboriginal community, not from records kept by the State.
- Having a register of knowledge holders that sits outside of the outcomes of the native title agreement and the procedures and institutions that have been created as part of the processes of the native title agreement, undermines the right of Aboriginal people to choose their own representatives for the purpose

of consultations by proponents and by the ACH Council in relation to important decisions regarding their heritage.

- Who owns the data in the ACH Directory?
- Are knowledge holders listed with the LACHS, or will that be a subset?
- Directory is not always accurate. Feeling that there are a number of legacy issues and backlog in the existing register which may impact a Proponent's ability to determine the knowledge holders
- Confidentiality is important
- Establish a state-wide register of knowledge holders and the area they hold knowledge over. This would alleviate many of the current issues and potential unintended consequences of the Bill.

  As part of a registration process, applicants should be required to demonstrate they meet the criteria of a knowledge holder as defined in the Bill and are subject to an independent verification process by the Department of Planning, Land & Heritage and/or the applicable Local Aboriginal Heritage Services (LACHS).

  Consultation to develop a ACH management plan should be limited to registered knowledge holders. It is foremost in the interest of Aboriginal persons who believe they hold knowledge over an area to be registered to ensure their knowledge is appropriately considered by decision makers.

  Only registered knowledge holders should be able to nominates sites to the proposed Aboriginal Cultural Heritage Directory, apply for Stop Activity Orders, apply for Protected Sites, or appeal decisions where the appeal is made by an Aboriginal party.
- No hierarchy of contacts: just provide a list of knowledge holders.
    - First contact is to go to DPLH
    - Remove numbers: proponent can either contact Department or search directory rather than who are first then second
- Who will update the ACH Directory with knowledge holder information? How frequently will it be updated?
- Should be a map available of LACHS/Knowledge holder boundaries to ensure people understand who they are to consult with, relevant for those with multiple known family groups for their property.

- It would be useful to have the information presented spatially so that people can check a map and quickly/easily understand who the knowledge holders are or who they need to speak to. That would also be beneficial where there is an overlap of knowledge holders in an area, to make sure everyone who needs to be included, is included.
- List of individual knowledge holders with contact could create too much work with no compensation.

SUGGESTED AMENDMENTS

Stakeholders suggested the following amendments:

- On page 7, point 7(2) - it would be worthwhile repeating that the information in ACH Reports and ACH files about potential knowledge holders may not be accurate. Surveys may not have been carried out with the correct people.
- On page 7, point 7(4) - it may be useful to clarify that native title registered bodies in the ACH Act include native title service providers.
- Page 5 - knowledge holder definition is a typo and does not directly reflect the Act.
- Typo in 4a

OVERLAPPING NATIVE TITLE CLAIMS

Some concerns were raised about overlapping native title claims, and their impact on the local community dynamics, as well as how this would work alongside the policy of only one LACHS per area.

Comments included:

- Overlapping native title claims can cause problems re guidelines
    - People can self-identify as knowledge holders
    - Needs to be inclusive but aware of local cultural connections and obligations
    - Northern territory should be consulted on this matter
    - Need clarity re guideline implementation for small PBCs.
- There are areas of the State (including the Goldfields) where there are still competing Native title claims and multiple knowledge holders exist that do not

necessarily agree. A process needs to be developed to ensure proponents can get a single, clear, response.

- We are frustrated that the Government is insisting that there will only be one LACHS in an area. This disadvantages all Aboriginal people in areas where there is more than one system of traditional lore and culture and reduces the effectiveness of heritage management in those areas if knowledge holder organisations are also not adequately funded.
  If we will only be recognised as 'knowledge holders' under the Act, then we have made it clear that we will be doing the same function as a LACHS and need to be similarly supported and funded.

IDENTIFYING KNOWLEDGE HOLDERS

Stakeholders across all groups largely agreed that Aboriginal people from the local area concerned should be the ones to identify knowledge holders – the onus should not be on the proponent to do this. This raised the recurring theme of the administrative burden this placed on LACHS. One proponent advocated for Department to be accountable in keeping this information up to date and available.

Comments included:

- The definition of knowledge holder must be clearer.
  - Knowledge holders and representatives of country are not the same people.
- Local community organisations and agencies can also assist in identifying knowledge holders
- Native title claimants should also be contacted
- It should be those actually living local now.
- Aboriginal Legal Service, Aboriginal Medical Service and local community Aboriginal Corporation.
- Who is going to determine who a knowledge holder is? You can't rely on the Directory only.
- Disconnect between Aboriginal culture and bureaucratic processes.
- The role of knowledge holders, independent of recognised native title holders for relevant areas, should be more limited than what is currently provided in the knowledge holder Guidelines. Where there is a requirement to consult

with knowledge holders, those people should be identified and consulted with by each relevant native title party if there is one for the area.

- To help proponents identify relevant knowledge holders, the draft guidelines set out four steps:
    - Searching the ACH Directory
    - Reviewing ACH Reports
    - Contacting the native title party and/or native title representative body
    - Contacting Department to seek advice.

  The issue raised in our previous submission, that this process relies on non-Aboriginal people to correctly identify all knowledge holders for an area still remains.
- In order to review ACH Reports, these must be made available publicly. Currently, it is only possible to access reports that have been registered upon request to DPLH. Will this step be cut out in order to minimise administrative burden and to ensure the public have all necessary information to correctly identify knowledge holders?
- Whilst native title parties are likely best placed to advise on appropriate knowledge holders where there is no LACHS, this has the potential to place an undue administrative burden on them to perform a function they are not resourced for.
- The Draft knowledge holder Guidelines identify multiple methods of identifying knowledge holders, but the native title party (PBS or native title representative bodies) should be listed as the primary source.
- There should be a concerted effort from the Department to create LACHS' to cover the entirety of the state as the steps outlined to identify knowledge holders have some gaps.

  If there is no LACHS for an area, the onus should be on the Department and/or the native title party/rep body to provide a list of knowledge holders to contact to ensure that the right people are involved and to provide surety to the proponent that they have covered off on this adequately.
- Department to be the primary owner and accountable authority to determine the appropriate knowledge holder/s, and hosts this information within the

centralised ACH Directory, including Prescribed Body Corporate, LACHS and Council contacts

PROCESS CONSIDERATIONS

Stakeholders posed comments and questions about the process around consulting with knowledge holders. The comments tended to centre around the accountabilities of the LACHS. Aboriginal stakeholders wanted to ensure the right people were sent out on surveys. Proponents' comments were similar, with more emphasis on the need to be able to rely on the advice around who the knowledge holders are, record keeping, and what to do if things don't go to plan. The Northern Territory Act was referenced as a possible model to learn from.

Comments included:

- Needs to be a process in place to hold LACHS accountable for consultation and LACHS must know what sites are already registered etc.
- Need to stop just one family being sent on surveys when they might not be the right people.
- Proponents need to be able to challenge the LACHS if they believe the wrong knowledge holders are consulted
- Need to ensure key custodians don't get left out.
- There should be 'the right to object' to cultural advice through LACHS
- What are the criteria for the LACHS to select the right person / people to provide advice on a site as the knowledge holder?
- Big concern that the right knowledge holder won't be consulted. What is the process/due diligence to make sure the LACHS follow that requirement?
- Compulsion for LACHS to engage with knowledge holder – needs to be captured.
- What happens when a knowledge holder passes away?
    - Transmission of knowledge
    - Next alternative person identified
- Proponents go through the LACHS where a LACHS has been identified. Consultation with Traditional Owners / knowledge holders would be undertaken by the LACHS in keeping with existing processes for identification and consultation.

- What is the process where there is no LACHS, the native title party is not responsive and there is a lack of clarity around known/registered knowledge holders, potentially adversely impacting key Local Government operations?
- The kind of assistance that Department will provide to proponents where the proponent cannot identify any or all Knowledge Holder/s, and the timeframes for Department to provide a response (under proposed step 4 in the draft guidelines)

  A pathway forward in circumstances where neither the proponent nor Department can identify any or all Knowledge Holder/s. We consider that it is important that proponents can rely on Department advice in relation to knowledge holder identification, including comfort that Department will provide confirmation to the proponent that no knowledge holder (or no additional Knowledge Holder) has been identified despite all prescribed reasonable steps being taken.

  It is important that the proponent has clear steps to take that will ensure approvals are not at risk of future invalidity and that knowledge holders are engaged as envisaged by the ACH Act. The directory would facilitate this.
- Engagement with knowledge holders should be coordinated through relevant representative bodies. This is important in terms of record keeping and accountability on facilitating ACH management.
- Can the native title Act process be used? To help identify knowledge holders: i.e., use similarities of native title process.

REGISTRATION OF KNOWLEDGE HOLDERS

Comments about registration of knowledge holders came largely from proponents, with the exception of the first dot point below, which came from a South West workshop. Proponents sought certainty in the process through a requirement for knowledge holders to register, and a process around ensuring communication with the relevant native title body or LACHS to ensure that those who registered were the correct people to speak for Country.

Comments included:

- What about knowledge holders that refuse to register?

- In the absence of a LACHS for a particular area, it is necessary to understand the obligation of knowledge holders to register. In the instance where there is not a LACHS it is important that the register identifies the appropriate knowledge holder/s for the area so that a proponent it able to commence consultation on the proposed project without undue delay.
- For knowledge holders, paragraph 3:
  There is an inconsistency in the use of knowledge holders, that being, a proponent is obliged to consult a knowledge holder but a knowledge holder is not obliged to register as a Knowledge Holder. This is an unsatisfactory loose arrangement which is not credible, permitting a knowledge holder to literally be drawn from anywhere just to fill the knowledge holder requirements at a time undermines credibility and the option to take advantage of the situation, i.e. a knowledge holder from part of an area or adjacent area does not guarantee relevant knowledge for that area (and has been shown to be unreliable in the past) whereas an obligation to register a knowledge holder in advance for an area ensures integrity and the right person for the assessment.
- On page 6, at point 5, there is a reference to knowledge holders being able to register themselves as such with the department. There should also be a requirement for the department to notify any Local Aboriginal Cultural Heritage Services (LACHS), native title parties or native title registered bodies/native title service providers for the relevant area if an application is received for someone to be registered as a knowledge holder. As these bodies need to be aware of knowledge holders and have responsibilities to include them in heritage processes, they need to know if someone is seeking to be registered for their relevant area. It is also important they are informed prior to registration, as there may be a dispute over whether someone should be registered on the Aboriginal Cultural Heritage (ACH) Directory as such a knowledge holder. It would be appropriate for that issue to be ascertained by the ACH before registration, due to the difficulties of removing information from the directory later.
- We reiterate the suggestion in our Phase 1 submission that the guidelines should provide a clear process in respect of how knowledge holders register

their details with Department for inclusion on the ACH Directory. This will assist to encourage registration and ensure that the purpose of the ACH Directory is fulfilled.

AVAILABILITY AND ACCESSIBILITY OF KNOWLEDGE HOLDERS

Some questions and concerns were raised by the proponents about the availability and accessibility of knowledge holders, and the impact on the timeframe of projects in the event people were unable to be contacted.

Comments included:

- It is important for the success of the whole ACH process that knowledge holders are available and contactable. The Guidelines need to consider and address the very real possibility that a knowledge holder cannot be contacted within a reasonable timeframe. A process will need to be developed to manage the practical reality of where a knowledge holder exists but is uncontactable.
- *Users of the Directory should note that it may not contain (all) knowledge holders for the ACH or an area, however this does not mean that there are no knowledge holders. Knowledge holders may choose not to be identified on the Directory or their identify has not been able to be verified. The Department should be contacted if there are any doubts as to the identification of knowledge holders for particular ACH listed on the Directory.*
  This note on page seven is very ambiguous and will likely result in additional timely steps added to the process. There needs to be an easy and time efficient way to access those people who are nominated as the LACHS.
- Is expectation for due diligence to use all four contact suggestions to find knowledge holders?

EXISTING ENGAGEMENT STRUCTURES

Considerations from proponents around how to link with existing engagement structures under the act included:

- Many Local Governments have existing engagement frameworks they utilise in order to consult with their Aboriginal communities. This can include established Aboriginal Advisory groups made up of local Aboriginal

community members who are knowledge holders for the area. Concerns have been raised that advice and decisions of existing Aboriginal parties within these Advisory Groups may be in conflict with the established LACHS. Considerations needs to be made to acknowledge these existing structures with a guideline developed to support such dispute resolution.

- Consideration to be given to how to acknowledge existing engagement structures and mechanisms with a guideline developed to assist Proponents to engage successfully with both existing engagement structures and LACHS.

Draft ACH Management Plan Template

Questions

- Is there anything else that should be considered in the ACH management plan template?
- Any other comments?

Table 7 below shows emerging themes from the submissions about the Draft Management Plan Template, through the lens of Aboriginal stakeholders, proponents, and other (inclusive of State Government, service providers, archaeology and heritage consultants, and general community). This theme was considered through the lens of comments made specifically about Parts A-I of the management plan Template.

Table 7: Emerging themes about the management plan Template

Aboriginal Stakeholders	Proponents	Other
Part A - Executive Summary - General summary of the project, activities, timeframes, and parties.		
	Guidelines for areas without ACH?	Interaction with existing plans/documents
	Tailor templates to various contexts	Flexibility of template
		More examples, case studies needed
Part B - General - Description of proposed activities, Description of area, Timeframes (duration), Parties to the plan.		
Information to be provided to LACHS at initial commencement of engagement.	Further areas for inclusion in this section	
Clarify commercial arrangements	Clarification of level of detail	
	Aerial Photography	
Part C - Consultation - Details of consultation, Outcomes of consultation (including alternate views).		
Include a consultation process in the template		Note points of difference in views

Part D - Demonstration of informed consent, extent to which harm is authorised.		
Aboriginal stakeholder should determine what constitutes informed consent	Distinction between consent to harm and authorising the management plan	Risk Considerations
Interaction with ACH and native title decisions	Examples of evidence needed	
Inconsistency with self-determination - Minister not required to authorise	Clarify concept of "feasible options"	
Demonstration of engagement	Consideration around consent and non-objection.	
Protection against bullying	Culturally appropriate examples needed for seeking informed consent	
Involvement of Elder in process		
Mutually agreed code of conduct		
Defining good faith		
Meet on Country		
Consequences		
Traditional Owner sign-off		
Email summary of conversation		
Informed consent must include knowledge holders		
Part E - Details of the ACH present in project area.		
Desktop assessment not sufficient	Guidance/education around why cultural sites are important	Include status and heritage values
Inclusions: No go areas, other cultural heritage issues, open vs closed reports	Structural suggestion	
	What happens if a site is not registered?	
Part F - Managing Aboriginal Cultural Heritage - ACH impact statement, measures in place to avoid or minimise harm, managing impacts, managing access.		
Accountability measures	Consider biological impacts to streamline process with	Move listed measures to managing impacts

	Environmental Protection Authority	
"Keep it simple, depending on project complexity	Guidance on assessing cumulative impact	Assign responsibilities
Inclusion: acceptable level of objection scale	Limit requirement around identifying impact	Consideration of contextual, ongoing, and cumulative impacts
Interaction with other agencies	Clarification around rehabilitation and remediation	Consideration of mitigation vs offsets
Offsetting not appropriate	Interaction with Environmental Protection Authority processes	Defining permissible impact
Inclusion of flora and fauna in plan	Inclusion - risk assessment	
	Examples needed	
Part G - New information - Contingencies for managing ACH if there is new information, dispute resolution.		
Minimum requirements/process needed	Further guidance around types of changes	Flexibility/change of work scope
Mechanism to sequester sites if new information becomes available	Incorporate into existing processes	Provision for ongoing monitoring of site
Case study recommended	Process for new information needed	
	Potential for information from stakeholders not previously included in consultation	
Part H - Rehabilitation and Remediation - Measures in place for post activity rehabilitation and remediation.		
no feedback provided		
Part I - Compliance with Aboriginal Cultural Heritage management plan - schedules for ongoing engagement, schedule of roles and responsibilities.		
Include Review, Evaluation and audits	Tailored plan for pastoralists	

More examples needed	Pro Forma for Aboriginal Cultural Heritage Management Plan	
LACHS should be involved at all stages	Approvals and review	
Interaction with existing agreements and Native Title	Interaction with Environmental Protection Authority	
	Who is responsible for compliance?	
	Include revision table	

OVERVIEW

Submissions relating to the draft management plan template discussed some of the finer points of the template, suggesting many further inclusions and details. Stakeholders identified some linkages with native title and Environmental Protection Authority legislation and consideration. There was broad agreement on the need to further define processes for each part. There were no particular areas of conflicting views – more of a shift in emphasis, with Aboriginal stakeholders wanting detail and certainty about knowing what was happening on their Country and maintaining their voice in that; and proponents seeking certainty about what they needed to do and what circumstances triggered that responsibility.

The following section explores stakeholder feedback on Parts A-I of the ACH management plan Template and includes relevant comments from the submissions for consideration.

PART A - EXECUTIVE SUMMARY - GENERAL SUMMARY OF THE PROJECT, ACTIVITIES, TIMEFRAMES AND PARTIES.

While there were no comments specifically addressing the Executive Summary section, there were a number of proponent comments that more generally addressed the need for flexibility in the template to accommodate different project scenarios, sizes and complexity. Stakeholders also sought more case studies and examples.

Comments included:

- Flexibility should be allowed, and the process streamlined if no known sacred sites are located in the area of interest
- There should be different management plan templates and information requirements based on the size of the area impacted, the complexity and purpose of the proposed activities, the level of impact and the resources of the proponent.
- Consideration be given to developing different ACH management plan templates, taking into account variations in the size of the area to be impacted, the complexity and purpose of the proposed activities and the resources of the Proponent.
- Consideration should be given to developing an ACH Management template specifically for Local Government.
- Ensure the existing approved management plans and documents approved under the Aboriginal Heritage Act (i.e., Section 18s) are included in the Directory.
- Provide templates to allow proponents to follow a consistent proforma, however provide freedom to provide additional/alternate information if deemed necessary
- The hypothetical scenarios are somewhat limited. No mention of broader disturbance of land or water for mining or infrastructure or exploration.

PART B - GENERAL - DESCRIPTION OF PROPOSED ACTIVITIES, DESCRIPTION OF AREA, TIMEFRAMES (DURATION), PARTIES TO THE PLAN.

Stakeholders provided a number of specific considerations for inclusion in Part B of the management plan template. Aboriginal stakeholders sought the inclusion of specifics around the geographical areas, timeframes, equipment, personnel, use of resources and site impacts of the activity, as well as clarifications on what constituted commercial arrangements. Proponents sought the inclusion of details about third parties, other land users in the same area, and other applicable agreements. They also sought clarification on the level of detail required in this section.

Comments included:

- The ACH Act provides that ACH management plans must not include any details of commercial arrangements between a proponent and an Aboriginal party. It is unclear to what extent heritage protection arrangements between proponents and Aboriginal parties which include paying Aboriginal people for their time and expertise with respect to Aboriginal cultural heritage constitute “commercial arrangements”. It would be useful to clarify what constitutes such “commercial arrangements” and whether or not there is scope for such agreements, or parts of such agreements to be included in ACH management plans. Further, in the context of the Kimberley, PBCs recognised the need for a Kimberley regional standard and/or version of a management plan to reflect the high bar of agreement-making already undertaken across the region.
- Details of the nature, scope and objectives of the proponent’s proposed activities; four 1:100 000 or other appropriate scale topographic maps of the area in question, and/or aerial/satellite images, showing with reasonable accuracy the areas where the proposed activities are to occur
- Estimated time and period for the performance of the activities
- The techniques, infrastructure and items of equipment to be used
- Number of personnel who will be involved in the conduct of the activities
- Likely effect of the activities on the environment (including the provision of any reports required by the relevant state or federal legislation concerning the environmental impact of the proposed activities and/or environmental protection measures which may be required or recommended);
- Any water, timber, vegetation, soil (including ochre) or other natural resources proposed to be obtained
- The area or, where appropriate, line distance the subject of the activities (in square or, where appropriate, line kilometres)
- Details of any other aspect of the activities which will or is likely to have an impact adverse or otherwise upon or cause disturbance to the environment or to the exercise of the rights and responsibilities of the native title holders
- Any other relevant information.

- Discussion of land use considerations, for example, if other land users undertake activity in the management area.
- Consideration of third parties and how cultural heritage management actions identified in the management plans will be transitioned to other parties.
- Discussion on Aboriginal cultural heritage place integrity and condition and taphonomic factors.
- Discussion of other applicable agreements or commitments to Traditional Owners that relate to cultural heritage and the Aboriginal cultural heritage subject to the plan.
- The ACH management plan requires 'detailed information regarding the nature and extent of all activities,' but the level of detail is unexplained. It is not clear, for example, whether proponents are expected to provide the level of detail included in a mining proposal or an application under Part IV of the Environmental Protection Act 1986 (WA); a State Agreement proposal; or some other metric.
- Recommend that the level of detail required to be included in the ACH management plan is clarified.
- Use of aerial photography for before and after impact considerations. Some current management plans can be quite wordy – a more succinct document is encouraged.

PART C - CONSULTATION - DETAILS OF CONSULTATION, OUTCOMES OF CONSULTATION (INCLUDING ALTERNATE VIEWS).

There were two comments made in relation to this section. Aboriginal stakeholders sought the inclusion of a process for consultation with the relevant native title party. Another' stakeholder requested more specific requirements for the articulation of different points of view.

Comments included:

- An assessment of the characteristics of Aboriginal cultural heritage must be informed by the relevant native title party or, where the native title party is the LACHS or where there is no native title party, the LACHS. The template ACH management plan should therefore include a process for proponents to

consult with the relevant native title party about the existence and characteristics of Aboriginal cultural heritage and whether or not it is appropriate for this information to be disclosed in an ACH Management Plan. Of course, it would be preferable for the relevant native title party to be engaged as early as possible in the process, ideally as one of the mandatory steps outlined in the ACH Management Code and prior to any determination by a proponent of the level of impact an activity may have on Aboriginal cultural heritage.

- 5.3 Part C: Outcomes of Consultation – this section should specifically state that the ACH management plan must identify and articulate any points of difference in views between parties to the plan.

PART D - DEMONSTRATION OF INFORMED CONSENT, EXTENT TO WHICH HARM IS AUTHORISED.

Part D received considerably more feedback than other sections of the template, with all stakeholders raising some thoughtful points.

Aboriginal stakeholders discussed the need for what constitutes informed consent to be defined by the relevant Aboriginal party, with suggestions that there be a mutually agreed code of conduct, on-Country engagement and Elder involvement in the process. There were also questions raised about how informed consent was carried through, given the Minister was not required to authorise a Management Plan.

Proponents discussed the language used in the template, suggesting that the emphasis be moved away from informed consent to harm, and towards informed consent or non-objection to a proposed activity that may impact ACH.

Comments included:

- The ACH management plan template contemplates the informed consent of the Aboriginal party. In order to have an ACH management plan approved by the ACH Council, the proponent must provide evidence that each interested Aboriginal party has given informed consent to the plan.
  The ACH management plan template provided during phase two of the co-design process requires the proponent to have provided certain information to

the Aboriginal party. It also requires the proponent to provide evidence that consent has been given voluntarily without coercion, intimidation, or manipulation.

It seems odd that the requirement of informed consent is not dictated by what is required of the Aboriginal party in order to provide informed consent. It is often the case that culturally appropriate decision-making involves discussions with various family or estate groups across several days and possibly with a period of time between such discussions to allow people to digest the information provided and to seek guidance from others who may have responsibilities or knowledge of the particular area and its cultural heritage. What constitutes informed consent and whether it is free from coercion, intimidation and manipulation must be dictated by the relevant Aboriginal party, not the proponent.

- The State should also consider whether entering into an ACH management plan by a PBC constitutes a “native title decision” for the purposes of the native title (Prescribed Bodies Corporate) Regulations 1999 (Cth) (PBC Regulations). If the ACH management plan provides the consent of a PBC to any activity that impacts native title rights and interests, it will likely constitute a “native title decision” for the purposes of the PBC Regulations and the relevant PBC will therefore need to comply with the strict requirements for making native title decisions set out under the PBC Regulations. This is an important consideration in relation to resourcing and capacity of PBCs to engage with the processes set out under the ACH Act, whether or not they become LACHS.
- Contrary to the objects of the ACH Act and the principles set out in the State’s Aboriginal Engagement Strategy, while the ACH Act refers to informed consent of the relevant Aboriginal party, it is not a requirement for an ACH management plan to be authorised by the Minister on recommendation of the ACH Council. This is difficult to reconcile with the notion that Aboriginal people have custodianship over their own cultural heritage.
- Management plan must demonstrate that the LACHS/PBC has engaged with the knowledge holders

- What protection do Aboriginal People have against being bullied by proponents?
- Assurance that the right people are speaking on behalf of Country. An Elder should be involved in this process, not just the young fellas paid to go out and survey.
- Section 143(1) of the ACH Act requires proponents and Aboriginal parties to use their "best endeavours" to reach agreement about the terms of an ACH Management Plan. The ACH Act does not specify what constitutes best endeavours in this context, nor what a proponent is required to do to satisfy this requirement. At a minimum, a standard of "good faith" negotiations should be required of proponents. Consideration must also be given to the resources available for Aboriginal parties to meaningfully engage in the formulation of ACH management plans. Without adequate resources and capacity, Aboriginal parties may not be able to meet even a low threshold of "best endeavours".
- Code of Conduct (mutually agreed between Aboriginal stakeholders and proponent) including appropriate timeframe; systematic process; appropriate fees; agreement of level of professionalism; opportunity for Elders to have a voice.
- Mandatory: people need longer to think about proposals/negotiations etc; important to be able to "look forward" to consequences; proponent should have to come and meet with Traditional Owner "on country" and letter should be signed by all Traditional Owners
- What demonstrates that I have gained 'informed consent' – discussion about forms of communications – email summary of the conversation may suffice.
- management plan must demonstrate that the LACHS has engaged with knowledge holders, Informed Consent must be afforded and demonstrated by the LACHS to the knowledge holder as well.
- Section 5.4 of the Draft Plan states that "*as part of demonstrating informed consent from the Aboriginal party, the ACH management plan will also need to demonstrate that harm to ACH proposed under the ACH management plan has been authorised by the Aboriginal party*".

This is inconsistent with the requirements of s 146 of the Act, which require consent to the ACH management plan (ACH management plan), and not consent to “harm”. There is a key distinction between providing positive consent to harm and not opposing an activity.

The informed consent requirements of the Act require the Aboriginal party to be fully and properly informed about the proposed activity the subject of the ACH management plan, including the information required by s 146(2) of the Act, which concern potential harm and mitigation methods.

The consent to the ACH management plan is better characterised as a consent to the proposed activity, noting the potential for harm to ACH and the mitigation methods to be employed, and not a consent to the harm itself.

The identified statement should be removed from the Draft Plan.

- It is unclear how a proponent can provide “evidence” of informed consent, particularly that the consent has been given voluntarily without coercion, intimidation or manipulation. Examples need to be provided as to what would constitute appropriate evidence.
- The requirement to provide ‘details’ of other feasible methods to carry out activities lacks definition. There may be any number of feasible options considered by a proponent in the years leading up to a final investment decision; and, based on a range of factors including commercial, engineering, social, environmental, and Aboriginal heritage considerations, a preferred option of project execution is settled upon. It is not clear how much detail, on how many other ‘feasible methods’, are to be provided as part of the process of securing informed consent.

  Recommend that the concept of ‘feasible options’ is clarified to provide certainty on expectations.
- The requirement for inclusion of an ‘impact statement’ and evidence of the Aboriginal parties’ informed consent to impact to ACH: In many instances, the Aboriginal party may be culturally prohibited from providing consent to impact ACH. Historically, this prohibition has been managed by the Aboriginal party providing a notice of non-objection to an activity proceeding in circumstances where the activity may impact ACH.

Recommend that the concept of informed consent to harm ACH is modified to permit informed non-objection to an activity.

- We observed concerns from the co-design workshops, that we share, around the format 'informed consent' will take. Further guidance, including examples, regarding culturally sensitive wording for demonstrating authorisation that would be accepted by the ACH Council within the ACH Management Plan, would be useful.
- What happens if Traditional Owners say they did not give free prior and informed consent or there is a discrepancy between what they consented to and what actually happened on site?

PART E - DETAILS OF THE ACH PRESENT IN PROJECT AREA

There was a small amount of feedback on Part E, mostly seeking clarity around specific points or further inclusions.

Comments included:

- On page 8, in point 5.5, in relation to identifying ACH, there should be a warning that a desktop assessment will usually not be sufficient. Even if prior heritage surveys have occurred, advice should be sought from the LACHS, and consideration given to the quality and scope of prior investigations.
- Plans need to be comprehensive and be included on the data base
- Appropriate level of detail re ACH in the area may be dependent on the project scope, no go areas, other cultural heritage issues, or something else
- Include Open versus Closed Reports
- Need clarity re legislated elements of management plan
- The ACH management plan template should be reconciled against a hierarchy of definition of Aboriginal Heritage, for instance, artefacts that are common and widespread like discarded pieces of flint should have a lower hierarchy or preservation value than perhaps a hunting hide made of stacked stone.

  It is accepted all artefacts are related to culture but not all artefacts are unique.

Currently, there is no guide as to the importance of anything, providing no guide to a proponent of an activity on freehold land other than waiting for deliberations from unidentified individuals on the management of low-grade, possibly insignificant artefacts and sites.

- Should part E be higher up, as that is the main focus around this?
- Ethnographic sites that are not registered – what happens?
- The standard of maps including details and diagrams needs to be high
- Include status and heritage values

PART F - MANAGING ABORIGINAL CULTURAL HERITAGE - ACH IMPACT STATEMENT, MEASURES IN PLACE TO AVOID OR MINIMISE HARM, MANAGING IMPACTS, MANAGING ACCESS

There were many questions and comments across stakeholder groups about Part F.

Aboriginal stakeholders sought more detail around what should be included in this section, including how it would interact with other legislation and agencies. Environmental factors such as flora and fauna were suggested as inclusions for consideration.

Environmental impacts and interaction with the Environmental Protection Authority were also referenced extensively by proponents, especially in terms of potential duplication of process, and knowing which legislation should be considered first.

The inclusion of offsetting was questioned by Aboriginal stakeholders, who said this was inappropriate for ACH. Offsetting was raised again by another' stakeholder, who referenced in detail how it offered no benefits to Traditional Owner groups.

Comments included:

- What is in place to ensure the integrity of the heritage expertise?
- How will the ACH council know that the correct people have been followed and that the process was done correctly?
- Different scale depending on project complexity
- Limit length to include key info
- Acceptable level of objection scale
- Limit pressure on LACHS though being buried in necessary detail

- Why is offsetting a consideration in the management plan? You can't offset ACH. Does this refer to financial offsets? If so, it should be worded differently
- Where is the EPA consideration of the importance of Aboriginal heritage?
- How will DMIRS and lands conflict of interest be managed?
- Flora and fauna are an important part of heritage, in a lot of circumstances they are totems, as such, environmental factors should, in some way, be considered in the Management Plan.

- Social Surrounds: The ACH management plan Code should set out how harm arising to ACH from the physical and biological impacts of an activity, including holistic and cumulative impacts, should be considered. This will enable the Environmental Protection Authority to take into account the ACH Act decision making processes as mitigating the potential impacts of a proposal on the environment and removing duplication and inconsistency between the two regulatory and assessment processes.
- Cumulative Impacts: The Code should include clear guidance on how this assessment should be undertaken to support the decision making under the Act.
- Requirement to identify impact to cultural landscapes given authorisation is not required to disturb them. This requirement should be limited to commenting on whether the ACH is known to be part of an identified cultural landscape.
- Requirement to address rehabilitation and remediation – not referenced in the Act. Seek confirmation that this refers to mitigation and/or repatriation of ACH rather than the general ACH management plan area. If the latter, an ACH management plan should be able to refer to the relevant government approved closure plans which are subject to regular updates throughout the life of a project.
- Overlap and duplication with the EPA process (Section 38) e.g., Cultural heritage 'factor' and EPA management plan templates.
- Need to confirm who is the delegated authority
    - ACH Council approvals before EPA?
    - Look at bilateral assessment process (EPA & DCCEEW)

- There may be unintended consequence of differing opinions on management measures between ACH Council and EPA. I think there will be confusion from proponents about what process to go through first or whether they can be done at the same time.
- Need for a generic ‘Impact Risk Assessment’
- Governance on continuity between areas on management plans actually protecting Aboriginal Heritage; projects not unduly delayed.
- Example of where unavoidable impact rejected
- 5.6 Part F: Manage impacts to ACH during works – most measures listed, for example further surface recording, scientific excavation, and analysis of ACH, should happen before impacts on ACH. As seen in the case of the Juukan site destruction, values must be understood before making a management decision to impact a place, and further excavation or assessment may bring new information to light. We therefore recommend that these measures be moved to the section above 'Managing impacts to ACH prior to works'.
- Resourcing of compliance, monitoring and reporting activities. Resourcing and responsibility for monitoring compliance with the ACH management plan must be clearly assigned.
- There should be a standard section in all ACH management plans as to how new information about ACH will be managed.
- We note that there is no guidance provided on undertaking an impact assessment and developing an Impact Statement. We recommend that this additional information be developed and included in the Management Code. It should include consideration of not just physical impacts, but also social, cultural, environmental, 'down-stream' and cumulative impacts
- Offsetting is mentioned as a potential measure to manage impacts on ACH sites. My experience in NSW is that when this takes the form of setting aside land as ACH conservation areas that this causes more problems than benefits. Firstly, any offset area offered up by a proponent is an area that they probably never intended to develop anyway and is in many areas coincident with an environmental offset area. Any ACH located therein was usually never under threat and the proponent has not sacrificed anything. Secondly, although land put aside as an offset may not be of commercial use to, say, a

mining company, it may represent potential opportunities to other industries or community groups who are now usually locked out from this potential. Thirdly, offset lands do not necessarily offer any benefits to Traditional Owner groups for whose sites the land is being offset for. Offset lands usually remain in the ownership of the proponent and are only passively managed - i.e., fenced and avoided. There are minimal opportunities for Traditional Owner groups to engage with this land and many activities they may wish to conduct may be prohibited by environmental or safety reasons regulated under different legislations. Lastly, as responsible landowners, and as required under legislation, proponents should be protecting and conserving any ACH sites on their land that they do not have permission to disturb anyway. Land offsets do not work.

Instead, proponents might be encouraged to mitigate the disturbance they do to tangible ACH sites (one manifestation of Aboriginal culture) by helping to heal, enhance and promote other aspects of Aboriginal culture. This might take the form of contributing to a language centre, building a keeping and cultural education facility, funding Aboriginal community health programs, funding the upkeep of important community places like waterholes or lore grounds, employing Aboriginal heritage rangers to monitor the condition of ACH sites ... there are abundant programs that proponents can embark upon to enhance the broad spectrum of Aboriginal culture as an 'offset' for disturbing a narrower part of it. This should be encouraged and should be built into ACH management plans, particularly for larger projects.

- Define the 'permissible impact' - i.e., what level / type of impact will adversely affect the cultural heritage values
    - Are there design alternatives etc that might mean the cultural heritage value impacts are lessened or avoided?

PART G - NEW INFORMATION - CONTINGENCIES FOR MANAGING ACH IF THERE IS NEW INFORMATION, DISPUTE RESOLUTION.

Stakeholder feedback on Part G generally centred around the need for a clear process to follow in the event of new information, or new ACH being identified.

Aboriginal stakeholders sought at least some minimum requirements for processes, to mitigate potential power imbalances that could impact negotiations, and the inclusion of stop work requirements to consider new information.

Proponents sought guidance around the types of changes or new information that would trigger this section, and discussed the need for not only a process, but also a failsafe.

Comments included:

- On page 9, point 5.7, in relation to new information: the regulations and guidelines should provide minimum requirements for processes to ascertain new information, rather than leave it to the parties to reach an agreement, in circumstances where there is usually uneven bargaining power in favour of proponents. If there are minimum requirements for ongoing consultation and review, and confirmation the Aboriginal parties themselves may unilaterally report new information to the ACH Council, this would be preferable.
- The new information process could include:
    - A stop-work requirement in the area of newly identified heritage
    - LACHS to be notified immediately
    - A requirement to consult regarding the new information
    - An amendment to the ACH management plan.

  These should be mandated in the regulations and guidelines and works should not be able to re-commence in the area until these requirements have been met. There must also be a provision for the LACHS to withdraw its consent to an ACH management plan where new information alters their agreement.
- It should be recognised that new information could be the result of scientific analysis of heritage material. Usually, these are dates for the antiquity of use of a place. Other analysis can reveal residues revealing past uses of the place and environment. There should be some mechanism to sequester sites and/or areas within management plans that are subject to analysis until:
    - The final results of the analysis are available
    - The Heritage Custodians assert the results are sufficient and no further work is required

    - An assessment can be made of those results and whether it has a bearing on the management of the cultural values.
- It is recommended the dating process for sites of antiquity be used as a case study in the guidelines to illustrate how it might work in relation to management plans, addressing new information and the potential for plans to be amended in light of new information.
- Currently there is no outline with the ACH management plan overview of the types of changes to an ACH management plan that will trigger the requirement for an amendment to an ACH Management Plan.
  Guidance around the types of changes that can be mutually agreed between a Proponent and LACHS to an ACH management plan once it has been approved, and those changes requiring ACH Council approval would be very useful.
- Incorporate into DMIRS approval processes as is currently done with Programs of Work and Mining Proposals for Aboriginal heritage areas and endangered species.
- New information should not be considered after the plan has been signed.
- Process for adding new ACH to management plan
- In the past things changed after a project commenced because different individuals from the Aboriginal parties have additional information on ACH in the area.
- It needs to include a process/mechanism for what happens if there is a change of work scope. Work scopes often change due to unforeseen circumstances. The management plan needs to be flexible enough to cope with changing circumstances. Establish what process should be followed if the scope of works change.
- At the moment, you would be relying on the proponent to report any changes in work scopes, which might not always happen for whatever reason. There needs to be a failsafe or a checking process for example, if a Traditional Owner or community member observes a changed work scope, how can that be reported and managed?
- An audit system should be put into place so that say 5% of completed projects are randomly checked to see if what a proponent originally proposed in the

management plan is what actually ended up happening on site. If not, there could be a financial penalty paid to the knowledge holders (which would help with capacity building). You'd hope this wouldn't happen, but having this audit/check in place would be sensible due diligence and would act as a good motivator for proponents to report scope changes and 'do the right thing'. We know that self-regulation doesn't work so this is a sensible way of the State doing its due diligence to check things are working as they should be.

- Inclusion of requirement for ongoing investigations (e.g., so that any new ACH is identified)

PART H - REHABILITATION AND REMEDIATION - MEASURES IN PLACE FOR POST ACTIVITY REHABILITATION AND REMEDIATION.

No feedback provided about Part H.

PART I - COMPLIANCE WITH ABORIGINAL CULTURAL HERITAGE MANAGEMENT PLAN - SCHEDULES FOR ONGOING ENGAGEMENT, SCHEDULE OF ROLES AND RESPONSIBILITIES

Feedback on Part I centred around reporting, review and evaluation processes.

Aboriginal stakeholders sought built-in reporting requirements that would allow the LACHS to evaluate compliance and continue to be a part of heritage management.

Proponents raised questions on who and how often a plan would be reviewed and sought a clearer pro forma to work with. One detailed comment raised the possibility of overarching heritage management plans to meet the context of pastoralists.

Comments included:

- As outlined above, there should be a requirement built in for the reporting back of progress and compliance to the LACHS with the possibility for LACHS to evaluate and respond to this information.
- The provision of information back to the LACHS regarding a) the implementation of the purpose of the plan and b) the resulting impact to heritage values will promote dialogue to further the management of extant

heritage values, facilitate access and foster goodwill. It will also allow Heritage Custodians to gauge where the management plan has been implemented properly and where there might be cause for an investigation into a breach under the ACH.

- Performance monitoring, review and evaluation by Heritage Custodians will provide assurance the plans are delivering effective heritage management as intended and will support decision-making in the future.
- There should also be a requirement for a system of audits of compliance with management plans. This process should be transparent, ethical and timely and may require provision for Aboriginal inspectors and funding for them, as well as the proponent cooperating with them.
- Overall, the structure of the plan is good but there could be more examples of impacts and avoidance.
- LACHS should:
    - Determine the circumstances in which a ACH management plan is required.
    - Play an active role in developing any ACH management plan and in developing specific ACH management plans for each case.
    - Be funded by proponents to undertake the necessary research and writing of these documents.
    - Finalise the ACH management plan and approve the final document.
- Existing Heritage agreements – there are quite tight timeframes, how will these be met and what are the changes which will take place as a result of this Act? Can this legislation override native title future act agreements?"
- Development of Heritage management plans for pastoralists will effectively need to encompass the entire pastoral station. Plans will not relate to specific acts, rather the continuing use and management of the land. The examples and framing of the guidance around the management plans seems very focused on one-off 'acts' and how to manage the impacts. This is not reflective of the dynamic nature of operating of pastoral lease.
  The process, timing and costs to develop these management plans will be challenging for pastoralists. It is something the entire pastoral sector is broadly unfamiliar with. Inevitably resources will be prioritised by relevant

bodies to develop heritage management plans with the resources sector first, because it is a current known cost of doing business.

It is critical the State develop a clear detailed heritage management plan which supports execution between pastoralists and Traditional Owners that balances the practical and legal obligations of a pastoral leaseholder with reasonable measures to manage ACH.

As outlined earlier, given the expanse of cultural heritage, there is every possibility through the development of these plans, pastoral leases will be prevented from access to significant land holdings, potentially rendering the lease no longer viable; and where they may still remain viable, the management requirements imposed or expected to be met will be cost prohibitive.

- It is disappointing that the Government has not developed a template/pro-forma Aboriginal Cultural Heritage management plan (ACH management plan) as was committed earlier in the process. The ACH management plan is fundamental to the operation of the Act and the provision of a template by the Government that they consider satisfies the Act would answer several outstanding questions.
- Will the Department approve ACH management plan? Or who will?
- How often will it need to be reviewed?
- Who will be considered the proponents authorised signatory? E.g., registered manager? CEO?
- Confirmed that if a project is Environmental Protection Authority constrained, constraint on the decision on ACH management plans does not apply. Amendment to Environmental Protection Act section 41 (4) [s.348]
- How the audit will be done and by whom to make sure what's been agreed has been done on the ground?
- Include standard revision table so amendments can be documented and provide clarity.

FURTHER CONSIDERATIONS

There were some further questions and considerations about the management plan Template raised by stakeholders, which did not fall specifically within Parts A-I.

These included:

- How will complexity be dealt with? Can't see how in current template.
- Examples/scope needs to be broadened e.g., water holes
- Cultural mapping support / protection
- Should talk about cultural values that change with each group – need flexibility. Should we also map cultural 'values?
- Still bureaucrats trying to fit Aboriginal heritage into white law – need a whole of country approach.
- Split EPA social surroundings from cultural heritage.
- Monitoring of areas should be constant, so impact is avoided, detailed and done by the person with the right skills. Monitors should be trained
- Higher level of participation works better than at a lower level – strong consultation and a comprehensive legal system to support Aboriginal people.
- Need to talk about this as developing proper work plans for 5 years that seek approval, not single permits/plan for every single job.
- Timeframes for enquiries to the Dept of Planning, Lands and Heritage as per LACHS & ACH Council, Department should have timeframes to answer questions
- 5-year plans – all permitted under a permit or management plan, approval ahead of time.
- Interface with other pieces of legislation: mining Act etc (s29); Definitions don't always align
- Are mechanisms in ACH sufficiently strong in terms of "expedited procedure" and Native title Act (DMIRS)
- Ephemeral streams, access points change so will always be new disturbances
- Relevance to existing pastoral activity
- Will create huge amount of extra work for public (e.g., Local Government) and private organisations simply maintaining existing infrastructure

- Management plan is far too complex in structure.
- LACHS would need knowledge of engineering processes in some cases? If technical info involved, it needs to be able to be presented in lay terms.
- Can the proponent be a part of the LACHS group? If due diligence / relevant knowledge holder consulted cannot see why not – possible conflict of interest though.
- Could the Council ultimately reject a management plan that proponent and LACHS have proposed together? Issues of late with Dept. ‘suggesting’ we remove things from the S18 application. How often will the Council sit, Aboriginal Cultural Material Committee sits 11 times a year which is not enough as it is.

Draft Timeframes

Questions

- Do you have any feedback on the proposed timeframes?
- Any other comments?

Table 8 below shows emerging themes from the submissions about the Draft Timeframes, through the lens of Aboriginal stakeholders, proponents, and other (inclusive of State Government, service providers, archaeology and heritage consultants, and general community).

Table 8: Emerging themes about the Draft Timeframes

Aboriginal Stakeholders	Proponents	Other
Cultural obligations	Infrastructure and funding needed to support system	Proposed timeframes are upper limits
Cultural and social protocols	Shorten timeframes	Consider impact on timeframes of some tier 2 and 3 inclusions
Time for advice from community and other experts	Local government needs timeframes to be responsive	Impact of cultural obligations on timelines
Remoteness	What happens if timeframe is exceeded? What happens to ACH management plans already in the system for a long time?	Proposed timeframe as maximum term
Other commitments	Lengthy timeframes will impact funding opportunities	Clarify that application/plan can proceed if agreement reached before timeframe
Longer timeframe needed, or ability to gain extensions	Shorten time frames	Timeframe on Stop the Clock provisions
Cultural obligations and prior commitment impact on timeframe	Shorten timeframes Tailor to industry type	Extend timeframes

Funding will affect timeframes	Support time frames Need timeframes for appeal Implications for not meeting time frames	Timeframes for all consultation should be longer
Small PBCs need a worst-case scenario	No time limit on permits	Timeframes should take into account lore and cultural business, cultural load; include a stop the clock provision in the Code
Funding needed to meet timeframes	Shorter timeframes Clarity around stop the clock provisions	Stop the clock provision needed
Extend timeframes	Resourcing needed to support LACHS to meet proposed timeframes	Review timeframes after a year
Cultural authority to make decision will impact timeframes	Proposed timeframes (162(2), 143(2), will cause significant delays to projects - should be reduced.	When does 80 working days start?
Mining companies - inappropriate timeframes	Set a maximum timeframe Process or penalty for exceeding	
Extend timeframes	Resource Council/LACHS adequately to meet proposed timeframes Increase timeframe for agreement making, reduce 120 days for ACH Council to make a recommendation where no agreement has been reached.	
Realistic timeframes	Proposed timeframes could result in project delays, especially if system is overwhelmed	
Impact of cultural obligations	Flow Chart needed to demonstrate process and timeframes	

	Clarity on when timeframes commence	
Compound effect with other legislative timeframes	Reduce timeframe for recommendation by ACH Council to Minister to 50 days	
Timeframes not achievable	Clarity on what is a minimum reasonable consultation period	
Need to be able to request extensions	Reduction of timeframes	
Consider impact of law time on timeframes	Further regulation around Stop the Clock provisions	
Timeframes impacted by heritage that is tangible, intangible, and irreplaceable	Approval terms for permits and management plans Flowchart needed for overall timeframes and process Amend language to "business days"	
Intergenerational socio-economic factors	Support for LACHS and ACH Council to meet proposed timeframes	
Underfunding of PBCs	Clarify timeframes for Council to make a decision	
Recommendation on 113(b)/122(3)(b)	Reciprocal Obligations Problematic until structures are in place Administrative burden Long term plans	
Recommendation on 118(2)/125(2)	Can process run parallel to DMIRS? Timeframes too long	
Recommendation on 119(2), 126(2)	Recommendation on 143(2)	
Recommendation on 143(2)	Recommendation on 162(2)	
Recommendation on 150(2)	Interaction with DMIRS Timeframes not achievable	

Recommendation on 162(2)	Getting structure established will delay timelines Government agency involvement	
Recommendation on 175(30(c)	Timeframe for ACH Council to consider application - too long?	
Recommendation on 176(2)	Extend timeframes	
Request timeframes for additional matters to be included in Phase 2	Due Diligence timeframe short Risk mitigation in place	
Sufficient funding needed for employees for LACHS to meet these timeframes	Flexibility of timeframes	
Longer timeframes needed - clarify when the timeframe begins (e.g., receipt of notice)	Recommendation on 113b	
Consider transcription of verbal responses to permits and management plans	Clarification on 175(3)c	
Reconsider deadlines that are concurrent with other processes	Recommendation on 176(2)	
Working days not business days	Timeframes too long, flexibility needed, resourcing needed	
Don't place pressure on Elders	Streamline process penalties for non-compliance clarification on stop the clock timelines	
Ability to extend needed	Timeframes conflict with local government and pastoralist activities	
Who can Stop the Clock?	Rejection process	
Negotiating between parties - six months	Timeframe impact on funding	

Cultural conventions should be mandated, and timeframes take them into account	Consider priority-based applications	
	Notification of commencement of 80 days	
	Demonstration of reasonable time	

OVERVIEW

Submissions relating to the Draft Timeframes discussed issues ranging from cultural factors impacting timelines, to the pros and cons of extensions, compliance and getting started. There was broad agreement on the need for more detail in the process, and conflicting views on the timeframes themselves – generally speaking, Aboriginal stakeholders advocated for more time, and proponents for less, once again underlining the tension between the priorities of following cultural processes and ensuring Country is cared for, and the time and cost pressures of business as usual.

The main themes to arise included:

- Potential conflicting timeframes
- Cultural factors impacting time
- Other factors impacting time
- Funding of LACHS
- Working days or business days
- General comments about timeframes
- Timeframe extensions
- Not meeting timeframes
- Stop the clock
- Inclusions for phase 3 consultation
- When do timeframes start?
- Responses
- What constitutes a reasonable period?
- Transition period
- Questions

The following section explores these themes at a high level, and includes relevant comments from the submissions for consideration. Table 9 below outlines direct feedback on the timeframes themselves from the stakeholder groups.

Table 9: Direct feedback on proposed timeframes

Section	Aboriginal Stakeholder Feedback	Proponent Feedback
113(b), 122(3)(b) **20 working days**	Recommend - Four months, having regard to: No resourcing or cost recovery available for LACHS to respond to these notices Reliance on unfunded PBCs many of which do not have staff and rely on volunteers or external service providers The significant and intrusive nature of the activities under tier 2 Four months is comparable to the timeframes provided under the *Native Title Act 1993* for Aboriginal people to respond to activities on country. Should be extended 6-8 weeks	
118(2), 125(2) **20 working days**	If a procedure is introduced to allow persons to be notified under ss 113(b) and 122(3)(b) to provide their comments under those sections directly to the ACH Council, the proposed timeframe of 20 days is appropriate. However, if such a procedure is not possible a four-month timeframe to respond is appropriate and practicable for the reasons set out in the row above. Should be extended 6-8 weeks	
119(2), 126(2) **20 working**	The proposed timeframe is the same as that proposed for the ACH Council to allow persons notified of an application to provide their views on the application. It does not appear possible for these two timeframes to	

days from the date of receipt of ACH Permit application	run concurrently. The time for the ACH Council to determine an application should run from the end of the notice period under s118(2) or 125(2) (as the case may be). In relation to ACH permit times, there is a 20-working day notice period prescribed for responses to the ACH Council's notice of receipt of an ACH permit application. However, there is also a 20-working day period from the receipt of the ACH permit for the ACH Council to make a decision. This means the deadline for the Council's decision is the same as the deadline for people to respond to the notice - an inadequate amount of time for the ACH Council to give proper consideration to objections. For the ACH Council to give a serious assessment of any responses, there should be at least 20 days from the deadline for responses, not from the receipt of the application. Should be extended 6-8 weeks	
143 (2) **80 working days**	Eight months / 160 working days, with a power to extend on application of either party, having regard to: The resourcing and funding constraints on LACHS and on “interested Aboriginal parties” that are not LACHS. The likelihood that ACH management plans may involve native title decisions which can only be validly made with prior consultation with and consent of common law holders in accordance with the provisions of the *Native Title Act 1993*. Eight months is comparable to the period of 6 months under the right to negotiate provisions of the *Native*	Period for interested Aboriginal parties and proponents to reach agreement on the terms of an ACH management plan - this period should be brought back to 60 days, which is enough time considering on site assessment and management documentation and advice has been incorporated into the plan. In regard to the development of ACH management plans, additional time is allocated to agreement making with an equivalent reduction to the 120 Business Day period for the ACH Council to make a recommendation where no agreement has been

	Title Act 1993, with additional time for native title holder consultation and consent. Four months for negotiating a management plan between the parties is too short, should ideally be six months. 4 months for negotiating a management plan is too short. It should be 6 months.	reached. This encourages the objective of the Act for parties to engage in respectful and effective agreement making. 143(2): Minimum of 40 days and maximum of 80 days to reach an agreement (due to after 40 days one party will know if they are ever going to reach an agreement and if so, there should be time pressure to reach an agreement within 80 days) Maximum of 60 days to provide a first draft of a plan for consideration and feedback and a subsequent 30 days to provide a final plan. 80-day timeframe may not be achievable due to workload and for activities with large scope.
150(2) **20 working days**	30 business days given the likely high volume of applications for the ACH Council to consider.	
162(2) **120 working days**	It is unclear why a 6-month timeframe is required for the ACH Council to make this recommendation, particularly given the proposed timeframe for the parties to the ACH management plan to reach agreement is only 80 days. Need clarity on the 120 working days, needs to take into account procedural fairness. Council will need to step in at some stage.	Period for ACH Council to make a recommendation to the Minister about an ACH management plan where there has been no agreement between the proponent and the interested Aboriginal party - this period should be brought back to 90 days as it should be recognised that all the arguments and supporting documents have been well defined to permit a decision. Additionally, there is a financial and cost of effort for the proponent which should be taken into account. Noting that a number of the timeframes have been extended from the Phase 1 timeframes from 15 days to 20 days, there is still no further

		clarity on how the 120-day timeframe for the ACH Council to consider an application in order to make a recommendation to the Minister regarding a management plan has been determined. In the absence of clarity, we again suggest that 40 working days is a more reasonable timeframe. The prescribed timeframe for s 162(2) of the Act should be reduced from 120 working days to 60 working days. This will still allow approximately 3 months for consideration by the ACH Council before a recommendation is made to the Minister. The process set out in the Act for a proponent to undertake before submitting an ACH management plan for approval or authorisation is comprehensive – and time intensive. The 120-day timeframe for the ACH Council to consider such an application is excessive and without justification. Further, this timeframe fails to consider or provide for circumstances where revisions of ACH management plans will be required to be submitted to the ACH Council for consideration. This timeframe must focus on the assessment by the ACH Council for compliance with the Act, and to make a decision regarding recommendation. The duration of the 120 Working Day timeframe provided to the Aboriginal Heritage Council (AHC) to assess an ACH Management plan pursuant to s 162 (2) of the Act should be reduced. In circumstances where s162(2) becomes relevant, significant time,

		effort and resources will have been expended. 40 working days be the maximum time allowed for the AHC to assess a contested ACH management plan and make a recommendation to the Minister.
175(3)(c) **20 working days**	Recommendation - 40 business days / 2 months, having regard to the resourcing and socio- economic factors which impact of the capacity of PBCs and native title holders to respond within a short time frame. The requirements for “public notice” under s175(3)(c) should include publication in local newspapers, on local radio stations, and in local social media groups. 20 days is a quick turnaround time for PBCs and local government. 175(3)c “period to respond to notice from the ACH Council…” Who does this refer to? Who is responding? If LACHS then 6-8 weeks would be better. 20 working days, a local government can’t meet that timeframe, no time for a Council meeting.	
176(2) **20 working days**	40 days given the likely high volume of matters requiring consideration by the ACH Council. Period for ACH Council (176(2)) is too short, should be 6-8 weeks.	

POTENTIAL CONFLICTING TIMEFRAMES

Stakeholders raised a number of factors which potentially could conflict with the proposed timeframes. These included other legislative timeframes and obligations, and potential conflicts within the Act.

Comments included:

- Prescribed timeframes for ACH management plans as proposed in the regulations do not account for the range of provisions in the Act which, if triggered, will extend these periods significantly. These include:
    - Ability for the ACH Council to set a longer period for parties to reach agreement on an ACH management plan under s143(b)(ii). This directly undermines the certainty of the proposed 80-day period.
    - Ability of the ACH Council to 'stop the clock' on an assessment under s148 and s158 for a specified period of time to request the provision of further information by either party.
    - Ability of the ACH Council to direct the proposed parties to an application for authorisation of an ACH management plan into mediation for a specified period under the ACH Council or a mediator.
- Given the mechanisms listed above and the fact that the timeframe for the ACH Council to recommend an ACH management plan that has been agreed by a proponent and an Aboriginal party is 20-days, Strongly recommend the revision of the proposed timeframe for a recommendation by the ACH Council to the Minister for authorisation of an ACH management plan to a maximum of 50 working days to reflect the obligations of the ACH Council in undertaking this assessment.
- Approval to work ground is needed to comply with tenement conditions and their timeframes.
- Timeframes will only work if DMIRS don't blow out: Find out if process can run parallel
- KUA agreement, land clearing permits, compensation to Indigenous groups ILUA agreement, land clearing permits
- State policy to identify Hierarchy of applications. DWER clearing permit 1-3 years [should be] 1-2 years assessment,
- ACH Permit 4 years [should be] 1 year assessment

- The ability to carry out Local Government Area activities and pastoralists carrying out activities under the LAA conflicts with the timeframes for approvals and the existing activity categorisations for tier 2 and tier 3.
- Need to have the timeframes registered under the ACH Act & work in with DMIRS mining tenement requirements.
- Need to be flexible to accommodate grant and permit conditions – fast tracking needed.
- Timeframes should be consistent with other statutory timeframes - usually 30 working days e.g., DBCA.
- Conflict with other legislative timeframes – compound effect.
- Need to tie in with other Govt dept. timeframes e.g., SPL timeframes
- The current Department portal and system to get a clearing permit already takes 9-12 months. The timeframes proposed are too long yet already unachievable.
- There are times where it will be impossible to meet the timeframe.

CULTURAL FACTORS WHICH MAY IMPACT ON PROPONENT TIMEFRAMES

Aboriginal Stakeholders discussed cultural factors impacting timeframes, advising that the timeframes must take into account a variety of considerations, including cultural obligations and lore time, distance, climatic events, and allowing adequate time for community processes to be carried out around consultation.

Comments included:

- Proponents should consider cultural conventions and commitments which may mean that Aboriginal people are not contactable for a period of time, which may impact on proponents' timeframes. This may include:
    - Law time and sorry business
    - Cultural and social protocols, such as gender and kinship
    - Coordinated consultation processes can be time and resource intensive: proponents should not rush Aboriginal persons to make decisions or expect an answer at the first consultation as matters may require consideration, including in accordance with cultural protocols
    - Proponents should allow time for Aboriginal persons to take proposals back to their communities or access appropriate expert advice

    - Remoteness considerations – some communities, including postal services and internet connection, may be cut off during the wet season.
    - Proponents will need to consider that there will be occasions where the person(s) to be consulted will have other consultation commitments elsewhere that may result in reduced availability.
- We strongly recommend that the suggested timeframes for Aboriginal parties to provide comment are made longer than 4 weeks and/or that there is a simple process created where parties can apply for an extension of time when needed.
- Timing for processes under the Act must fully account and allow for Aboriginal cultural obligations and needs for proper internal consultation and external co-creation and also the backlogs and time pressures of work already undertaken by PBCs.
- There will need to be board meetings, admin staff won't have cultural authority to make a decision.
- Timeframes underestimate the volume of work and doesn't allow for times of the year, law time, sorry time, timeframes need to be more realistic.
- Timeframes in subsidiary legislation and other instruments must take into account the following considerations:
    - The irreplaceable nature of some aspects of Aboriginal cultural heritage, particularly where it is physically manifested in the landscape.
    - The tangible and intangible elements of Aboriginal cultural heritage, which mean that the nature, scale and cumulative impacts of activities on Aboriginal cultural heritage cannot be determined solely by reference to the extent of ground disturbance of those activities.
    - The intergenerational racial wealth gap experienced by Aboriginal people directly attributable to loss of recognised property rights for 100+ years, and the impact this has on socio-economic indicators and the ability of individuals to fully engage in voluntary activities such as actively participating in native title and protection of Aboriginal cultural heritage.
    - The central role that PBCs will play in the management and protection of Aboriginal cultural heritage under the ACH Act where the chronic

underfunding of PBCs is widely recognised. The ACH Act will impose additional regulatory burdens on PBCs in circumstances where all levels of government and industry recognise that PBCs do not have sufficient resources to perform current functions under the *Native Title Act 1993* and the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) (CATSI Act), let alone additional functions under the ACH Act.

- An appropriate comparison may be the timeframes to respond to expedited procedure applications under the *Native Title Act 1993* (Cth). For responses to ACH permit applications (and extensions of these), the timeframe is four months or about 80 working days. In relation to the right for negotiating ACH management plans, the time-period is six months or about 150 working days. These timelines are already too tight for many native title parties, as they cannot address many of them in the time provided. It would be unrealistic to expect them to be able to comply with ACH Act notices in even less time when the issues, work required and matters at stake are often similar.
  For example: the type of information needed to respond to ACH permits is likely to require far more detail about Aboriginal Cultural Heritage and how it will be impacted - much more than a standard objection to an expedited procedure notice. It is likely to require LACHS or other Aboriginal groups to consult with people who speak for the area, obtain detailed information about it, and then develop the material into a formal response. It may also require a visit to the location. More than 20 working days will be needed to compile this information together in the necessary format. Similarly, in relation to ACH management plans, 80 working days is clearly insufficient to allow for genuine consultation and to enable LACHS or other Aboriginal groups to consult with native title holders and knowledge holders, obtain expert advice (as suggested in the draft consultation guidelines) and give notices of meetings to consider options.
- It is unreasonable to place time pressure on Elders when considering complex matters.
- Ensure culturally significant periods are adequately captured (such as lore time, or allowable times for sorry business) to ensure adequate time is

available for LACHS to review documentation, and periods required can be understood by proponents.

Sufficient time must be allowed for Traditional Owners to consider all the aspects of the proposed management plan. Given the difficulty in reaching appropriate groups for consultation this may need to be extended.

- The timeframes for the whole process have been incredibly short for such a complex issue. The timeframes for all aspects of the consultation and implementation should be extended as long as possible to ensure the best, most practical outcome for all stakeholders.

  We recommend that the timeframes need to be adjustable for seasonal climatic events and impacts, cultural business, sorry business, family obligations, access to country, and periods of community overload. We suggest that a 'stop the clock' provision be included in this document. We repeat our comments from our Phase 1 submission – time limits mean nothing without proper resourcing.

OTHER FACTORS IMPACTING TIME

There were some more general factors impacting timelines raised by stakeholders.

These included:

- Some lands at a distinct disadvantage: all exploration agreements are “blocked out” over the 3-month period over Christmas Dec-Feb (“exclusion period”)
- Mining companies drops things on us on 18 December with 21 days to respond.
- You’re relying on companies who don’t follow the rules to follow the rules
- Proposed timeframes are too restrictive and do not take into account the many on-ground logistical, cultural and financial challenges faced by LACHS. Existing timeframes do not allow for meaningful consultation that would be required to obtain informed consent.
- Timeframes should be extended to take into account the need for the time required to undertake consultation with relevant people and should not apply during the business period 1st December to 1st March.

FUNDING OF LACHS

As in the responses to other themes, there was broad general agreement across stakeholder groups that LACHS must be adequately funded to meet their obligations around the timeframes.

Comments included:

- Timeframes will relate to funds available to review the request
- Small PBCs require a worst-case scenario articulated
- Proponents are driving up costs & resourcing interfaces here: without funding we will not be able to meet timeframes/undertake LACHS duties
- The time periods overall are far too short to enable LACHS to respond - and it is even worse for native title parties or knowledge holders who have even less infrastructure set up to respond to these notices. The timeframes for responding are only feasible if there are full-time employees engaged in responding within such timeframes. There needs to be sufficient funding for LACHS and other bodies to enable this. In the absence of sufficient funding for LACHS and others, the timeframes must be extended substantially. This is particularly the case if proponents cannot be charged for time spent on responding to ACH permits.
- Again, the State government needs to fund and support this system. Otherwise, the Local Government sector (which is often underfunded itself) will not be able to provide and maintain vital infrastructure to both the local Indigenous people and the community. This system will come at the cost of safe existing roads/infrastructure.
- This needs to be a fulltime corporation/office/infrastructure to ensure this works correctly. Again, the state government is setting the ACH council up for failure.
- The current realities of existing cultural heritage management see engagement with groups that are under-resourced, regularly fail to meet commercial timeframes and struggle to manage the often-differing views in their groups.

  With that context in mind, a 20-working day turn-around for ACH permits in particular is welcomed by Industry. It is anticipated that there will be a very

high volume of ACH Permit applications for tier 2 activities. Appropriate Government training and resourcing will be needed to support the reality of these timeframes.

- The LACHS and ACH Council will require adequate start up and ongoing funding and capacity building to enable these timeframes to be met
- What if people are overburdened by applications and cannot respond within the timeframes?

WORKING DAYS OR BUSINESS DAYS

There was disagreement about the use of the term working days in the timeframes. Aboriginal Stakeholders favoured working days, and proponents favoured business days – with the implication that the use of the term business days would shorten the timeframes.

Comments included:

- Take reference out of working days – just make days
- Qualify as working days not 'business days' i.e., org that operates 3 days per week means 20 days = 12 days.
- The Prescribed Timeframes should refer to 'Business Days' (not working days).
- It's good that it says working days

GENERAL COMMENTS ABOUT TIMEFRAMES

There were numerous general comments about the timeframes. Aboriginal stakeholders advocated for them to be longer, and proponents advocated for them to be shorter.

Comments included:

- Triple the timeframes at the minimum.
- Timeframes – all legislation needs to consider realistic consultation timeframes. i.e., mining approvals and ACH Act (be in line with / consistent)
- Expedited procedure must not impact heritage procedure

- Timeframes are first and foremost a significant aspect of both procedural and substantive rights and should be developed with regard to the role they play in affording these rights.
- The ACH Council is also given a very tight timeline to respond, especially if mediation is required in this time as well. This, too, will not be realistic unless the ACH Council meets very frequently to consider the likely large number of permits and responses.
- Timeframes need to be shortened significantly
- The timeframes are still too long and again it should be noted that timelines potentially need to be broken down by industry. Pastoral timeframes should be no more than 10-15 days per step in the process (15 being the highest).
- The Aboriginal Cultural Heritage Council must publicly report annually on how the various LACHS are meeting these statutory time frames so that real bench marking between LACHS within each region can be achieved.
- Process will, by its nature, require time to navigate through. As such, certainty of the timeframes should be clear to allow proponents to appropriately schedule the management of Aboriginal cultural heritage, and required approvals, when planning proposed projects.
- Realistically, it is likely that the time from commencement of negotiations with the relevant Aboriginal parties to a decision of the Minister will exceed 12, and potentially 18 months. This is likely to result in significant delays to the implementation of projects.

  If the current unworkable Due Diligence Guidelines persist, it is suggested that a maximum timeframe be set for areas where there is no heritage on the Directory, so that where no response is received in a reasonable timeframe the activity can commence. In many cases prospectors have limited time to start and finish their proposed activities otherwise they lose their right to prospect and/or suffer penalties from DMIRS.
- The Department has struggled to meet any realistic timeframes for s18 and similar assessments. Concerns are thus raised that performance standards, especially for tier 1 works, are met. Local Government often has State funding related to works based on tight delivery timeframes and as such needs the State to be responsive in all aspects of permits and permissions

- As highlighted in the Phase 2 Workshop held in Carnarvon, all proposed timeframes are lengthy and have the potential to impact in a number of ways, least of which would be the ability to progress normal/key Local Government operations (and safety/risk impacts where road maintenance is concerned), and the ability to submit timely funding applications and therefore secure key funding opportunities.
- The identification of timeframes by the Government is appreciated. However, it is unclear how the Government has decided that these timeframes are appropriate or what resourcing will ensure that these timeframes are met. Greater detail on why these timeframes were chosen is sought in future codesign documents.
- Due to the scale of the legislation and the number of activities covered, there is a risk of the regulatory bodies being overwhelmed by the number of applications being submitted. This could result in project delays for activities that are likely to have a very low risk of impacting upon ACH and risks system integrity as proponents may fail to submit applications if delays in the system are excessive.
- The obligation to consult should align with the six-month (120 working days) negotiation in good faith period prescribed under s.35 of the *Native Title Act 1993* (Cth). Given that the DRAFT material proposes an 80 working day period for negotiation of an ACH management plan, recommend that the Government prescribe a further 40 working day period for consultation under s.139.
- The Prescribed Timeframes attempt to provide certainty of process and facilitate timely and well- informed decision making. As it stands, it is difficult to understand the overall timeframe from beginning to end for permits and management plans. The City endorses WALGA's recommendation that a flow chart be developed to demonstrate the process and timeframes (Recommendation 17).
- Local Governments rely heavily on grant funding and the timeframes may impact the ability of the Local Government to apply for grant funds as well as expend any funds within grant funding timeframes.
- Whole process should be completed within one year

- Timeframes too long
- Priority based application assessment based on urgency/timing/funding etc
- The suggested timeframes for obtaining an Aboriginal Cultural Heritage (ACH) Permit or management plan include 12 week and 52-week periods respectively.

  While it is appreciated that these timeframes include procedural fairness processes and would be considered upper limit suggestions, particularly for establishing and reaching agreement on an ACH Management Plan, they are lengthy timeframes that will require careful inclusion in planning processes. As such, further review should be made to the current inclusion of some activities as tier 2 and tier 3 categories within the Draft Activity Categories Table to ensure the ACH Council is not overburdened with Permit and management plan requests and that delays beyond the suggested timeframes are minimised.
- The proposed prescribed timeframes appear reasonable as maximum terms. However, would like to see a provision explicitly stating that the next “phase” can progress sooner should the requirements have been fulfilled before the prescribed timeframe has elapsed. For example:
  - For ACH permits, if all persons to be notified under sections 113(b) and 122(3)(b) have responded prior to 20 business days having elapsed, the proponent should be able to apply for the permit upon receipt of the final response, and not have to wait out the 20 business days.
  - For ACH management plans, if proponent and LACHS can reach agreement before 80 business days, the ACH management plan should be able to be submitted to the ACH Council for approval upon agreement sign off.
- permits and management plans relating to regular and ongoing operational and maintenance activities undertaken by Local Government authorities should have approval terms, up to twenty years, before requiring renewal.

TIMEFRAME EXTENSIONS

Aboriginal Stakeholders sought the ability to extend timeframes when needed, to accommodate cultural obligations and other impacts on timeframes.

Comments included:

- Are timelines able to be extended by agreement between parties? Delay in responding (Ceremony, Sorry Business etc)
- LACHS face many challenges in relation to meeting timeframes and flexibility needs to be built into the process to account for this. Timeframes should be extended and further to this, provision for applications for extensions on timeframes by the LACHS needs to be adopted.
- The Ngaanyatjarra Lands is extremely remote and is a vast area with people spread out across many communities. Cultural obligations and commitments are strong and involve high levels of mobility and time away from community of residence. If the necessary consultation is not able to occur due to challenges/ delays associated with these circumstances (including sorry business and absences of required people from community) then an extension period should be granted.
- The ACH Council must be empowered to extend timeframes on request by the relevant parties, LACHS or native title parties, native title representative bodies or knowledge holders. There are many reasons for possible delays, such as bad weather, communications issues, Sorry business, Law/Lore business and similar. The parties may also be close to reaching agreements, which should be able to be encouraged by extensions of time. To prevent timeframes from operating unfairly, and to enable all parties to be fully aware of the information necessary to make decisions, such a power to extend time is crucial. We note there are provisions for extension in s143 of the ACH Act, but the timeframes prescribed for ACH permit responses and other aspects should include provision for a number of days or other additional time the ACH Council may permit. Given timeframes are to be prescribed in the regulations, the prescribed periods can simply be a number of days and any extension granted by the ACH Council.
- May need to extend if Aboriginal parties can’t respond even though they want to.
- Item 5(a) on page 6 - There is reference to proponents taking cultural conventions into account and how this may delay their timeframes. These should be mandated as matters that proponent must take into account. This is

another reason why it is essential there be more sensible timeframes and why the ACH Council should be empowered in the regulations to extend times.

- There should be a clear process for how both parties can request a timeframe extension due to unforeseen circumstances.

NOT MEETING TIMEFRAMES

Stakeholders sought clarity on what would happen if timeframes were not met. All agreed that governance was needed. Some proponents suggested a punitive approach, and others clearer process maps.

Comments included:

- What are the repercussions for not meeting timeframes?
- Governance on timeframes being met.
- Proponent gives notification to LACHS – what if there is no response? Definitive timeframes needed – otherwise if no replies etc then action can be taken by proponent/DMIRS
- Clear outcomes needed from consultants when being asked – balances in place to stop abuse of the process (certainty of timeframes)
- The permit periods appear reasonable. Nonetheless, it is suspected that should the timeframes be exceeded there is little to no recourse for a proponent. Consideration should be given to deemed approvals after the timeframe to ensure timely processing and not delay construction.
- There should be real implications for parties not reaching these time frames, such as automatic progress to the next step in the process.
- There needs to be a process and penalties for exceeding the proposed timeframes. Will time bars be applied?
- The Code and the Consultation Guidelines are amended to insert reciprocal obligations on the behaviour of the parties.
- Overall timeframes for the end-to-end process, including DDA and alternate pathways for consultation if a response is not received within a specified time, should be provided. It is recommended that a flow chart be developed to demonstrate indicative timeframes of the full process.
- What happens if there is no response - Can the proponent simply proceed?

STOP THE CLOCK

Stop the clock provisions within the Act were discussed across all stakeholder groups. Aboriginal stakeholders viewed these as an extremely important part of the process to allow for cultural obligations to be observed, and for the ACH Council to request further information.

Proponents sought further clarification around these provisions, including defined timelines and assurance that the provision would have clear guidelines.

Comments included:

- Will there be ‘stop the clock’ processes like for DWER clearing permit assessments?
- The timing for reaching agreements on ACH management plans should start from when the negotiations start. It is insufficient for proponents to give notice of a proposal to enter into a management plan but then do nothing to attempt to start discussions. Recommend a "stop-the-clock" provision that can be enacted over Law/Lore time and during Sorry or other cultural business.
- Can the ACH Council stop the clock?
- It is also important to note that the current prescribed timeframes do not take into consideration the range of provisions with the ACH Act that allow the ACH Council to extend the process. These provisions include the ability for the ACH Council to extend the time to reach agreement, ‘stop the clock’ on assessments and direct parties into mediation.
  Further clarity needed in what would trigger the ‘stop the clock’ provision as well as when in the process the clock may be stopped.
- Concerned about the ‘Stop the Clock’ mechanism being applied to any/all Governmental timeframes. The Stop the Clock mechanism should only be applied in extreme circumstances and for defined periods. Government should prescribe the basis on which the ‘Stop the Clock’ mechanism may be enlivened.
- Government should prescribe the maximum period over which the AHC may enliven the Stop the Clock mechanism, and that all usage of the Stop the Clock mechanism is publicly reported along with public reporting of

compliance with all prescribed timeframes (as is commonplace in other Government agencies and statutory bodies)

- The timeframes indicate that we have a short amount of time to conduct due diligence. We do have mechanisms built-in to avoid ‘stop the clock’.
- Can the clock stop for certain occasions E.g.- For Sorry Business?
- `Stop the Clock’ for ACH Council mediation – period need to be defined.
- It is suggested that the ACH Council’s “Stop the Clock” provisions (i.e., where the Council seeks further information, or where the Council steps in as mediator) also have prescribed timeframes associated with them to give certainty and insurance that neither party can drag out the process unnecessarily.
- Are there 'stop the clock' provisions that the ACH Council can activate if they need to request information lacking from initial submissions?

INCLUSIONS FOR PHASE 3 CONSULTATION

The following inclusions were recommended for Phase 3 of the consultation:

- Include the following in the next phase of consultation:
    - s 56 - ACH Council to be notified of Aboriginal ancestral remains 46 - objection to decision of ACH Council on a LACHS application
    - s 57 - period to return Aboriginal ancestral remains
    - s 64 - notifying ACH Council of secret sacred objects
    - s 65 - return of secret sacred objects
    - s 68 - reporting Aboriginal cultural material to the ACH Council
    - s 75 - making submissions to ACH Council on whether an area should be declared as a protected area
    - s 77 - ACH Council consideration of an application for an area to be declared as a protected area
    - s 131 - objection to decision to refuse ACH Permit
    - s 155 - time to object to a decision of the ACH Council
    - s 158 - ACH Council request for further information
    - s 171(4) – notice of change of proponent for an ACH management plan
    - s186(4) - ACH Council recommendation on stop work order.

- The proposed timeframes do not include the timeframe for the Minister to make a determination on an ACH plan that has already been at least 200 working day in the system.
- Statutory time frames should be established for periods of appeal by proponents and Traditional Owners.
- Do management plans need to go to public for comment?

WHEN DO TIMEFRAMES START?

Several submissions sought clarity on when timeframes started.

Comments included:

- We assume the timeframes prescribed all run from the date when the party receives the notice, rather than when it was sent. This should be clarified. Any presumed date of receipt should account for delivery times in remote areas.
- Furthermore, and specifically in relation to ACH management plans, it is unclear when the 80 days in which parties have to reach agreement on an ACH management plan will commence. It is not clear whether the 80 days commences from the date of the parties' first consultation; from when 'in-principle' agreement is reached by the parties or from some other trigger point
- It's not clear when the period of 80 days is triggered and commences. The 80-day period is just for the agreement of a Management Plan, does the Proponent need to notify the Aboriginal Party of intention to commence the 80 days?
- Reading the table in s.6, it is unclear what starts the 80 working days clock for the "period for interested Aboriginal parties and proponents to reach agreement on the terms of an ACH management plan". It would be beneficial to define exactly when this time period starts.

RESPONSES

One Aboriginal stakeholder provided further advice around flexibility and accessibility for knowledge holders making a response:

- Provision should be made for LACHS to respond verbally on ACH permits and ACH management plans. Recommends the Department consider taking and transcribing these verbal submissions. Translators should also be an option.

Many key knowledge holders do not speak or write English as a first language, and this presents a barrier to full participation under the ACH Act.

WHAT CONSTITUTES A REASONABLE PERIOD?

Proponents sought further guidance and detail about what constituted a reasonable period of consultation.

Comments included:

- s.139 of the Act establishes a condition precedent to service written notice in compliance with s.142 which in-turn triggers the commencement of the prescribed 80 working day period to negotiate an ACH management plan under s.143. Section 139 requires consultation in accordance with the consultation guidelines for a 'reasonable period'.
  The draft prescribed material provides neither direction nor guidance on what constitutes a reasonable period:
  - The scope of the requirement to consult prior to submission of the s.142 notice is imprecise. The language used in the document requires proponents to make 'repeated attempts' to contact the Aboriginal party using 'text messages or email', and that the proponent must 'not rush' the Aboriginal party but must consider that the Aboriginal party 'may be elsewhere' and may have 'reduced availability'. The guideline notes that this 'may result in delay' but that the proponent should 'try to agree consultation timeframes with the Aboriginal party'.
  - Planning and scheduling a tier 3 activity is a significant endeavour. Securing and mobilising people, plant and equipment requires predictable timeframes that are not reflected in the current guidance material,
  - The absence of temporal limitations on what constitutes 'reasonable' consultation is problematic. How is an independent decision-maker to assess the reasonableness of the timeframe allowed for consultation and from what point in time?

  Project developers are reliant on predictable schedules and an absence of both timeframes and a reciprocal obligation to constructively engage has the

potential to undermine the ‘agreement- making’ policy objective underpinning the Act.

Recommend that the Government reconsider the s.139 open-ended consultation period prior to submission of a notice under s.142 and that the Regulations prescribe what constitutes a minimum reasonable period.

- Further guidance is required through the Consultation Guidelines to provide proponents with clarity regarding the satisfaction of the consultation obligations set out in Section 139(2). As the guidelines stand, there is not sufficient guidance regarding the process for a proponent to demonstrate ‘reasonable time’ to the satisfaction of the ACH Council, to meet the obligation set out in the Act.

  This will be particularly critical in situations where a proponent is unable to engage a LACHS or knowledge holders and will be required to demonstrate to the ACH Council that attempts were undertaken in a reasonable time and capture the multiple methods and other requirements set out in the draft guidelines.

  Recommend further guidance is inserted into section 5(a) of the consultation regarding the demonstration of reasonable time for the purpose of satisfying s139(2).

TRANSITION PERIOD

Some proponents were concerned that the transition period into the Act could be problematic while LACHS were being established.

Comments included:

- As Pastoralists/ landholders we want to deal with our local Aboriginal groups who have the local knowledge. We hold concerns about potential delays to pastoral projects in the process of a LACHS being established
- Could be problematic in early days when structures aren’t in place for identifying appropriate people to respond.

QUESTIONS

The following general questions were posed:

- Can a generic statement be made re the high likelihood of Aboriginal Cultural heritage existing?
- Can there be different timeframes for different areas?
- Can a further breakdown of timeframes be provided? Explain why so much time is required e.g., 120 working days, could this be broken down further?
- Is there a process for the rejection (section 168) examples of such rejection? So that if it's spelled out then organisations don't go through grievances process as they clearly understand the work is not supported.
- If we apply for funding for the project the timeframe will delay it to next year? The funding may not be available next year?

Draft Fee for Service Guidelines

Questions

- What other considerations should be included in the Fee for Service Guidelines?
- Any other comments?

The section has been addressed in two parts:

- What is a service people can charge for?
- Is this fee reasonable?

What is a Service People Can Charge For?

Table 10 below shows emerging themes from the submissions about the *Draft Fee for Service Guidelines – What is a service people can charge for?* through the lens of Aboriginal stakeholders, proponents, and other (inclusive of State Government, service providers, archaeology and heritage consultants, and general community).

Table 10: Emerging themes about what is a service people can charge for?

Aboriginal Stakeholders	Proponents	Other
Are there circumstances where government or other organisations will not be required to pay fees?	Agriculture exempt from fees	Fees should be applied proportionally - type/size/scale
Clarity on fee structure needed	LACHS must be properly resourced, support and training should be provided on top of proposed budget	Permit application/assessment fee missing
Fee Guidelines significantly limit the scope of activities that LACHS will be able to recover costs for, compared with scope of services	Endorsed fee schedule Creation of monopoly	Endorsed fee schedule
LACHS must be properly resourced, or they will be set up to fail	Consider interaction of fees with existing heritage agreements	Detailed outline of fees needed
Proper funding needed	Funding needed to support LACHS to meet commitments	Clarity on who determines fees; Fees should be capped

Structure is problematic: Inconsistency in what can be charged for	Endorsed fee schedule sought	Conflict of interest around LACHS making heritage determination and providing fee for service
LACHS need to be able to charge 50% up front to cover their costs of carrying out the work	Ancillary fees should be funded by government	State should fund LACHS admin responsibilities, in lieu of this being a chargeable fee
An hourly or daily rate would be a more workable structure	No fee if no profit	Tie fees to market value
Funding needed	Regulation needed of fees and charges	Financial modelling needed to ensure LACHS can sustainably operate as a business
Proponents may need to fund translators	Not clear what services can be charged for Seeking indication of what fees will be	Endorsed fee schedule Tiered costs
Travel charged by the kilometre	Fee structure should be tiered	Fee for entire process - create certainty
Are there fees for tier 1 and tier 2 work?	Tiered fee structure No ancillary fees Clarity on what the fees will be	Fee structure: Lump sum or time/cost? Fees commensurate with other professionals, pay for all work done
Guidelines for Elder payments	Funding for pastoralists	Include fee for capacity building - training young people in the work Include travel expenses and accommodation
Existing native title agreements and fees	Community groups exempt, or government fund the cost Creation of monopoly	Legislative requirement, government should fund
Consider cost to LACHS, place-based considerations	Holistic agreement for whole land management	Fees to include: Admin, accommodation, travel, vehicles

	No to ancillary fees	Clarity around tier 1 and 2 fees
	Funding needed to support LACHS to meet commitments	Fee to include?
	Certainty around pricing	Negotiation and timing of fees
	Standardise fees	Need to know what fees are Legal structure of LACHS?
	Refund costs if new information halts a project	Clarity on fee structure
	Standardise fees across industry/government	Fee inclusion - travel and site visits
	Funding for LACHS	Equitable fees
	Endorsed fee schedule for LACHS	Fee structures
	Sustainable funding for LACHS	Within boundaries

OVERVIEW

Submissions relating to *What is a service people can charge for?* discussed a range of issues related to the structure of the guidelines and whether pricing should be standardised and regulated.

Stakeholders identified some gaps in information around fees for services that were not related to tier 3 ACH management plans and raised some other structural issues such as the need for a tiered approach. There was broad agreement on the need for clarity around charges for costs related to non-tier 3 activities, and enough funding to ensure the viability of LACHS carrying out the work.

There were conflicting views on those charges, with Aboriginal stakeholders raising concerns they would be expected to provide those services for free while proponents made money from activities in heritage areas, and some proponents advocating for those to be either at no cost, or government funded.

The main themes to arise included:

- What is a service people can charge for?
- Structure and scope of fees
- Modelling of fees
- Funding and resourcing
- Feedback on guidelines
- Agriculture
- Monopoly
- A tiered approach
- Regulation of fees and charges
- Holistic agreements

The following section explores these themes at a high level and includes relevant comments from the submissions for consideration.

WHAT IS A SERVICE PEOPLE CAN CHARGE FOR?

The following are direct responses to the question, what is a service people can charge for?

- Provision of advice and assisting proponents should include all reasonable work done at the due diligence stage and in responding to ACH permit notifications. Such advice and assistance may include:
    - Carrying out surveys so proponents can be advised where they may carry out activities without damaging ACH
    - How such damage can be minimised.
- Would LACHS monitoring tenements, applications, transfers, other changes, be a service LACHS could charge a fee for?
- Can you charge fees for ancillary services?
- Regional considerations important: having a range important; native title does it by the km a travel fee + over and above
- Would seeking over the phone advice to validate due diligences processes be a chargeable service?
- If the proponent has accommodation and other delivery functions, those such fees should not be charged in developing an Aboriginal Cultural Heritage Management Plan

- Proponent needs to pay for review of permits which takes a decent amount of time to review and consider properly.
- There should be no ceiling on fees and no capped fees. Fees should be on a project-by-project basis as required to get the job done properly.
- The proponent should be responsible for covering the full cost of Aboriginal consultation, not just the time spent in the field on a survey.
- The payment should include an hourly fee for time spent on the survey and a reasonable component for time spent off the survey (e.g., consulting with family/community about the proposed activity, undertaking research, preparing information for submission into a management plan etc).
- The payment should also include expenses incurred in addition to an hourly fee, including travel expenses and potential accommodation if overnight stays are required.
- If requested by Traditional Owners, the proponent should also pay the fee of an independent consultant, facilitator or communicator to work with the Traditional Owners and assist them with the process e.g., interpreting technical information or communicating with the proponent.
- Proponent needs to pay a fee for capacity building in the Aboriginal community. Participating in heritage surveys and consultation requires knowledgeable and skilled Traditional Owners who understand the process and what is expected of all parties. There is a need for capacity building in the community so that young Aboriginal people are ready to become the next generation of people who will participate in consultations. The proponent should pay a small fee towards training and developing young Aboriginal people to be involved in these surveys, including paying for them to attend heritage surveys with family members and having the opportunity to participate in the ACH management plan process.
- On-costs/administration fees/Accom/Travel Vehicles (corporate overheads) to be included
- Purchasing requirements and delegations of gov’t agencies
- Will fees include travel and site visits time?
- Include industry rates in consideration of reasonable fee
- Part application fee for administrative effort

- Provision for admin fees
- These Guidelines talk about fee schedules for Local Aboriginal Cultural Heritage Services (LACHS) when providing services, however we think that this document should also be supportive in mentioning that knowledge holder organisations and native title groups will also be setting fees for services as well.
- Fee schedule to reflect costs, region, local area

STRUCTURE AND SCOPE OF FEES

Stakeholders provided extensive general feedback on the structure and scope of the fees proposed in the guidelines. Aboriginal stakeholders raised concerns that under the current structure, they would be expected to do certain elements of the work for free. This related to services provided to the Department, the ACH Council, and activities related to tiers 1 and 2.

Comments from proponents generally sought clarity around the structure of fees, and suggested they be commensurate with other professionals engaged in similar work.

Comments included:

- We noticed that point 3 in Appendix 1 of the Fee for Service Guidelines advises that “a person designated as a local ACH service cannot charge a fee for services that it provides to the Department or the ACH Council in connection with any local ACH service functions”. We have to assume that this means that Government or the ACH Council will not have to pay for services provided by a LACHS. This is a pretty big statement to be hiding at the back of the Guidelines.
  This needs to be further explained and confirmed if LACHS will have to foot the bill for work requested by the Department or the Council. We also wonder whether other Government Departments will be able to ask ‘the Department’ or Council to request the LACHS to do work (for free), so that organisations like the Water Corporation will also not be paying for services. This should also be in the Fee for Service Guidelines.
- The draft LACHS Fee for Service Guidelines (draft LACHS Fee Guidelines) for phase two of the co-design process specify that LACHS will only be able to

charge fees “in relation to the delivery of the services associated with the development and negotiation of the ACH management plan”. ACH management plans are only required for tier 3 activities.

- The draft LACHS Fee Guidelines significantly limit the scope of activities that LACHS will be able to recover costs for, compared with the broad scope of services LACHS are expected to provide.
- LACHS are central to the operation and implementation of the Act. Section 48 of the Act contains an expansive list of functions they are expected to fulfil beyond the making of ACH management plans, including:
    - Engaging and negotiating with proponents, native title parties and knowledge holders about activities that may harm heritage (s 48(a))
    - Providing advice to proponents about the nature and extent of cultural heritage in certain areas (s 48(c))
    - Advising and reporting to the ACH Council about various matters (s 49(d),(e),(h))
    - Engaging with other LACHS (s 48(f))
    - Undertaking maintenance, conservation and preservation of cultural heritage on the ground (s 48(g)).

  Despite these very broad and complex statutory functions, LACHS have no statutory basis to charge fees for the majority of the services they will provide, including those that relate to three of the four “Activity Categories” under the Act. LACHS are also barred from charging a fee for the services they provide to Department or the ACH Council. The State has thus far not committed to providing adequate and ongoing funding and support to LACHS to carry out these functions. Rather, the expectation appears to be that LACHS, and the Aboriginal people that run and advise them, will perform the majority of their services and functions under the Act for free.

  The consequence of this is that Aboriginal people will be required to volunteer their time and expertise in the performance of numerous statutory obligations under the Act. This is fundamentally inconsistent with the value and importance purported to be placed on Aboriginal cultural heritage by the State. It fails to observe the principles outlined in s 9 and 10 of the Act that Aboriginal people should play a central role in the protection of Aboriginal

cultural heritage and the management of activities affecting it, and that ACH should be prioritised for the benefit of all Western Australians. Moreover, it will significantly limit the ability of LACHS and Aboriginal people to effectively carry out their roles and responsibilities under the Act, which will work to undermine the objectives of the Act itself.

Aboriginal people already undertake an extensive amount of unpaid labour to protect their cultural heritage against harm from the activities of proponents and others, for the benefit of the whole community. Under the current proposal, Aboriginal people will be further burdened with a significant amount of unpaid work under the Act, much of which is designed to assist proponents to make a profit by undertaking commercial activities that may harm ACH. The proposed process disempowers Aboriginal people and is contrary to the right to fair and equal remuneration for work recognised in articles 7 and 15 of the International Covenant on Economic, Social and Cultural Rights. LACHS, and the Aboriginal people that run and advise them, must be fairly remunerated and funded for all of their functions under the Act and their expertise on ACH must be properly valued.

- LACHS are expected to do a massive body of work for tier 1 and 2 at the costs of the LACHS.
- Existing native title agreements and fees should apply
- LACHS will be undertaking an important professional service once vested with these new responsibilities, therefore it is entirely appropriate that they recoup all costs and earn a professional income through the provision of these services.
- System to support proponents to do the correct thing
- Certainty of quotes
- There is little transparency in the fee structure that an Aboriginal party can change. One assumes that should the ACH permit or ACH management plan assessment process be bogged down then 'market' rates will escalate and be a valid marker for the fee structure.
- If an entity exists that should, under the new regime, be appointed as a LACHS, and if there is no other similar entity, there is no advantage to them agreeing to an externally imposed fee structure when they may be engaged to

perform the same functions with a proponent in the absence of a LACHS. This has the potential to become the most contentious issue.

- Fees also need to be set on the entire process, not necessarily on each step where the ability to continually charge for contact is available to the monopoly holder
- Are the fees on a lump sum or time/materials basis? Need to be clear.
- Set fees structure for defined projects i.e., river wall in private property.
- Standard fee across the state
- Needs to be equitable
- How do LACHS fee structures interact with specific or multiple ILUAs – setting a single fee structure might not work.
- Fees need to be commensurate with other professionals engaged on the project, for example, just like a senior knowledge holder such as an engineer or scientist should be paid an appropriate hourly rate, so should a Traditional Owner.
- Information from Department and ACH Council is free – this info should be free because it is a legislative requirement imposed by government
- If LACHS are providing fee for service, will they operate as a consultancy / contractor would in terms of signing onto 'Goods for Service' contracts, provision of quotes, liability insurances etc fitting in with local government procurement policies.
- Is the fee itemised? Is there an appeal process? If re-submission will there be another fee?

MODELLING OF FEES

Two comments within the submissions advocated for modelling to be carried out around the funding as part of the planning process.

Comments included:

- Further, as raised in our submission during phase one of the co-design process, developing the LACHS Fees Guidelines at this stage is premature given the absence of meaningful consideration, including robust modelling, of the cost of developing the capacity of LACHS to perform these functions and the separate ongoing capacity costs required for LACHS to perform these

statutory functions over time and in different regions of the State. We are not aware of any modelling undertaken by Department since its representatives conceded that no such modelling had been undertaken during phase one. We have offered on a number of occasions to contribute to such modelling based on over 40 years of experience managing the protection and preservation of Aboriginal cultural heritage across the Kimberley region, but that offer has not been taken up.

- Whilst this version captures a broader range of activities expected to be undertaken by a LACHS, we are still gravely concerned that the fee-for-service funding model will not work for many LACHS. As highlighted in our previous submissions, there are many additional activities that a LACHS will need to perform in order to keep an organisation fully functioning and sustainable, which will not be covered by fee-for-service provisions outlined. We again call on the Government to conduct a feasibility study into the establishment of the LACHS, and as part of this, to undertake financial modelling to ascertain the appropriate level of funding to sustain the LACHS and ensure that they can deliver the services that they are required to perform.

  We further recommend that international models of heritage funding be seriously investigated, such as that used in France, which require a levy to be paid towards the operation of local agencies responsible for the on-going conservation and management of ACH. In a similar way, LACHS require capacity and resources to continue operating when heritage assessment or consultations are not being requested –and to manage concurrent projects when they are. European funding models work off a marginal % of net project worth and therefore will be proportional to the size and nature of ground disturbance undertaken. Other fees and costs, e.g., for heritage assessments and consultations, could then be commensurate with industry expectations.

FUNDING AND RESOURCING

All stakeholders agreed that LACHS needed adequate funding and resourcing from the government to meet the administrative load the Act would entail.

Comments included:

- LACHS are being set up to fail. The proposal under the draft LACHS Fees Guidelines is insufficient to correct the power imbalance between proponents and the State on the one hand, and LACHS on the other hand; and is insufficient to put LACHS in a position to properly carry out their prescribed statutory functions. If LACHS are not properly resourced and funded, and their work fairly remunerated, they will fail at the expense of Aboriginal cultural heritage. If LACHS are unable to meet the administrative burden placed upon them, then there is a significant risk that otherwise avoidable harm to Aboriginal cultural heritage will occur.
- LACHS must be fully resourced for all direct and indirect costs associated with all aspects of their operation. PBCs are already massively underfunded for their considerable statutory duties, and funding needs to be paid upfront and enable a full and effective delivery of services. It needs to be a condition on mining tenement holder tenements that they fund such service providers and likewise for all other proponents such as government agencies, local governments and land developers. If the State cannot or will not fully fund these services for proponents, then it must be a condition of any proponent licence or approval that their licence or approval is contingent both on provision of funding but also getting a full and prior heritage clearance through the relevant local Aboriginal cultural heritage service provider before they can conduct their activities.
- Can Royalties be used to fund Aboriginal groups to do this work? 1% of mining royalties would sufficiently fund all LACHS – it's from Aboriginal country that mining and royalties are being generated so royalties should be used to fund the LACHS; only a very small amount is required to do so adequately
- The $10million committed by the State Government, over four years, appears woefully insufficient to the task ahead. The funding, and the actions of Government, suggest that the Government has decided that Industry will fund the majority of operation of the LACHS. Such a model would facilitate the potential commercialisation of Aboriginal Cultural Heritage.
- The above financial commitment by the Government was announced in the context of the Western Australian State Government having a general

government operating surplus for 2021-22 that was estimated by the Treasury at $5.7 billion. The WA State Government has the financial capacity to invest in the establishment of the LACHS. It has so far, chosen not to. Given the monopolistic powers to land access to the majority of the State being granted to the LACHS, the capacity of LACHS to fulfill their functions has to be a priority. Substantial funding has to be committed now to reduce the impact of the new legislation on the timeliness of approvals and the cost of doing business.

- If the State Government wants the LACHS to succeed they should fund the establishment and continued operation of their administrative activities.
- It is understood that LACHS will be able to charge a fee for service and that a reasonable fee structure needs to be approved by the ACH Council prior to a LACHS being established. However, it is also understood that LACHS won't be able to charge for responses to ACH Permit notifications, which will likely become one of the biggest administrative tasks for LACHS. It is therefore suggested the State consider providing further funding to LACHS in lieu of ACH permit notification response fees.
- Proponents shouldn't have to subsidise ACH-Government should pay for clearance surveys-Government should pay for ACH plans to be organised because government want the plans to happen

FEEDBACK ON GUIDELINES

Direct feedback on elements of the guidelines was provided across all stakeholder groups. A recurring question from all groups centred around whether fees could only be charged for the development of an ACH management plan, or whether fees could be charged for costs associated with performing a LACHS functions as an organisation.

Further discussion from Aboriginal stakeholder revolved around the sustainability of LACHS under a structure where they potentially could not charge their administrative costs, the complexity of the work itself, and the impact this would have on determining fees.

Proponents sought further clarity from the Guidelines around what the fees would be and who was responsible for consultation costs.

Comments included:

- On page 6, point 5.1, the guidelines are misleading when it mentions a LACHS can only charge fees for the delivery of services associated with the development and negotiation of the ACH management plan. Under s34(b) of the ACH Act, a LACHS can charge fees for service for costs associated with performing its functions which, under s48, go far beyond negotiating and developing an ACH management plan.
- The fee-for-service guidelines should make it clear that fees can be required to be paid before the services are provided. Most LACHS will not be in a position to afford or take the risk of incurring costs that may not be recovered. It is essential that they can ask for fees in advance. LACHS should be able to charge a minimum of 50% of the agreed upon budget estimate, prior to the works proceeding.
- The reference to historical fees and charges on page 7, point 5.2(2), could be problematic if these are set in stone for some time. This could, in turn, prevent market rates from increasing by not approving fee rises. Fees and market rates have risen substantially over the years, and it is necessary for any schedule of fees to allow for increases in the same way.
- In relation to page 7, point 5.2(5), there is a problem with setting fees on the basis of deliverables because the cost of providing such deliverables will vary substantially depending on the facts of each case. For instance, the size of an area surveyed, distance, terrain, complex archaeology or ethnography will all involve different time and personnel for a similarly described deliverable. A far more sensible approach to a fee schedule would be an hourly or daily rate. Short, simple work will be cheap while longer surveys and reports and more complex negotiations will cost more. If proponents need some certainty, they can reach a funding agreement with an approved budget in advance for each area. However, that should not be determined in the abstract by a generic list of deliverables and fees.
- Item 5(b) on page 6 and item 5(d) on page 7 Consultation Guidelines - Proponents are asked to be aware that English may not be the first language of people consulted. The guidelines should specify that, in those circumstances, proponents will need to fund translators for the group.

- Supportive of the development of a fee for service schedule for LACHS that is reasonable, relevant and reflect market rates. Noting that a $10 million budget has already been established by the State to fund LACHS, request that this budget is reviewed regularly to determine its adequacy to support LACHS so that they are able to provide services in a timely manner. Support and training that may be provided by Department to LACHS should not be drawn from this budget.
- The guidelines as they stand allow the ACH Council to determine if a LACHS proposed fee schedule is reasonable. It is recommended that the guidelines are updated to ensure consideration of established heritage agreements and fee schedules that sit in existing heritage agreements.
- The Draft Guideline should be amended to acknowledge that LACHS will be bound by an endorsed fee schedule for any fee for services charged in connection with any LACHS service provided.
- These Guidelines refer to the development of management plans only. It is not clear in this Guidelines whether LACHS can charge for other activities such as Due Diligence requests. This needs to be clarified. Services other than management plans should be funded by the State Government.
- The Draft LACHS Fee for Service Guidelines provides clarity around the fee structure they are required to comply with. However, without any indication of what the fees will be no clarity is provided around the financial implications for Proponents. Additionally, it is not clear what services LACHS can charge for.
- The LACHS Fee Guidelines need to clearly state that fees can only be charged for work undertaken to develop and negotiate a management plan (not for work relating to a Permit).
- The LACHS Fees Guidelines should make provision for regular reviews of fees.
- If proponent invests in a project, which has an ACH management plan and new information comes to light that stops the project, the proponent should be refunded the costs of the project by the government
- The draft does not address who is responsible for the costs of the consultation. This must be made clear. For example, what is the Government’s consideration of the proponent’s position if the Aboriginal party

refuses to engage in consultation unless their costs are fully met (which is common in relation to native title and Aboriginal heritage consultations under the *Native Title Act 1993* (Cth) and the *Aboriginal Heritage Act 1972* (WA)? Section 101 of the Act does not require a proponent to fund the consultation costs of the consultees.

- Doesn't appear to cover permit applications/assessments.
- A clear statement should be included in the Draft Guideline that each party is responsible for its own costs of consultation.
- No fees or charges for tier 1 or tier 2 activities
- Due process for any changes to fees for tier 1 or 2 in the future

AGRICULTURE

Pastoralists raised concerns about the viability of conducting their business as usual under the Act. Comments included:

- Agricultural practices should be exempt. It would be non-viable to have to have every paddock inspected to carry out normal agricultural practices. It adds another layer of costly red tape.
- Potential costs and fees developed through this guidance may be cost prohibitive to many pastoralists. This could lead to risks in terms of operations where pastoralists choose not to progress important work to maintain their lease and meet requirements, or avoidance of effective engagement and management of ACH due to the prohibitive costs in the view of pastoralists.
- The State should make available adequate funds to support pastoralists in engaging in these matters; or recognise on an annual basis a 'return' which can be lodged with the State which is deducted from annual leases costs.

MONOPOLY

Some proponents raised concerns that the LACHS structure would create a monopoly situation, resulting in higher fees.

Comments included:

- The Act creates a monopoly for each LACHS or other entity for the evaluation of cultural heritage for a particular area. The heritage value may be intangible, and may (have) come into being at any time, past present or future. The

evaluation of heritage may not be questioned, even by the Minister for Heritage and may be kept secret for reasons of cultural sensitivity. And the draft regulations allow LACHS to set their own fees? It is hard to see how this will not foster corruption. It is astonishing that the state government has set out to create conditions such as these. LACHS or their equivalent should not set their own fees.

- The Government is granting a monopoly over the provision of substantial and vital Aboriginal heritage services. It is beholden on the Government to ensure that accessing such monopoly services does not have an excessive cost and that the LACHS are resourced appropriately to undertake their regulated role.
- The Federal and State Government should cover all costs associated with fees and charges as this is being imposed by them. Perhaps then we won't be charged exorbitant and over inflated fees and charges for services that are solely at the discretion of the stakeholder who receives the monies. This is known as a creating a monopoly and contradicts the Federal Competition and Consumer Act 2010 (Competition and Consumer Act).
- An agreed set fee must be stated by the state government. A monopoly will be given for those in place requesting fees, there's no opportunity to create a healthy competitive sector which COULD lead to astronomical fee requests.

A TIERED APPROACH

Proponents advocated for a tiered approach fees to allow for differences in the size and scale of projects and organisations.

Comments included:

- No fees should be charged in instances where the applicant is undertaking works on behalf of the public and will not benefit financially from them.
- Proponents from different industries are seeking approvals to undertake works for different purposes and consequently different fee structures should be established for different industries through a tiered approach. Registered charities and volunteer organisations, not for profits and tax funded government agencies should all be charged at a lower rate than profit making companies and corporations.

- LACHS fees need to cover the costs of LACHS undertaking the functions set out in the legislation, while at the same time being affordable for different Proponents and recognising that different landholders conduct activities for profit or not-for-profit. It is recommended that differential fees be developed for different size/ type of proponent and that fees and charges be regulated such as those within planning legislation.
- Local Governments, Charities, Not for Profit Organisations or Community Groups should be exempt from being charged any fees.
- Fees to be based on activity and tier (against risk assessment matrix as identified in Fact Sheet 1 and 2), as well as purpose (for example, public value versus commercial interests) and rated according to outcome. These fees should be applied proportionally depending on the type, size and scale of the activity and risk of potential impact to ACH.
- To give proponents certainty, perhaps a state-wide fee schedule could be applied, with variation included for experience levels and regional expenses? If the government, through the ACH Council, agree that a higher rate ought to be charged, then the gap could be subsidised by government and recouped through future earnings/royalties if approved...? I know we are talking chicken feed sums for some here, but there are vast differences in pocket depth between different proponents so care needs to be taken to ensure that fees global mining companies are willing to pay does not become the common currency.
- Consideration of ability to pay – tier 3 – retaining wall vs mining.
- Can fees be structured according to who the proponent is? i.e., small prospectors vs big mining company.
- Scale of fees to ensure equity for proponents across the State (e.g., similar to lawyers)

REGULATION OF FEES AND CHARGES

Proponents sought regulation of fees and charges by the state government, via an endorsed fee schedule, to ensure that fees remained “reasonable.” Various suggestions included tying fees to market rates and providing clear guidelines around payment terms.

Comments included:

- It is appropriate that a LACHS be compensated for undertaking the functions set out in legislation. However, in circumstances where a LACHS will become the only provider of services, it is prudent that a LACHS fees and charges be regulated. As it stands, there is significant uncertainty regarding the fees that a LACHS can charge. A fee schedule that sets appropriate thresholds and recognises the public interest in a proposal will be vitally important to achieving the objectives set out in the Act.
- Relevant market values for fees.
- Should be a “one stop shop” for proponents not an algorithm
- The fees across Western Australia should be standardised across all industries and government agencies. All tiers of Government should be expected to pay the same rate as Industry.
- The Draft Guideline should be amended to acknowledge that LACHS will be bound by an endorsed fee schedule for any fee for services charged in connection with any LACHS provided.
- Mining sectors will be able to cover fees, however Local Government/small scale private sectors will not be able to match the kind of fees requested of the mining sector. Again, there must be a reasonable set fee stated by the state government, or the ability to apply to the minister should a fee be completely unreasonable.
- Concern that Local Government will be paying anything that the LACHS ask as 'reasonable costs for expenses' in order to facilitate approvals
- It is unclear whether there is any Ministerial or other oversight of the ACH Council who are empowered to approve a variation to the fee structure.
- Fees for some services such as the issuance of a permit should be capped (unless exceptional circumstances).
- Has the potential for significantly budgetary implications for small Local Governments. There is a conflict of interest perception where a LACHS is making both the determination (tier 2 or 3 and therefore permit or management plan requirement) and also providing fee for service functions.
- I understand that it is inappropriate for the department to dictate what fees a LACHS should charge but, on the other side of the coin, as the proponent

does not have 'free market' choice in this matter the ACH Council will need to be very transparent in how it assesses 'reasonableness' in terms of fee structures. ACCC advice on how to navigate this tricky issue will be paramount.

- Clear guidelines regarding terms of payment.
    - Is it flexible?
    - 30-day invoice?
    - Fee for Service – management plans
    - Who pays? Proponent
    - At what stage do they pay? - clarity
    - How to get governance and consistency for different levels or advice given.
    - Consistency on fees at different levels.
- Requirement to publish a schedule of fees and charges annually

HOLISTIC AGREEMENTS

Some proponents suggested alternative approaches to fees from a “big picture” angle. While the focus here was around seeking certainty on potential costs, the discussion echoed feedback on other themes, (particularly from pastoralists) around the potential for overarching agreements that would enable large operations to work with LACHS without creating separate agreements for business-as-usual activities.

Comments included:

- With words like “must negotiate...” this concerns proponents about open-ended costs. It would be great to see holistic agreements between proponents and PBC/Representatives for the whole land management, not just the current project.
- Further and sustainable funding will be required to support the full engagement of LACHS within a new system. Industry is motivated to support this vital ‘capacity building’ process, however this will require a holistic approach which captures more than solely fee for service elements supported by proponents. The demands placed on a LACHS by the ACH Council, the Department and the systems created must also be considered and addressed by government. The potential to work collaboratively with the Commonwealth

Government on an aligned approach to the sustainable funding of PBCs overall should also be pursued. Strongly recommend the prioritisation of additional funding allocation in the 2022-23 budget process for the delivery of this important government reform.

- Makes sense to lodge everything you can at once – this will be difficult considering all the additional costs that come after consultation has brought about new conditions. Maybe agree to a % of capital costs instead of an hourly rate? Need to rethink going forward how rates / fees are applied. Rates to be dependent on purpose of works i.e., mining vs a coastal path.

FURTHER QUESTIONS

The following further questions were posed by stakeholders in their submissions:

- Can a LACHS require a proponent to use a specific heritage service?
- How will fees for the management plans be monitored, controlled, and audited?
- What happens with payment for knowledge holders outside of LACHS?
- Coverage of insurances e.g., monitors, outside of LACHS?
- In the event of changes/cancellations, are proponents or the LACHS providing a fee?
- Can we have a sample/template for “Reasonable fee #5 – the specification of deliverables provided through the function”?
- Will resources be redistributed to lower activity regions i.e., Perth/Peel region vs outer regions so they can cover monetary costs?
- Unreasonable fees being charged! Who intervenes to resolve the dispute?
- Can/do LACHS publish their fee schedules for proponents – to assist in transparency and certainty i.e., as a guide to management plan proponent?"

- How much influence will proponents have?

Is this fee reasonable?

Table 11 below shows emerging themes from the submissions about *Draft Fee For Service – Is this Fee Reasonable?* through the lens of Aboriginal stakeholders, proponents, and other (inclusive of State Government, service providers, archaeology and heritage consultants, and general community).

Table 11: Emerging themes about is this fee reasonable?

Aboriginal Stakeholders	Proponents	Other
Tax status of fees	Regulation of fees	Financial sustainability of LACHS
Adequate funding of LACHS Transparency and good faith of LACHS	Provision for appeal Cost recovery only	No profit/public benefit - reflect in fee
Funding needed up front to pay for functioning of LACHS	Tiered fees No profit/public good - no fee	Rates tiered to purpose of works
Heritage survey logistics have considerable costs	Regulation of fees and charges/state-wide fee schedule Tiered rates, Greater certainty	Tiered Rates
One size fits all approach to funding will not work	It is essential fees are not excessive	Risk of monopoly Regulation of fees
Fee for service guidelines - Government/Local Council to fund	Funding and training for PBCs	Legislative process, state should cover cost
Consider cost to LACHS, place-based considerations	Clarity needed around funding for non-ACH activities for LACHS	Government funding needed Tie to CPI
Consideration of level of experience	Tiered fee structure for local governments	Certainty around fee structure
	Fees are high, relationships are strained	Region-specific rates
	Regulation of fees	Regulation of fees
	Fees are high	Review of fees

	High fees will make projects unviable	Paper trail - build trust
	Efficiency of LACHS operation in a monopoly environment	Cost may be prohibitive
	Broader agreements	Fees tied to project specifics
		Rates should be commensurate with market and skill rates in the same region
		Regional considerations
		Invest in capacity development
		Regulation of fees
		Funding needs to be adequate
		Existing agreements and fees
		Sliding scale for fees
		Budget priorities
		Sustainability of LACHS
		Scope for negotiation
		Risk profile of not being able to afford activities

OVERVIEW

Submissions relating to *Is this fee reasonable?* discussed similar themes to the previous section. Stakeholders identified that up-front funding for LACHS to employ staff and deliver work was critical, and discussed issues around transparency, instances of existing fees, and tiering fees for project size and scale.

There was broad agreement on the need to fund LACHS and have clarity on fees for work carried out outside of management plans.

Aboriginal stakeholders sought certainty that they would be funded to carry out the work. Proponents sought to ensure that fees would not be prohibitive to projects being carried out.

The main themes to arise included:

- Funding and resources
- Work outside of management plan context
- Transparency
- What is a reasonable fee?
- A tiered system

The following section explores these themes at a high level and includes relevant comments from the submissions for consideration.

FUNDING AND RESOURCES

Funding and resources for LACHS continued to be a significant theme for all stakeholders in this section. Aboriginal stakeholders discussed the complexity of anticipating the workload in vastly different geographical contexts, the need to be adequately resourced to meet the workload in terms of staff, and importance of funding of fees being paid upfront to allow the work to proceed.

Proponents generally agreed that base funding for LACHS to deliver services was critical. Some stakeholders suggested that fees be tiered to levels of experience.

Comments included:

- There is differing capacity amongst LACHS to carry out the functions under the new Act with some operating on extremely limited resources and funding to carry out existing functions. Funding should be provided based on an assessment of each LACHS particular circumstances.
- It is difficult to anticipate the level of work that will be incurred subject to the new Act, however functions under Section 48 would almost certainly require the addition of new staff. This is not possible if we are reliant on fee-for-service funding from proponent; and any funding ‘gaps’ between fees from proponents would need to be covered by additional funding from the CEO of the Department.

- All funding, including funding from proponents and from the CEO will need to be paid in advance in order to meet ongoing staffing and employment needs.
- In this particular instance the LACHS would further require up front funding to establish and set up the processes and steps required under the Act. In this instance the LACHS covers a vast area and is rich with cultural heritage that is not captured by the ACH Directory. Often entries on the ACH Directory are erroneous. Under the current arrangement, the LACHS would need to undertake significant, further research and consultation to identify and collate data and manage cultural heritage for the purpose of assessment of notices under Act. At a minimum, this would require funding for the establishment systems for record keeping and collation of cultural data and ongoing funding for a Heritage Officer position in order to effectively fulfil obligations to protect heritage.
- In order to carry out obligations under the Act, the LACHS would need to mobilise staff to travel to communities to engage with and seek the views of the relevant people. In this instance, this is a significant logistical exercise for the LACHS with considerable costs involved. Due to the very remote nature of the area, any travel and mobilisation is likely to be costly and is outside of the currently funded abilities of the LACHS. Any funding needs to take into account all the costs incurred.

  As such, a 'one size fits all' approach to the funding of LACHS across Western Australia is unlikely to work in relation to funding for meeting the LACHS obligations under the Act.
- Some functions that will require funding will only be known later on and there should be the ability to apply at later dates for further funding requirements, not assuming all items that will require funding will be known up front.
- Level of experience should be tiered with fees
- Given this is a state introduced process that there should be some costs associated with this covered by the state
- Due to the public good provided, LACHS should receive ongoing base funding from Government and not be totally financially reliant on the fees they charge to proponents to develop ACH management plans.

- LACHS do have to make enough money to provide the service though. Forced to be a compliance body so need to ensure they can conduct that role. Very challenging set of circumstances to work through.
- Is there scope for negotiation with LACHS? Council approves the fee structure which would need to be standardised. Currently fees are dramatically different across the State. Risk will increase if we cannot afford certain activities.

WORK OUTSIDE OF MANAGEMENT PLAN CONTEXT

All stakeholders sought clarity around fees for service outside of ACH management plans, in terms of capacity building and resourcing for LACHS, and certainty around the nature and amount of fees in different scenarios for proponents.

Comments included:

- This needs to be further explained and confirmed if LACHS will have to foot the bill for work requested by the Department or the ACH Council. We also wonder whether other Government Departments will be able to ask 'the Department' or ACH Council to request the LACHS to do work (for free), so that organisations like the Water Corporation will also not be paying for services. This should also be in the Fee for Service Guidelines.
- No guidance is provided regarding the ability of a LACHS to charge fees outside of an ACH management plan context, including for example, where a proponent consults with a LACHS as part of a Due Diligence Assessment. The City advocates for greater certainty in terms of when a LACHS can charge a fee and what that fee will be in any given scenario.
- The fee schedule refers only to activities LACHS must undertake in relation to ACH management plans. As fee for service arrangements for LACHS are an essential part of the capacity building for PBCs, it is important there is clarity regarding the functions which will form part of the fee for service guidelines and those that will be the subject of separate funding streams.
- Department investigates and confirms whether a financially sustainable model beyond seed-funding will be provided to LACHS to ensure sustainability and ongoing effectiveness. LACHS be given the ability to recoup funds prior to tier 3 activities to allow an ongoing and sustainable source of income.

TRANSPARENCY

Stakeholders discussed the need for transparency around fees to ensure everyone acted in good faith. Points raised included a provision for appeal if a proponent felt fees were unreasonable, risks around monopoly providers, paper trails, and linking fees to treasury guidelines.

Comments included:

- Question the potential for conflict of interest where LACHS representative have no requirement to act in good faith.
- Need to be an undertaking not to incur excessive and unnecessary cost to the proponent to make the proposed project unviable
- For the LACHS representative to be required to not delay or inhibit unnecessarily, be clear and transparent
- There needs to be provision for appeal if the proponent feels the fees are excessive. Also, what protections will be in place to prevent knowledge holders or other Aboriginal groups from charging unreasonable fees where there is no LACHS?
- It is not appropriate for fee variations to be approved by the ACH Council upon request, fees should be linked to treasury guidelines and not a part of the relationship between ACH Council and LACHS but on a basis of good governance.
- All has to be through the books, ensure there are paper trails
- The LACHS cannot be compared generally to any other “organisation or individual providing a service”. Each LACHS will be a monopoly provider for its area as per s 36(3) of the Act.
  Generally, the pricing and efficiency of service providers is determined by market forces. If a service provider is overpriced or too inefficient, then there will not be demand for services from that provider and ultimately the providers business will fail. LACHS will not be subject to those market forces and accordingly there will be no incentive or compulsion for efficiency.
  Nothing requires a LACHS to operate in an efficient manner. The Act only regulates “timeliness” in s 48(2) of the Act.

It is questioned what value the recent historical fees and charges levied by “former incarnations” will be. Most fees, charges, percentages of expenditure and royalties are commercially confidential. The recent historical fees and charges levied were based on a different cost structure under different legal obligations.

Without some incentive or compulsion to operate efficiently, then basic economic theory suggests it is likely that the fee charge by a LACHS will be greater than that which would otherwise be provided by a competitive market. There is nothing in the Guideline to stop the LACHS from always providing a “premium” service with a “premium fee”.

"With words like “must negotiate…” this concerns proponents about open-ended costs

- There are big concerns that a group that has the monopoly on providing a service, also are allowed to set the fees with no guidelines
- For specification of deliverables, paper trail should be given to all parties to ensure representatives are aware of all reports/consultations

WHAT IS A REASONABLE FEE?

The question *What is a reasonable fee?* was addressed indirectly for the most part. Proponents were mostly concerned with ensuring fees were not excessive to the point projects would be abandoned. A few cited examples of fees they considered unreasonable.

Comments included:

- Tax benefits, can the fees be tax deductable?
- The Government must make a choice as to how much they consider the cost of access should be to undertake economic activities in Western Australia. The Department defers to the ACH Council to set the fee schedule, but there has been limited acknowledgement that the fee schedule is not how much will be charged for land access it will merely be the calculus for it. The process for determining these costs will rely in part on the existing costs. The existing costs can be considerable, for example a company was charged $785,118.40 for a community meeting to undertake native title negotiations. This amount was subsequently revised to $564,965.502. Over half a million dollars to begin

negotiations (where the finalisation of any agreement might require multiple such meetings over more than a year) is excessive, unreasonable, and unsustainable for the resources industry.

- It is now commonplace for mineral exploration companies to be charged between $15,000 and $25,000 per day for cultural heritage surveys, with most surveys exceeding $100,000 in total.
- Fees need to be able to demonstrate they are cost recovery only and not in excess of this, in line with the Costing and Pricing Government Service Guideline. As effective monopolies, LACHS should be subject to regular audits.
- No fees should be charged in instances where the applicant is undertaking works on behalf of the public and will not benefit financially from them.
- Under the current model, there will be occasions where the cost of obtaining approvals will exceed the actual cost of implementing projects and this will have obvious implications on the ground (i.e., projects could be scrapped, and funding directed elsewhere).
- It is essential that fees are not excessive and cause a proponent to abandon a project, existing information could be utilised in some cases
- At a recent phase two rollout of the ACH held in Carnarvon on the 28th of July, a stakeholder commented that the last Heritage Survey cost $33,000. The Department presenter laughed and joked that "we were lucky to get it that cheap". This comment was more than insulting and indicated to the room the true intention of some of the beneficiaries of this Act. The average proponent cannot afford anywhere near that amount and will encourage proponents to do the wrong thing and incite racism.
- The operation of the LACHS will be due to statutory requirements and therefore the fees should reflect this element.
- Take into account the size of the parties, proponents should not have to pay 10 people $500 a day
- Need to be an undertaking not to incur excessive & unnecessary cost to the proponent to make the proposed project unviable

- Fees should relate solely to the service provided, not the development, impact, or proponent, unless those factors directly make the service provided more costly.
- Fees and charges should be set at a reasonable level, in line with similar charges in other jurisdictions, that increase annually at CPI. Western Australia should avoid the experience of other jurisdictions where the costs of cultural heritage increase significantly over time.
- Need a regional based rate (or local depending on the capacity of the LACHS)
- Fees may fluctuate for extreme contractors i.e., engineers - > ensure externals charge reasonable fee
- Set the bar high but be reasonable
- If prices are too dear there will be less businesses willing to participate in works.
- Rates for each person to be the same as other people with similar skills doing similar work in the region
- Survey quote is 30k vs mitigation costs of 3k, do you abandon the mitigation due to cost or purely do not have the budget to cover?

A TIERED SYSTEM

Discussions continued in this theme about the potential for a tiered system to account for the different kinds of organisations and scales of project that would come under the act. Proponents raised various scenarios, such as hobby farmers and projects that were for the public good.

Comments included:

- It appears that the Fee for Service Guidelines have been prepared with private entities in mind. Local Governments rarely benefit financially from the projects they undertake, and the Fee for Service Guidelines should be amended to reflect this.
- In circumstances where a LACHS will become the only provider of services it is prudent that LACHS fees and charges be regulated. As it stands, there is significant uncertainty regarding the fees that a LACHS can charge. A fee schedule that sets appropriate thresholds and recognises the public interest in a proposal will be vitally important to achieving the objectives set out in the

Act. Therefore, recommend the implementation of a state-wide LACHS fee schedule, similar to the kind provided in Planning legislation. Also recommend that differing fee rates for different types of activities should be considered (e.g., mining company v local government authority).

- Local Governments provide facilities and services for the benefit of local communities and operate on a not-for-profit basis, obtaining revenue from rates, Commonwealth Financial Assistance grants, borrowings and fees and charges. Accordingly Local Governments should be considered at a different fee schedule than commercial activities which are being undertaken for profit.
- LACHS fees will need to be paid by a wide range of members of the general public when complying with the Act. For example, families residing on blocks greater than 1100m2, non- profit associations (local football clubs) and small hobby farming retirees. The fees should accordingly not exceed the minimum cost if the service were provided by an independent efficient service provider.
- What if development is purely for public benefit? Budget priorities will shift. If development will not be making money, should it not be reflected in the fee? Nobody has unlimited funds so need to find a balance.
- The current fee structure is based on what large mining companies can afford, not what a small family business can afford
- Fee schedule could be based on value of proposed project
- Level of experience should be tiered with fees
- Consider sliding scale for fees within the context of the application.
- What if development is purely for public benefit? Budget priorities will shift. If development will not be making money, should it not be reflected in the fee? Nobody has unlimited funds so need to find a balance.

Draft State Significance Guidelines

Questions

- What else should be considered, by the ACH Council, to determine whether ACH may be of State significance?
- Any other comments?

Table 12 below shows emerging themes from the submissions about the Draft State Significance Guidelines, through the lens of Aboriginal stakeholders, proponents, and other (inclusive of State Government, service providers, archaeology and heritage consultants, and general community).

Table 12: Emerging themes about State Significance Guidelines

Aboriginal Stakeholders	Proponents	Other
Consult with LACHS/knowledge holders at a minimum	Process for early assessment of ACH to avoid delays	Support for this assessment
Process is problematic	Time and cost structures for this process	Revise definition of scientific
Places with state significance should be protected from impacts - small impacts can become large over time	Determine state significance now	Anyone in WA should be allowed to nominate a site
Consideration of State significance should be included in applications for permits	Impact of prior disturbance?	Revise guideline - does not need to meet all values, can meet one value and be of state significance
What additional protections will be afforded, given the Minister has the final say?	Compensation for pastoralists if impacted by a site of state significance	Examples needed
Fails to place Aboriginal people at the centre of decision making	Include: Threshold for state significance Clear process for formal assessment	Inclusion - sacred sites
Threshold trigger needed	Interaction with *Heritage Act 2018*	

Guidelines display non-Indigenous concepts of what is State Significance. Should specifically include Aboriginal significance in the definition.	Pathway to nominate sites for State Significance outside of management plans is needed	
Aboriginal people should be making the decision as culturally appropriate	Threshold trigger for site assessment Clear guidance on who is an interested party	
Include spiritual aspect under social	Threshold needed for defining what would meet State Significance	
Return of artefacts	Clarify role of local government service delivery requirements	
How will sites be managed?	Clarify role of local government service delivery requirements	
Protecting IP	Process and management of state significance sites	
Consideration: Shows connection across the state, e.g., songlines	Early registration of sites	
Cultural significance - medicine plants, healing water, missions, burial sites, massacre sites, tracks, rivers	Process to determine Likelihood of larger landscapes being defined? Tourism while protecting sites	
Burra Charter doesn't provide specific guidance for state significance	Status of Commonwealth Protected areas	
Resources needed	Will an ACH management plan trigger state significance? - early heads up	
Conflicts of interest	State Significance triggers	
Consider a statement of the heart, written in language, to embed cultural context and reflection in the document		

Clarity on protections, consultations with ACH Council or parliament		
Educational aspect of site		
Consider environmental values		
Sites identified in workshop		
Consideration of state significance to be included in the applications for permits. Also, to include places to be considered of state significance without needing to be part of due diligence process.		

OVERVIEW

Submissions relating to the State Significance Guidelines discussed mechanisms for determining state significance, including the need for threshold triggers and separate mechanisms outside management plans to allow for proactive management.

Stakeholders identified considerations around types of significant places, and different cultural approaches to determining what was significant. There was broad agreement on the need for a separate mechanism and threshold triggers to identify sites.

Aboriginal stakeholders sought to be at the centre of this decision-making process about their cultural heritage, and for the assessment factors to include cultural and spiritual aspects.

Proponents wanted ways to know early if a state had state significance, and to understand what the triggers for that determination were.

The main themes to arise included:

- Separate recognition
- Final decision
- Aboriginal voices
- Assessing state significance
- Threshold triggers

- General considerations

The following section explores these themes at a high level, and includes relevant comments from the submissions for consideration.

SEPARATE RECOGNITION

A broad range of stakeholders called for a separate recognition process for sites of state significance, outside of ACH management plans. Aboriginal stakeholders sought mechanisms for early assessment, and proactive management and protection. Proponents similarly sought pre-emptive determinations that would give early warning and/or public information for their planning phases.

Comments included:

- We noticed in the Introduction on page 5 of these Guidelines that "consideration by the ACH Council as to whether ACH is of State significance only arises where there is an application for approval or authorisation of an ACH management plan".
  It seems that ACH management plans will usually be applied for if there will be an impact to ACH. This section seems a bit out of place for heritage protection. Places of such high significance as State significance should be able to be recognised separate to an intention to impact the place and be protected from impact.
- If this level of heritage is really part of the way that Western Australia identifies itself as a State and will include places of high cultural significance to Aboriginal people, then we believe that consideration of State significance should be included in applications for ACH permits and that there should also be a process where places can be put up for consideration of State significance without needing to be part of due diligence considerations to impact the place. This would bring proper protection early to these important places so they can be protected, not slowly chipped away at over time
- There are no obvious triggers or mechanisms for it to be brought to the attention of the ACH
- An assessment of State Significance is triggered only once an ACH management plan has been lodged with the ACH Council, with no ability for an earlier assessment to be requested. A process should be included that

allows an application for assessment of ACH that may be of State Significance to be submitted prior to an ACH management plan being submitted for a preliminary assessment, to avoid delays to the approval/authorisation process of the ACH management plan. This would allow Parties the opportunity to proactively develop management options for heritage values preliminarily accessed as being of State Significance during the agreement-making phase of the development of an ACH management plan.

- Exempt Activities and tier 1 activities can still be done in State significant places without any real checks in place for protection and tier 2 activities just need a ACH permit. We therefore wonder what the point is with people being able to do these activities and impact these important places when there is no process to consider and recognise them as State significance. All of these smaller impacts can add up and become large impacts over time and so a place that would be considered State significance if consideration happened could be impacted slowly to the point where State significance and protection is not given later on.
- How about consideration of the State actually determining (pre-emptively) within the metropolitan regions what areas of State significance exist now and provide this as public information
- Consideration should be given to the Assessment Criteria for Cultural Heritage Significance for places for entry into the State Register of Heritage Places as per the *Heritage Act 2018*.

  A pathway is needed to allow sites to be nominated for State significance in the absence of a development or activity proposal. This does not appear to be the case at present. While the practical case for nominating sites following the assessment of a management plan is obvious (most sites will need to be investigated in detail before this can be known) it should not be the only pathway
- There may be confusion with this one and Protected Areas. Project managers want to identify and get areas of significance for Traditional Owners on the state significance register. Asked if they can start this process before the

submission of an ACH management plan so that they don't have to wait the proposed 40 days.

- Note: I think there is still some confusion about "state significance". Interesting to hear that some Traditional Owners have indicated that they want support to advocate for certain ACH to be "nominated" for State significance (rather than Protected Areas?)"
- Why is State significance triggered by someone wanting to bulldoze it?

FINAL DECISION

Aboriginal stakeholders questioned the Minister's discretionary decision-making ability, raising concerns that that final say would impact the integrity of cultural heritage by failing to place Aboriginal people at the centre of decision-making.

Comments included:

- It is unclear from the draft State Significance Guidelines what, if any, additional protection will be afforded to ACH that is of State Significance, as the Minister has the final say in authorising activities that may harm ACH that is considered to be of "state significance". Further, while the Act purports to balance the interests of Aboriginal people and the broader Western Australian community, it appears that cultural heritage which is deemed significant by non-Aboriginal people is positioned to be afforded greater protection than cultural heritage that is self-determined as significant by the custodians of that heritage.
- The Minister's discretionary decision-making ability provided by the draft State Significance Guidelines undermines the object of the Act that recognises the fundamental importance to Aboriginal people of ACH and the central role of ACH in Aboriginal communities. The draft State Significance Guidelines again fail to place Aboriginal people at the centre of decision-making with respect to their own cultural heritage and its significance.

ABORIGINAL VOICES

Aboriginal stakeholders advocated for Aboriginal voices, knowledges and viewpoints to be central in the understanding of what constituted state significance and urged that *state significance* specifically include *Aboriginal significance*.

Comments included:

- Local decisions, values and priorities regarding cultural heritage need to be taken seriously and not be superseded by an external agenda and process that seek to claim significance on behalf of the State of Western Australia. The values associated with cultural heritage are often specific to each area with differing values placed on them according to connection to Country. The concept of an evaluation process for a State-wide ranking system is highly problematic and is incongruous with the ways heritage places are valued. At a minimum, consultation with the LACHS/ knowledge holders should be undertaken before a decision is made in relation to State significance.
- Will this Act affect the return of artifacts from museums back to Aboriginal people?
- Could the new council please consider a preface / vision statement / from the heart, under objects and principles about the intention of the document. Possibly written in language and to embed the cultural, context and reflection.
- These guidelines display a very non-Indigenous concept of what amounts to State significance. ACH is only given State significance based on what is important to the dominant culture in the State. For example: the reference to historical value refers only to post-contact history. This fails to consider Aboriginal viewpoints of importance as part of what is significant to the State. Similarly, social value refers to the value to the wider WA community. The danger is the most important place to an Aboriginal group, under their cultural rules, might not be considered significant enough if not shared by the numerically wider community.
- State significance should specifically include Aboriginal significance. There should be a recognition that high significance to Aboriginal people should be sufficient to give rise to State significance. This would put the State situation into a similar position to the Commonwealth *Environment Protection and*

Biodiversity Conservation Act 1999 which includes Indigenous heritage values as part of national heritage. Failure to do so would be a backward step.

- Further spiritual and cultural significance should clearly be recognised as specific additional components of State significance.
- How do we determine this site is more significant than that site? Within Aboriginal society there is a hierarchy within the community. Initiated men/women can make decisions for certain sites and only they can direct/guide the rest of us on what is/isn't sacred?
- One issue that has been raised a number of times with me is protecting Indigenous knowledge e.g., medicine, styles of art, language, so that it is not taken or exploited with no reference to Indigenous people. Maybe create a process for protecting IP.
- Knowledge: Richard Gould: Puntytjarpa rock shelter; archaeological site of international awareness. Additional considerations: Shows connection across the state (songlines, etc)"
- State significance guidelines – similar to Outstanding Significance guidelines, recognise the values are from the Burra Charter which is positive but the Burra Charter talks about values and doesn't talk about whether they are of State significance per se
- The acknowledgement of cultural heritage is significant for the State and must be embraced if we are to seriously accept the 60,000 years history.

ASSESSING STATE SIGNIFICANCE

Stakeholders spoke about a variety of factors around assessing sites of State Significance. Aboriginal stakeholders discussed the kinds of site that are important and protected, and advocated for spiritual values to be included in the values used in assessments. Other stakeholders recommended further attention be given to definitions in the framework that worked from non-Aboriginal frames of reference.

Comments included:

- Protected areas could include areas where medicine plants come from where people go to get these plants, animals as well.
- Cultural significance should be considered for protected areas, where we come back to, rivers, creeks used for healing water.

- Missions, where people were born historic places where parents were born there even though it was a mission it’s important to us.
- Burial sites should be protected areas.
- All burial places are sites and protected under the Act, but not Protected Areas.
- Burial places have the same protection as ACH plus you cannot interfere with human remains.
- Massacre sites, tracks that people walked on, should be protected areas.
- Rivers can be a site and can be nominated as a protected area
- Protection of historical mine sites from backfilling – lose valuable resource
- Environmental values should also be considered, as they are connected to the other values in accordance with Aboriginal culture.
- Lake Cowan: registered areas (women’s rock hole and men's sites); Jimberland site; Mine site rehabilitation fund.
- Consider the spiritual aspect of the site could come under the social aspect.
- Should spiritual be considered as part of the guidelines?
- We further recommend that the Draft Guideline should explicitly state that ACH does not have to have all types of values and that it may meet one value but still be of State Significance.
- Metro area would larger landscape areas fall into that category if nominated by LACHS? i.e., Swan River. Unlikely to be declared state significance. More likely to be an area that needs an extra level of protection.
- We strongly recommend that the definition of Scientific value in 'Section 5.7. Identifying cultural values be revised. Although rarity and representativeness have been used to assist in determining scientific value, they are not a central consideration. Undue focus on rarity and representativeness will lead to poor outcomes for ACH, because these terms are subjective and unclear to many. Rather, the focus of scientific value should be on the ability for ACH to contribute further knowledge and understanding of the past, and on enhancing Aboriginal and non-Aboriginal communities' connections to and appreciation for ACH.

  We therefore recommend that the sentence on page 9 of the Draft Guidelines be altered to:

Scientific value is measured by the extent to which ACH may contribute to further knowledge and understanding of past and present Aboriginal cultures and societies, and to enhancing community connections to and appreciation for ACH.

- Anyone who is in the State of Western Australia should be allowed to nominate a place for State significance, including members of the public, given that this provision is about the 'cultural identity of the State'
- Guidelines would benefit from examples that meet the stated criteria of State significance, as well as an explanation of how these sites differ/are regulated as compared to Protected Areas. Would it be simpler for understanding if the two categories were presented under the same guidance note?

THRESHOLD TRIGGERS

Stakeholders posed a range of questions and comments around the matter of threshold triggers, seeking clarification on how a site of State Significance could be determined, processes for formal assessment, and potentially early warning for proponents.

Comments included:

- Further detail is required regarding threshold triggers for assessment of sites by the ACH Council to ensure that there is sufficient distinction between the State significance assessment process - which by its nature will need to be in-depth and require significant attention by the ACH Council – and the broader duties of the ACH Council with regard to approval or recommendation of ACH management plans. Functional threshold triggers for application by the ACH Council will assist in enabling this distinction.
  Such thresholds could be based on the nature of the ACH, the impacts proposed, and the values held by knowledge holders. It is necessary that set thresholds function as the primary trigger for the ACH Council to determine if formal detailed assessment of the heritage within an ACH management plan is required. Other considerations could be considering the information provided via a proponent's ACH management plan and the input of the LACHS representing the Traditional Owners and/or relevant knowledge

holders within that document regarding the nature of the ACH particularly with reference to significance.

- State Significance Assessment guidelines should include clear threshold triggers for assessment of State significance by the ACH Council, as well as clear processes for the formal assessment of State significance including stakeholder inputs to this process.
- The Guidelines provide the framework and themes from the Burra Charter as the way in which State significance should be assessed but does not provide a threshold of what would meet State significance.
  Please provide further clarification regarding the thresholds the Council will consider in determining State significance, as well as further clarification regarding the evidence / information the ACH Council will need to assess this.
- How is a site of State significance determined? What is the process?
- State Significance - query about whether or not it will be possible to get a preliminary indication from the ACH Council as to whether or not a management plan is likely to trigger State significance. The query has been prompted as if State significance is triggered, it will affect timelines and proponents would like to be able to get an early “heads up” that this might be the case.
- Sacred sites have to be included in this.
- Will the Commonwealth protected areas be automatically protected areas under the Act?
- Prior disturbance of land should be a consideration.
- It is noted that the Phase 2 documentation aligns with the Burra Charter. However, there is still ambiguity as to how State significance is assessed and how it is established. As such, it is recommended that the State significance guidelines be further developed to prescribe the following:
  - Threshold for the ACH Council to assess in order to establish if a site is of State significance.
  - Clear process for the formal assessment of State significance.

GENERAL CONSIDERATIONS

Proponents discussed the need to inform and involve a range of stakeholders in matters of state significance, including local government, as well as the need to factor in assessment time to mitigate potential impacts on funding.

Comments included:

- Further, it will be important that the ACH Council have clear guidance regarding who may be considered an interested party in the context of the Act section 175(4)(f). It will be important for certainty of process for the ACH Council to ensure relevant stakeholders are provided an opportunity to provide a view in line with the requirements of the Act, without creating a process so broad that it delays consideration and progression of a project.
- It is acknowledged that the Draft State Significant Guidelines identify Local Governments as a stakeholder to ensure they are notified when ACH is believed to have State significance. However, the sector requires clear guidance about its role and responsibilities with respect to the provision of municipal and other services in areas of State significance. Assuming areas of State significance are most likely to be located away from cities and towns, the most likely intersect will be in relation to Local Government road maintenance obligations.
  Clarification be provided on the interrelationship between Local Government service delivery requirements and State significance areas.
- If areas of State Significance are identified and determined to exist on a pastoral lease, the impact on pastoralists must be considered in terms of the effect on their operations; viability of the lease; and ongoing costs to manage/ protect the lease. Adequate compensation must be provided for in this regard.
- State (and Federal) Grant Funding for Infrastructure projects is often time bound. Consideration needs to be given to how the grant schemes are structured to allow the $$$ and time required for a State significance process within the grant.

Draft Outstanding Significance Guidelines

Questions

- What else should be considered by knowledge holders making an application for ACH to be declared a protected area?
- Any other comments?

Table 13 below shows emerging themes from the submissions about the Draft Outstanding Significance Guidelines, through the lens of Aboriginal stakeholders, proponents, and other (inclusive of State Government, service providers, archaeology and heritage consultants, and general community).

Table 13: Emerging themes about State Significance Guidelines

Aboriginal Stakeholders	Proponents	Other
Knowledge holders must be notified of preliminary assessment of outstanding significance.	Guidelines must provide for protected area transitional conditions.	Include Sacred Sites.
Spiritual Value to be included as consideration.	Guidance is required in relation to thresholds.	
Places an unacceptably onerous burden of proof upon any knowledge holder applying for a protected area order.	Assessment criteria should be considered.	
It may be culturally inappropriate for Aboriginal Stakeholders to disclose certain information.	Guidance re protected area order conditions is necessary.	
Provide more clarity than simply the application process.	Consider guidelines for continuation of existing work in Section 19 areas	
Uniqueness is only one additional factor, not something that is required.	Traditional Owners should be the primary voice re outstanding significance.	
Even previously damaged ACH may still have outstanding cultural significance.	A clear process is required for how tenure expenditure in areas under consideration for Protected	

	Area status are to be managed.	
Submissions from proponents are not relevant to outstanding cultural significance considerations.	Definition of what is outstanding significance, and how assessment will occur, is required.	
Protected areas should be declared over culturally sensitive places to stop people taking photographs.	Thresholds needed	
Aboriginal people should define	Check and balances	
Include Burial Sites	Why it is significant	
Protection should include knowledge and transmission of why it is important to avoid	Accessibility of process	
Flexibility needed	Higher sign off than Minister	
Applies to contemporary sites		
Broader context - ACH does not stop within state borders		
Access to protected areas by Aboriginal peoples		
Recognition of spatial health and wellbeing		
Cultural value should be a measure		
Spirituality should be stated as a factor		
Protect the Dreaming stories		

OVERVIEW

Submissions relating to the Outstanding Significance Guidelines discussed general feedback on the guidelines, how to define outstanding significance, and some areas where differing cultural understandings may become problematic. There was broad agreement on the need for clarity in defining outstanding significance, and that Traditional Owner voices should be primary in deciding that. Aboriginal stakeholders advocated for cultural understandings to be further included in the guidelines.

Proponents sought clarity around continued access to land currently in use, and certainty that the legislation would not “tie up” large amounts of land.

The main themes to arise included:

- Draft Guidelines
- Burden Of Proof
- Community Health
- Different Cultural Understandings
- Defining Outstanding Significance

The following section explores these themes at a high level, and includes relevant comments from the submissions for consideration.

DRAFT GUIDELINES

There was a significant amount of general feedback in the submissions directly addressing elements of the Draft Guidelines. Aboriginal stakeholders raised a range of issues, such as the knowledge holder’s role in the process, the danger of legislation allowing potential harm to occur on a site of outstanding significance, and the importance of culturally sensitive information. Proponents sought a more accessible process, and transitional conditions or continued access in existing Section 19 areas.

Comments included:

- We noticed in the flow chart at the end of these Guidelines that notification is only given to the knowledge holders that make the application for outstanding significance if the preliminary view is that the ACH is not of outstanding significance.
  The knowledge holder does not seem to be notified if the preliminary view that the place is of outstanding significance. All other Aboriginal parties affected landholders and public Authorities are notified and given opportunity to provide a submission, but knowledge holders are not notified at this point.
  We strongly believe that the knowledge holders must be notified if the preliminary view is that the place is of outstanding significance so that they are kept informed and updated on the preliminary view.

- The process contemplated under the draft Outstanding Significance Guidelines does not acknowledge that it may be culturally inappropriate for Traditional Owners to disclose certain information to the State or proponents, including in relation to secret and sacred places or gender restricted areas and sites. If the State is to take seriously the basis upon which Aboriginal people in the Kimberley understand their connection to country, and the relationships they have with country, then areas where native title has been recognised should be thought of as integrated cultural landscapes. Places which require particular kinds of engagement and adherence to protocols should be determined by the relevant Traditional Owners, through the relevant native title party. Moreover, all determined native title lands should inherently be considered as having “outstanding significance” and therefore constitute protected areas if the relevant native title party makes such an application.
- The draft Outstanding Significance Guidelines suggest that ACH may be harmed or destroyed, despite a protected area order, if the Minister declares conditions on the protected area order that could allow for access and activities to occur that may harm cultural heritage. Legislation that purports to protect Aboriginal cultural heritage must not allow for the contemplation of Aboriginal heritage to be harmed in such a manner.
- It is good to see that places can be considered Outstanding significance, but it is still unfair that the Minister has the final say on deciding if a place has outstanding significance and is made a protected area. We are concerned that this will result in cases where many places of outstanding significance to Aboriginal people will not be made protected areas.
- On page 8, just above the factors at point 6.2, the sentence "knowledge holders should consider and address the following factors when preparing an application for a 'protected area order’" may give the wrong impression that every single factor needs to be addressed in an application. Only the people to whom the ACH belongs can say if, and how, an area is of outstanding significance to them. This will vary from group to group and possibly even among knowledge holders themselves, so therefore cannot be codified. It would be better to indicate some of the relevant factors that could be

addressed in an application include those under point 6.2 - but make it clear these are not exhaustive, nor do they have to be satisfied in each case.

- A point of guidance should be added, making it clear that even if an area of ACH may have been damaged or affected in the past, it does not mean it is no longer of outstanding significance or should not be declared to be a protected area.
- It is appropriately acknowledged that culturally sensitive information need not be provided. There is a danger that highly significant areas may be subject to many cultural restrictions on disclosure. There should be a point of guidance that, if there is a lack of detail due to cultural sensitivity, this should not be considered a factor against finding an area is of outstanding significance.
- It should be made clear that submissions and views of affected landholders, government authorities or other third parties cannot be of relevance as to whether an area is of outstanding significance. It is a matter solely for the relevant people to whom the heritage belongs. These third parties can only address conditions and other discretionary factors.
- The only way to get some places protected so that people don't take photographs is to make the place a Protected Area, however we believe that the Government won't make many of these places protected areas, so we are a bit frustrated that this particular activity hasn't been considered further after we raised the issue in our Phase 1 submission. There has to be a way for Aboriginal people to stop people taking photographs in some places of cultural sensitivity to protect the places and ACH from desecration and also disclosure to large groups of people through social media.
- The draft guidelines do not currently provide any guidance as to what conditions may be included in a protected area order, other than stating that an applicant can recommend conditions for inclusion and that these will be decided on a case-by-case basis.
- Possibility of Non-Disclosure agreements to inform key people
- ACH disclosure to the Minister (maybe non-disclosure statement): Premier to approve not just the Minister or maybe a Cabinet decision to minister to make recommendation to the Governor
- Process to be more accessible

- Brief reason (abstract) exp. Why declared a “protected area” added in the database
- We reiterate our comments in our Phase 1 submission that the guidelines must provide for protected area transitional conditions for existing section 19 areas.
- We consider that guidance regarding these conditions is necessary, particularly in the context of existing section 19 areas which will become protected areas under the new Act. The guideline should consider the views of a range of Aboriginal people as well as knowledge holders, supported by an experienced anthropologist. As stated in our Phase 1 submission, it is important that the guidelines consider continuation of access and work in respect of existing lawful works being undertaken in current section 19 areas or adjacent to section 19 areas.

BURDEN OF PROOF

Aboriginal stakeholders raised concerns about the burden of proof required of knowledge holders who make an application for a protected area order.

Comments included:

- An application for a protected area order can only be made by a “knowledge holder” and requires compelling evidence as to why the proposed protected area is of “outstanding significance” having consideration to a variety of factors.

  The application for a protected area will be decided by the Minister on recommendation from the ACH Council. The draft Outstanding Significance Guidelines state that “Aboriginal people are the custodians of their ACH. They are the people who know and understand Country and its heritage most intimately”; but the process provided by those same Guidelines fails to empower Aboriginal people as the primary decision makers about their cultural heritage.
- The Outstanding Significance Guidelines places an unacceptably onerous burden of proof upon any “knowledge holder” applying for a protected area order. A “knowledge holder” is required to provide maps, outline characteristics of the relevant cultural heritage using up to seven factors, and

provide detailed statements and supporting evidence and information. Putting aside the problematic nature of “knowledge holders” which has been addressed above and in earlier submissions, the requisite standard of proof to establish whether something is of “outstanding significance” places a heavy burden on Aboriginal people who have already had their rights recognised through often lengthy legal processes under the *Native Title Act 1993* . In applying for a “protected area order”, native title holders must once again produce compelling evidence to prove the significance of their cultural heritage with such evidence to be ultimately assessed by the Minister. It is contrary to the objects of the Act to create a further bureaucratic process through which Aboriginal people must again establish the significance of their country and cultural heritage.

COMMUNITY HEALTH

Aboriginal stakeholders discussed some factors around community health, as referenced in the draft guidelines (6.2 Factors), reiterating the central nature of significant sites to the overall health of the community that cares for them.

Comments included:

- Pursuant to the “community health” factor (draft Outstanding Significance Guidelines, [6.2]) the Indigenous Ranger Program and the work being undertaken and carried out by ranger groups throughout the region should be considered. The work being done by ranger groups highlights that determination areas are of outstanding significance, as cultural/ancestral landscapes of their people and also their contemporary workplaces. This work with native title determinations is having positive residual effect for communities and Traditional Owners, and any disruption to this space and the work rangers are carrying out on country would only have negative impacts.
- Community and individual/s health if a site is destroyed or accessed by unauthorised
- Site avoidance: where even leaving footprints is too much; all sites are of outstanding significance to Traditional Owners
- Recognition that the spiritual health and wellbeing of Aboriginal people is critical and connected to many ACH sites.

DIFFERENT CULTURAL UNDERSTANDINGS

Aboriginal stakeholders identified problematic concepts within the framework, where Aboriginal and non-Aboriginal cultural understandings differed. The submission urged a shift away from concepts like uniqueness, rarity and representativeness, and towards collaboration with Traditional Owners about what is outstandingly significant to them.

Comments included:

- To more appropriately appreciate an Indigenous space, such as the native title lands in the Kimberley (these being regional sites of “outstanding significance”) presents a real challenge for the State and the western legal, commercial and corporate systems. Essentially it requires a suspension of western metaphysics, taking into account how Traditional Owners engage with country, and such an appreciation can only be done with comprehensive, consolidated and genuine collaboration with Traditional Owners.
- On page 9, there is reference to "Uniqueness of ACH within its context". The concept of "uniqueness" is problematic, as it might result in only a representative sample - which would be most inappropriate. If this is based on outstanding significance to the Aboriginal group or knowledge holders (which is what has been set out), then it must be based on what is outstandingly important and significant to each of them - it cannot be based on what the State decides to choose to protect according to its own standards. For example: the water serpent is a common belief across the country, so it is not unique in that sense, but is of greatest significance to each group. It should be made clear that "uniqueness" is only one additional factor, not something that is required. Uniqueness should also be specifically described as uniqueness to each relevant group of Aboriginal parties or knowledge holders for that ACH.
- We do not recommend that rarity and representativeness are included as a factor for defining Outstanding Significance. The origins of these criteria lie in an outdated and Eurocentric definition of heritage significance. The intent of this Guideline must be to allow for Aboriginal people to define what is of outstanding significance about the ACH, and as such the concepts currently used in the draft guidelines are inappropriate. Their inclusion also introduces

a risk that ACH may be excluded from becoming a Protected Area because there is already an example of a particular type of ACH protected elsewhere. We refer you to Significance 2.0 (Russell and Winkworth 2009), which draws a clear distinction between primary values and comparative criteria. Rarity and representativeness do not constitute a primary value for heritage significance and therefore should not be given focus in the discussion of an ACH's value.

- From an anthropological perspective, the draft Outstanding Significance Guidelines are indicative of the State's inability to identify with Aboriginal perceptions and conceptualisations of place, and the things or phenomena associated with place. Aboriginal understandings of country and its significance are imbedded within place and things in that space, and it's the phenomenological experiences and engagement people have with places, things and phenomena in country that allows for connection, meaning, memory and cultural continuity. These spaces often incorporate relationships between human persons and non-human entities in the creation of "cultural values" that not only "really matter" to Aboriginal people, but are integrally tied to their ontology or way of being, and even their coming-into-being. Disruption and a lack of acknowledgement to the possibilities of such phenomenological experiences, and/or trespassing places with such cultural values could be considered a violation of human rights, given the ontological dispositions associated with country.

DEFINING OUTSTANDING SIGNIFICANCE

Stakeholders discussed how to define outstanding significance. Aboriginal stakeholders spoke about some specific kinds of sites, and advocated for spiritual value to be included in the assessment criteria for outstanding significance. Proponents, while largely supportive of Traditional Owners providing the primary voice in defining State Significance, expressed concerns over the potential loss of access to land, and a desire for clarity and certainty in the process.

Comments included:

- Burial sites to be added

- Outstanding significance guidelines – the factors listed are good but need to ensure that not seen to be limiting and that there is flexibility for how knowledge holders can demonstrate outstanding significance
- Does it apply to contemporary sites e.g., Mogumber Cemetery? Yes, it can.
- Should there be consideration to broader context? State borders not applicable to ACH
- Declared protected areas should still be able to be accessed by Aboriginal people.
- Can there be a buffer around a site where disturbing ground nearby could in fact damage the site? i.e., a creek (check if 'Katanning Town Creek' is registered).
- If it is seen to be outstanding by Aboriginal people, then why should it need to have criteria applied?
- Aboriginal people should determine "outstanding significance"
- Spirituality should be explicitly stated as a factor in determining Outstanding Significance.
- Tjukurrpa (dreaming stories) are to be protected at all costs.
- We have also noticed that spiritual value is included in the perspectives considered for ACH in section 2 of the draft ACH Management Code, but spiritual value is not included as a consideration for outstanding significance in section 6 of these Guidelines.

  We strongly suggest that spiritual value be included as a consideration in section 6 of these Guidelines. If 'sacred' values are meant to include spiritual values, then this should be explained in section 6.
- Further guidance is required in relation to the thresholds of significance for an area to become a protected area.
- Many of the key factors currently listed could apply to various ACH in WA and as such further guidance is required to outline the contributing outstanding factors that must be present for outstanding significance to be established.
- We are not a qualified authority in this area. While we understand there is a need for secure Heritage site protection, there would need to be responsible decision making here so as not to have large areas of the State's land excised from usable land use that would affect the State's economic use.

- Consideration should be given to the Assessment Criteria for Cultural Heritage Significance for places for entry into the State Register of Heritage Places as per the *Heritage Act 2018*.
- It is important for Traditional Owner feedback to provide the primary voice on matters of outstanding significance.
- Permanent protection of some heritage places through Protected Areas is important to the community, industry and the state. Currently, it can be challenging for Proponents to consider and agree long term protection of heritage places with Traditional Owners due to existing tenure expenditure requirements and having no other type of land tenure that can currently be utilised for such areas. To support Traditional Owners, PBC's and industry to understand and plan for potential Protected Areas the following would be helpful:
    - Clarification on if there will be any opportunity to apply an interim protected status over an area while it is being considered, or while works are occurring to develop information to support such a status designation. It would be very useful to have a clear process for how tenure expenditure in areas under consideration for Protected Area status are to be managed.
    - Further information on potential land tenure options and when these are planned to come into effect. With this aspect there is no reference point in advance about what may be outstanding significance, the regime is very loose, a knowledge holder or other can have an opinion that something is valuable and under the current regime this does not have to be substantiated by any other process other than opinion, there is no advance registering of something of significance, there is no assessment to determine or substantiate heritage value just opinion. No vetting and no certainty or equity of process.
- How can we judge it? Only Aboriginal people can have a connection to country in a spiritual sense.
- Outstanding significance needs to include sacred sites.

Determining Substantially Commenced

Questions

- What else should be considered to determine if a Section 18 is substantially commenced?
- Any other comments?

Table 14 below shows emerging themes from the submissions about the Draft Determining Substantially Commenced Guidelines, through the lens of Aboriginal stakeholders, proponents, and other (inclusive of State Government, service providers, archaeology and heritage consultants, and general community).

Table 14: Emerging themes about Determining Substantially Commenced

Aboriginal Stakeholders	Proponents	Other
Proponents should be required to demonstrate that the project has been substantially commenced.	Consider factors other than ground disturbance.	Include financially commenced.
Minister's decision to extend historical 's 18 consents' should only be granted in very limited circumstances.	Written approvals from Government for field activities should be considered as "substantially commenced".	Traditional Owner consideration.
Substantially commenced works must be legitimate project works.	Consider factors other than ground disturbance (i.e., project planning or approvals).	Consider resources and financial commitment.
LACHS, Aboriginal parties and knowledge holders must be notified of any extension of time applications, and invited to comment	Activity logs, photographs, or expert advice as evidence of substantial commencement.	
Ongoing consent and engagement with community should be a prerequisite for a section 18 approval continuing.	Key infrastructure should be more clearly defined.	
Include project viability in assessment process	Definition of 'substantially commenced' should be in line with other legislation.	

Ongoing consultation should not equate to approval	Include existing roads under Section 18.	
On ground works	All substantially commenced activities should be exempt.	
Financial and knowledge commencement	Section 18 approvals should not be retrospectively declined. Substantially commenced should be clearly defined.	
Guidelines around ACH requirements when substantially commenced	Section 18 approvals associated with pastoral activity should not expire.	
Consider retrospective provisions	Expiry on S18s Definition: Phases of larger projects with no ground disturbance activities but investment in various surveys have been completed	
Early transition needed	Site specific or area specific s18 - different opinions on substantially commenced	
Meeting obligations	Precedent for cancelling approvals	
	Consider criteria around ground disturbance	

OVERVIEW

Submissions relating to the State Significance Guidelines discussed a range of factors influencing what may constitute a project being substantially commenced. Stakeholders discussed ground disturbance, key infrastructure, and funding. Aboriginal stakeholders sought to ensure that activities on Section 18 projects were not carried out purely to extend the life of the Section 18 itself, and that approvals were carefully considered – especially in circumstances where they may have been initially granted without consultation. Proponents sought to have the complexity and resource commitment to projects taken into account, and certainty around access to the land.

The main themes to arise included:

- Defining substantially commenced
- Ground disturbance
- Key infrastructure
- Funding
- 10-year expiry
- Other considerations

The following section explores these themes at a high level, and includes relevant comments from the submissions for consideration.

DEFINING SUBSTANTIALLY COMMENCED

Some high-level discussions of the definition of substantially commenced covered legal definitions and consistency with state government use of the term, and drew a distinction between activity directly related to the S18 proposal, and activity carried out for the purpose of extending the S18 consent.

Comments included:

- How is the term “substantially commenced” interpreted by the Courts?
  There is some High Court authority on how the term “substantially commenced” will be interpreted. In the context of building and planning law, the High Court held in Day v Pinglen Pty Ltd [1981] HCA 23; (1981) 148 CLR 289 at [15] (Mason (as his Honour then as), Murphy, Aickin, Wilson, Brennan JJ) that the term requires that “the commencement is not merely evident, but is substantial, that is, of considerable amount”.
  Further, in Drummoyne Municipal Council v Lebnan and Ors [1974] HCA 34; (1974) 131 CLR 350 at [11], Gibbs J (with whom Barwick CJ, Stephen and Mason (as his Honour then was) JJ agreed) described the test as follows:
  Clearly the work or development which…should have been substantially commenced is that to which the approval or consent itself refers, and it would seem to follow that work or development is not commenced when nothing more has been done than acts preparatory to the work or development which is the subject of the approval or consent.

In the more recent decision of the State Administrative Tribunal in Western Australia, Auscon Pty Ltd and Town of Cambridge [2021] WASAT 116, the Tribunal noted that “the question of substantial commencement should be approached with some caution. This is because each case will ultimately turn on its own facts”, and “it is an objective test, and the work must be done relevant to the approved development and nothing else”.

    - Proponents should be required to demonstrate that the project has been substantially commenced, and that the commencement of the activity is directly related to the reason submitted in the s 18 proposal. Given the acknowledgement that in some cases s 18 consents have been granted without consultation with Aboriginal people, the Minister’s decision to renew historical s 18 consents beyond the 10 years should be carefully considered and only granted in very limited circumstances.

- The guidelines should make clear that any work to be considered in substantial commencement must be work that is required as part of the project. It cannot include work that appears to have been done primarily for the purpose of extending the life of the s18 consent. The Minister should be required to consider all relevant facts about the project to decide if this is the case. LACHS, Aboriginal parties and knowledge holders should be notified of any application made to the Minister for an extension of time and invited to provide comments.
- The definition of ‘substantially commenced’ should be consistent with other State Government uses of the term.

GROUND DISTURBANCE

There was some discussion across stakeholder groups around extent of ground disturbance as a determinant of the definition. Aboriginal stakeholders generally were of the view that if there was no ground disturbance, works should not be considered substantially commenced. Proponents were of the view that factors beyond ground disturbance should be considered.

- In relation to page 7, point 5.2, where ground disturbance as covered by a section 18 consent has not commenced: this cannot be regarded as substantial commencement of the work in the section 18, even if it is part of a

larger project area. The fact a larger project has commenced does not mean the "purpose for which the land the subject of the consent may be used, as specified in the consent, has been substantially commenced" as required by s325(3) of the ACH Act. The guidelines cannot validly expand the scope of the ACH Act.

- Must have on ground works-finance and other approvals are not sufficient.
- Timeframe might be ok but the criteria around ground disturbance is concerning as they might disturb ground too (proponents).
- As outlined in our Phase 1 submission, projects are often complex, multi-faceted and encompass multiple areas. As such, factors beyond ground disturbance should be considered for the purposes of determining substantial commencement under the ACH Act.
- Written approvals from governments department i.e., DMIRS for the commencement of field activities would be considered as “substantially commenced”.
- We consider that determining substantial commencement for the purpose of the Act should be viewed at a project scale and provide for consideration of a broader range of factors than solely the disturbance of ground.
- We recommend that Substantial Commencement guidance be broadened to incorporate consideration of factors beyond ground disturbance in the Minister’s considerations.
- Existing roads should be covered under a section 18
- Substantial ground disturbing activity includes any activity that would have required the section 18.

KEY INFRASTRUCTURE

Some submissions discussed the concept of key infrastructure, referenced under 5.1: *the ground-disturbance activity that has occurred directly relates to key infrastructure for the purpose of the granted section 18 consent.*

Submissions discussed the nature and interpretation of such infrastructure, and key elements to consider such as the installation of services.

Comments included:

- 3 factors:
    - Land clear
    - Land clear for infrastructure
    - S18 has a larger proposal from mines
    - Has 30% of the total funding been spent?
    - Does it need to be demonstrated on the ground and not on paper
    - Semi-permanent/substantial infrastructure commenced
    - Inspected to process that they have made a commitment.
- The definition of Substantially Commenced within the guideline relies solely on level of ground disturbance. In our previous submission to Phase 1, we noted that whether an activity has Substantially Commenced will depend on the nature of the purpose authorised. The factors that may be relevant to consider are:
    - The presence of temporary or permanent infrastructure
    - The installation of services (e.g., power, water) that are required to carry out or undertake the purpose.
    - The level to which pre-planning and operations readiness activities for the area have occurred.
    - Where application the level of salvage works undertaken in the area to relocate and protect ACH.

  Considering the general factors described above, the following could be provided to satisfy the requirement:
    - Activity logs documenting how often the Proponent has accessed and used the relevant area.
    - Aerial or ground-based photography show the extent of any ground disturbing works of the existence of any infrastructure.
    - Expert advice (e.g.in the form of stat decs) that demonstrates that the steps the Proponent has taken to date constitutes the substantial commencement of the purpose.
- It is noted that the definition of substantially commenced is generally aligned with planning and environmental legislation. However, it is noted that a project may be considered substantially commenced where the occurrence of ground

disturbing activity directly relates to ‘key infrastructure’. This may lead to interpretational difficulties in relation to what is construed to be key infrastructure and it is recommended that this be more clearly defined.

FUNDING

Submissions also discussed the impact of funding on the definition of substantially commenced, in terms of resources committed to the project, and amount of money spent, prior to any ground disturbance taking place.

Comments included:

- Needs to include financial and knowledge commencement not just ‘shovel in ground.’
- Phases of larger projects with no ground disturbance activities but investment in various surveys have been completed should be taken as substantially commenced. E.g.: clearing permits obtained, ethnobotanical surveys complete. E.g.: $100K spent but no ground disturbance (Butterflies - ACH ethnobotanical; mallee fowl – PR exercises; Engineer plans – awaiting government permits)
- Financially commenced should be included. Many activities require significant expenditure before shovels hit the ground
- Given the decision rests with the Minister, it is logical that guidance provides for consideration of the intent and purpose of the Section 18, with the test being whether the proponent can provide evidence that this work has substantially commenced. In this scenario, physical disturbance would be one factor considered, alongside evidence of factors which might include project planning and financing or grant of relevant approvals over the area.
- We emphasise our concerns from Phase 1 that there must be safeguards against proponents undertaking ground disturbing works just to maintain the status of the already permitted section 18 consents as this will lead to unnecessary harm to ACH. Consideration of commitment of resources and amount of money spent on a project should also be included in decision-making about whether a project has 'substantially commenced'.
- Assessment process to include viability of project (provides justification of why approved section 18 should not be commenced)

10 YEAR EXPIRY

Submissions discussed the following point (3.1): *section 18 consents will expire at the end of 10 years from transition day.*

Viewpoints from Aboriginal stakeholders ranged from opposition to this period of time, to cautious agreement and recommendations about the transition period.

Proponents sought extensions on the period, and questioned the inclusion of a sunset clause.

Comments included:

- 10 years is too long a period of time for a consent to remain valid given that it is often senior people who make these difficult decisions.
- Current S18s will remain valid for the coming 10 years OR ownership has changed, OR Minister decides the S18 has substantially commenced.
- Consider ‘retrospective’ provisions to discourage activities being commenced before 1 July 2023.
- 10 years seems reasonable.
- It is not correct to retrospectively decline a Section 18 approval transitioning under the proposed regulation. There are many legitimate reasons why a project may need the full 10 years of approval to be brought to fruition. There are factors to consider, design, financing, preparation of dovetailing a project into existing operations, the broad-brush definitions used by the Department look at activity through a mining lens where there is often greater access to capital and the capacity to deliver against a shorter timeline. Additionally, what is the definition of "substantially commenced", it is doubted that the Minister or staff will have the expertise to determine, therefore will their deliberations be based on opinion? Remembering that a project can have substantial progress before a sod is turned. The 10 years of approval should remain in place at transition.
- Similar to the mining Act: if an exemption from expenditure is granted or the ground cannot be worked an extension on the 10-year expiry can be applied for.
- Any s.18 granted in association with a pastoral activity should continue into the future and not expire. This is important to the ongoing sustainability of

operation and maintenance of critical infrastructure, to the welfare of animals and the management of the rangelands.

- Why does a sunset clause need to be placed into the ACH on Section 18? If it was good enough for a section 18 to be granted why seek to remove it?

OTHER CONSIDERATIONS

Other considerations raised by stakeholders included:

- Demonstration of ongoing consent and engagement with the community should be a prerequisite for a s18 consent remaining in place.
- Evidence of any on-going consultation is not something that can be taken into consideration as approval already granted
- Proponents should be required to meet obligations of good faith prior to endorsement
- Possibly consider guidelines around the degree to which a proposal may be 'substantially commenced' and yet still ACH requirements could be applied.
- Shouldn't incentivise activity / destruction of areas under s18 approvals.
- Early transition of s18s to management plans.
- Has proponent endeavoured to reach management plan?
- Proponents would be in a position to provide evidence of documentation approvals and other parties can have access to view, i.e., Traditional Owners.
- All substantially commenced activities should be exempt from the new Act. Any permit, authorisation given prior to the new Act being enacted should be considered valid and exempt.
- S18 could be site or area specific which may lead to differing opinions on substantially commenced
- Subdivisions often go on hold - this may happen, but often planners will have approvals cancelled and are used to reapplying.

Appendix A | General Activity Code Feedback

ABORIGINAL STAKEHOLDERS

Exemptions

- Exemptions and tiers should be determined by Traditional Owners/ knowledge holders on a case-by-case basis.
- The list of exempt activities in section 100 of the ACH Act is already problematic and will result in damage to, and the destruction of, Aboriginal cultural heritage. No further activities should be prescribed in the regulations as exempt activities
- It is already overcomplicated

Impact assessment

- It is inappropriate for only the proponent to undertake a 'due diligence' assessment in order to identify and take steps to avoid/ minimise damage to cultural heritage. Exempt or tier 1 activities, regardless of the level of proposed disturbance or the presence of pre-existing disturbance, may still present significant threats to heritage.
- Cultural obligations to look after country involve taking responsibility for all impacts and access to country regardless of ground disturbance and for this reason the identification and assessment of impacts should always be undertaken by the LACHS.
- Where an activity may be perceived to be exempt or low impact in one area will in others, significantly interfere or damage Ngaanyatjarra cultural heritage.
- Tier 1 and 2 activities can be particularly problematic in cases where Tjukurrpa relates to landscape features such as salt lakes and where Dreaming tracks are associated with vast tracts of land. In these and other instances, activities that may be considered by the proponent as exempt or tier 1 activities could significantly impact areas of significance.
- As such the application of a one-size fits all tiered activity category system, that proposes no limits to curb cumulative impacts, poses significant threats to cultural heritage, including damage and complete destruction and undermines cultural obligations in keeping traditional law and custom / native title rights

and interests and increases the risk of conflict between local Aboriginal people and land use proponents.

- In some cases, under a heritage agreement a proponent may be allowed to create tracks in the vicinity of cultural heritage or through exclusion zone areas. Aboriginal native title holders / knowledge holders should have the right to decide who accesses these areas in the future. Under the original agreement that gave permission, conditions may have applied that mitigate perceived damage or that support the cultural obligations of people to look after certain sites in keeping with Native rights and interests. This permission should not automatically be given in future based on the existence of the initial impact – i.e., based on reference to database of previous impacts.
- This due diligence process should be assessed by the LACHS on a case-by-case basis (taking into account particular activity and location) and LACHS should be funded appropriately for this assessment process.
- Aboriginal people are the only people who can determine the level of impact a proposed activity may have on their cultural heritage. Proponents cannot determine the level of impact a proposed activity may have on cultural heritage. Contrary to the objects and principles of the ACH Act, allowing the proponent to undertake this determination completely undermines the purported recognition in the ACH Act of the special interest Aboriginal people have in protecting, conserving, preserving and managing their heritage.
- The regulations must include a catch-all that allows the relevant native title party to determine which Activity Category an activity falls in on a case-by-case basis.
- Our view has consistently been that only Aboriginal people to whom ACH belongs can determine the level of impact. We note the designation of tiers is based on physical levels of disturbance and may bear no relation to the level of adverse impacts to the sacredness or significance of the heritage to the people whose heritage it is. It is important that activity categories still recognise the potential impacts on heritage values.
- The assessment of the likelihood of impact by a proponent based on ‘Known ACH’ or Directory or reference to database of previous impacts is unacceptable. This would allow the absence of heritage Directory records, or

the existence of works under a specific agreement, to fast-track land-use or to avoid consultation with Traditional Owners and knowledge holders. Absence of records on the Directory (or presence of previous work in DMIRS POW/ ground disturbance database) should never be taken to indicate the absence of heritage. Exempt or tier 1 activities, regardless of the level of proposed disturbance or the presence of pre-existing disturbance, may still present significant threats to heritage.

Tiers

- A due diligence process undertaken by the LACHS, that includes potential for assessment, consultation and heritage survey with Traditional Owners/ knowledge holders (to be paid for by the proponent) regardless of the impact is required for tier 2 Activities. LACHS should be funded appropriately for this due diligence process. The Aboriginal Heritage Council should not be empowered to make decisions on heritage matters without the involvement of the Traditional Owners and knowledge holders through the Local Aboriginal Heritage Service, even where land use proposals are deemed to be of low impact.
- The joint submissions made by the KLC, Nyamba Buru Yawuru Ltd, Karajarri Traditional Lands Association Aboriginal Corporation RNTBC and Walalakoo Aboriginal Corporation RNTBC on 15 April 2020 provides a non-exhaustive list of activities that must be allocated to tier 3.

Ground Disturbance

- Concerned that potential harm and impacts to intangible heritage are not reflected in the activity categories. As noted in our previous submissions, even passive activities like walking close to or photographing culturally restricted areas can cause cultural harm to some heritage places. The ways that different activities may or may not cause harm to ACH needs to be emphasised in the Activity Categories document and will require better understanding of the varied types of ACH. We therefore take the position that the Activity Category document and the Due Diligence Assessment Guidelines should prioritise understanding the ACH as a first step before deciding the level of harm and which approvals pathway is required. As they

stand the Activity Categories do not recognise that different kinds of ACH are affected in different ways by a given activity.

- Traditional Owners/ knowledge holders may have given permission for disturbance/use under a heritage agreement however this permission should not be linked in perpetuity to the disturbance itself and become dissociated with the terms of the agreement or the Traditional Owners who gave permission. Ngaanyatjarra people should have the right to decide who accesses these areas into the future and the terms of access / use, to maintain cultural obligations in keeping with traditional law and custom and native title rights and interests. In some instances, disturbance may have occurred where Ngaanyatjarra people were not informed and did not give approval. It is even more imperative in these instances that this is rectified by an assessment and approval process by Traditional Owners/ knowledge holders.
- The concept that significant ground disturbance can go ahead, without the consultation, approval and consent of Ngaanyatjarra people in an area where previous ground disturbance has occurred is not acceptable. The existence of previous ground disturbance does not indicate that approval has been given by Ngaanyatjarra people or that cultural heritage will not be significantly further damaged or destroyed as a result. In all circumstances of tier 3 activities a Cultural Heritage management plan should be a requirement.
- We can see that the rest of the Activity Table sorts activities out into levels of ground disturbance, however as we have said all along in this process, different levels of activity will sometimes also be considered to have different levels of impact to ACH by Aboriginal groups in different areas and so there still needs to be some way for this regional difference to be included in considerations of Activity Tiers. It would be good on this point for consultation to occur with knowledge holders and native title groups or LACHS to determine where there may be these regional variations and include these into the table.

Informed Consent/Cultural Heritage Management Plan

- The principle of informed consent should apply now and into the future and in circumstances where existing disturbance has occurred, the consent of

Ngaanyatjarra people should be obtained in order to ensure that damage does not occur. The espoused principles of the new Act include the recognition that cultural heritage is living, and that Aboriginal people should be involved in decisions regarding cultural heritage. In all circumstances a Cultural Heritage management plan should be a requirement.

- Information must be presented by applicants to Tradition Owners in a manner that is clearly understandable, that the implications of decisions are clearly articulated and recorded accordingly. Traditional Owners must have the final approval status.
- There is insufficient voice given to the Traditional Owners, especially in the DDA flowchart. This entirely misses the intent of the Act, which aspired to give Traditional Owners more control of their heritage. It also overlooks the fact that cultural heritage is dynamic, so it can never be a 'one and done' recording / survey / identification of places of significance. I also fail to see how heritage values (as listed in the Act) will be appropriately captured in this 'one and done' type approach.

Funding

- Administrative burden is significant – LACHS need to be adequately resourced and funded to undertake this work. This requires ongoing funding for positions / GIS database as well as funding for specific ACH management plans by proponents, to be developed. See further comments below.

PROPONENTS

1100 SQM

- Where the tier 2 activity flowchart states that "activity does not result in new or additional ground disturbance - activity may proceed". Those activities should be tier 1.
- It is assumed that the exemption threshold for residential development on lots less than 1,100sqm has been chosen to align with SPP3.7 - planning in bushfire prone areas. Justification for the selection of this lot size should have been provided. The lot size does not align with many lots zoned R10 in our municipality all of which are disturbed/developed for urban purposes and not subject to a Registered Aboriginal heritage site.

- Where it can be demonstrated that a lot now exceeds the threshold size by virtue of amalgamation then the exemption should carry over to the amalgamated parcel. Losing a perceived 'right' to an exemption may create a disincentive for amalgamation. (Does this pertain to 1,100sm?)
- The activity categories must clearly address the ongoing concerns around the application of the Act to residential, freehold properties that are larger than 1100 square metres and located in cities and towns. All activities on freehold properties in cities and towns should be exempt.
- Development of land subject to an approved structure plan (unless otherwise specified on the structure plan/land titles) should be exempt from a formal engagement process. The formal engagement process should be undertaken by the land developer at the earliest opportunity being the rezoning or structure plan stage. Identified (potentially) sensitive locations such as watercourses can be surveyed at that time and cultural heritage mapped or otherwise cleared.
- I understand that the purpose of having a tier 1 category is so that people first do a simple check that ACH is not located within their proposed work area, but there are many examples of tier 1 activities that should be considered exempt activities, especially those activities that constitute existing use. Ongoing agricultural pursuits utilising existing methods on previously cleared land is one such example.

Issues with Exemptions

- Exemptions should:
    - Allow for fast and accurate self-assessment
    - Cover broad classes of activities
    - Drastically reduce the number of activities that require detailed assessment
    - Allow better targeting of activities with higher likelihood of impacting ACH.
- Based on these criteria, the following works have been identified as having very low likelihood of interfering with ACH and should be exempt:
    - All activities within road reserves other than the initial clearing/construction of roads.

- Development on land that has been previously cleared or developed in a manner similar to that proposed. This could be restricted to urban areas and townsites if needed. This would exempt most development on freehold land.
- Maintenance of formal/constructed Public Open Space (POS) such as parks and ovals where natural ground contours and vegetation have been lost. This should be written to exclude natural areas, undisturbed parks/reserves and any formal POS adjacent to these areas such as POS that surrounds wetlands as such sites are more likely to still contain ACH.

- Activity that involves ground disturbance but does not result in new or increased ground disturbance. This is already a key step in the ACH management framework. Including it as an exemption would have significant benefits as discussed below. All of the above should apply unless a site has documented ACH. This is a necessary caveat given the number of locations across WA where development has already occurred in areas of ACH significance but where such significance has not been lost entirely.
- Additionally, exemption for ‘’development of a prescribed type’ under the Planning and Development Act 2005 should be removed. This proposal adds unnecessary complexity and could be used to obscure exemptions for individual projects or entire categories of activity. In the interest of simplicity and accountability, all exemptions should be done under the ACH Act directly.
- Finally, consider making ‘Exemptions’ a separate table. As it stands, the exemptions read like a lesser level of activity. This is not the case as many exemptions are for ‘tier 3’ type works. This would help make it clear to users that exemptions are different and if an activity is listed as exempt then it is not necessary to check tiers 1–3. It would also make it easier to provide explanations for exemptions to make this information more user-friendly.
- Having 'proponents' check the ACH Directory to confirm if exempt activities are located within a protected area will not work on most occasions. For example, recreational photography is listed as an exempt activity so under the draft guidelines people would be required to search the ACH Directory before taking holiday snaps. Either these types of activities should not be

countenanced under the guidelines or protected areas need to be conditioned to allow for most exempt activities to occur.

- Obligation on volunteers e.g., volunteer firefighter clearing or burning – may be burdensome – on both volunteers & LACHS
- Update the Draft Activity Categories to make it clear that a Permit is required for a tier 2 activity and a management plan for a tier 3 activity only where the activity is likely to or will impact Aboriginal cultural heritage.

Pastoral

- We consider that regulations should be developed to support the legislation which exempt all activities that are "Pastoral purposes as defined in the *Land Administration Act 1997*, including cultivation and grazing".
- The undertaking of pastoral operations across hundreds of thousands of hectares, management of the rangelands in accordance with lease obligations, and ensuring the health, welfare and safety of livestock could all be placed under duress as a result of these new obligations.
- In the current environment, there would almost be daily occurrences where an unplanned activity needed to occur that would trigger, at a minimum, due diligence obligations.
- Our members acknowledge, respect and support improved outcomes for the protection of cultural heritage. This must be balanced with pastoralists legal obligations and responsibility to manage the rangelands. We support the concept of holistic heritage management plans between Traditional Owners and pastoralist that would offer certainty in managing heritage and maintaining pastoral leases.
- We therefore suggest additional measures that encourage or incentivise pastoralists and Traditional Owners to prioritise execution of heritage agreements with Traditional Owners for their entire lease areas which would create a framework outside of the Act to properly care for and manage ACH. This could include resourcing bodies such as KPCA to assist pastoralists.
- We encourage the Department to directly engage with the pastoral sector to reconsider its approach to the tiered system and how it relates to extremely large and complex operations that require quick decision making to properly

manage the rangelands, commercial operations, and the health and welfare of livestock.

- The proposed arrangements pose ongoing risks to effective management, as well as potential compliance risks for pastoralists under the Act or other legislation. Essential management activities that are unanticipated may be prevented or unreasonably delayed despite being integral to sustainable, safe operations, and potentially result in loss of livestock and income due to matters beyond a pastoralist's control. An exemption for all pastoral purposes is therefore essential.
- Where relationships may be historically fractured or challenged between pastoralists and Traditional Owners, there is some risk the Act could be used to gain advantage or leverage in a dispute on the basis of an allegation that insufficient Due Diligence was undertaken, and harm resulted to ACH. This will potentially generate significant compliance burdens for the State and also administrative and cost burdens to both Traditional Owners and pastoralists.
- The nature of uses listed and their specificity can lead to gaps in the system where certain uses are not defined or missing from the list. A far more overarching approach to the nature of uses in each tier should be defined with activities associated linked back to their relevant legislation or approved program of works. We therefore consider the list of activities should actually be simplified.
- For example, a tier 1 activity is "Pastoral purposes as defined in the *Land Administration Act 1997*, including cultivation and grazing". There are many other uses listed as tier 1, 2 or 3 activities pastoralists would fairly presume are already covered in this overarching definition. This includes activities such as driving vehicles not on existing roads as part of mustering or allowing Aboriginal people access to hunt or undertake ceremonial activities; constructing new waterpoints, excavation to create dams; mechanical ground disturbance to install new fencing or maintaining crossing over waterways.
- The Pastoral Lands Board, which oversees the implementation of the *Land Administration Act 1997* on pastoral leases requires us to maintain and develop infrastructure including buildings, sheds, yards, fences, water points, firebreaks and access tracks, as well as rehabilitating degraded areas and

controlling plant and animal pests. All activities required of pastoral leaseholders under the *Land Administration Act 1997* should be classified as tier 1 activities, requiring "due diligence" (see above) only.

- Tier 1 activities would need to be significantly broadened to reflect the requirements of the Pastoral Land Act. e.g., Fences, roads, new bores, tanks, troughs etc. and the BAM Act regarding biosecurity issues. pipelines, yards. We therefore encourage activities in the tiers to be linked back to activities/ rights which already exist associated with different forms of tenure as opposed to very specific details themselves.

Impact of emergency management works

- It appears that not all activities that may be required to undertake in emergency situations are covered as Exempt activities. While many such activities appear to be considered tier 1 activities - relating to replacement of infrastructure in previously disturbed areas, there are also many other related activities of low level or moderate to high level ground disturbance that might be required. Concerned with the potential placement of these activities as a tier 2 or tier 3 activity. Activities required in emergency situations are unplanned and usually conducted as needed to address the relevant emergency as a matter of immediate urgency.
  Placement of such activities under a tier 2 or tier 3 category is taken as suggesting organisations would need to obtain pre-emptive type ACH permits or ACH management plans to account for all of these types of low level or moderate to high level ground disturbance activities over every LACHS area or equivalent area in the State.
  Given the 5 month timeframes for obtaining ACH permits and 5 months to 1 year timeframe for finalising ACH management plans, as currently proposed, such a task is considered onerous, and problematic given that most emergency based activities are already undertaken under other existing legislative mechanisms that provide for immediate action.
- We would be appreciative of more guidance on how the activity categories are intended to apply in the context of a working port with existing port infrastructure (so that the scenarios where e.g., ACH permits are required are

clear). The existing activity categories do not appear to have considered the specific needs of ports and we would be happy to discuss this further.

- The concept of the "natural ground level" is referenced in the table but not defined. This seems an important concept and it is unclear what it could mean in different scenarios. We suggest it be more clearly defined.
- The current Activity Table categorises activities undertaken in compliance with section 33 Firebreak Notices as tier 1, which would place an obligation on private landowners to undertake due diligence to determine if Aboriginal heritage is present. Widening of firebreaks is currently categorised as tier 2, which requires private landowners to undertake due diligence and potentially apply for a Permit. This categorisation raises a number of issues:
    - Who will be responsible for educating private landowners about this obligation?
    - What if a private landowner uses this requirement as an excuse for non-compliance with a Fire Break Notice?
    - What if a private landowner applies for a Permit and due to the timeframe required, the window for undertaking the mitigation activity has passed before the activity is conducted?
- If a Local Government increased the size of firebreaks within their district from 3 metres to 5 metres, due to seasonal climate impacts, this would require every landholder so issued to undertake the due diligence process for a tier 2 activity (due diligence followed by potential permit application). Potentially, Local Governments (and/or DPLH) could receive thousands of enquiries annually from landowners seeking advice and information about how to undertake due diligence and whether there is Aboriginal cultural heritage on their property. This situation would be overwhelming for Local Governments and could decrease compliance with section 33 Notices/ hazard reduction notices.

  Therefore, it is submitted that it is essential that compliance with all activities undertaken by a private landowner, Local Government Authority or contractor in order to comply with a Local Government firebreak notice under section 33 of the *Bush Fires Act 1954*, or other hazard reduction notice, including land

preparation, slashing, chemical treatments, clearing/ trimming of vegetation, mulching and burning should be exempt.

- Department to confirm that organisations (and Local Governments including private properties via a Section 33 notice) have the ability to clear and carry out planned burning for the purposes of fire prevention (including under the Bushfire Notice) provided it's not within a protected area.
- Department to confirm that the *Environmental Protection Act 1986* schedule 6 items (as listed under the ACH exemptions) allows relevant agencies (or those operating on behalf of these agencies) the ability for clearing, burning or other fire management works.
- For the new Flowcharts produced for tier 2 and 3 activities to include the phrase "Activity does not result in new or additional ground disturbance, Activity may Proceed." This wording will cover the 'maintenance or re-establishing of any disturbance works i.e., vegetation modification, firebreaks, etc., that occur in previously disturbed sites/areas. Widening or new works will require a DDA, which is good practise to ensure any potential ACH is avoided.
- s 98(d) of the Act provides that it is a defence to a charge of harm to Aboriginal cultural heritage under Part 5, Division 2 of the Act if the activity generating the harm was carried out in an emergency situation. In any event, emergency situations by their nature require immediate responses. Any requirement to undertake further due diligence and/or obtain an ACH Permit or approved or authorised ACH management plan for an emergency situation due to the classification of the emergency response as a tier 1, tier 2 or tier 3 activity would appear unintended. Emergency activities should be removed from the activity table in their entirety.

Further definition of terms

- Definition of a ground disturbance
- Determining levels of ground disturbance for excavation in this section requires further guidance - when is an excavation considered to be small open area excavation or test pitting vs large scale open area excavation? The current descriptions are too simplistic and subjective for guidance in self-assessment.

- Reference to salvage activities is made as a tier 2 Activity and also a tier 3 activity. Similar to excavations, the current descriptions are currently too simplistic and subjective for self-assessment and require further guidance
- Further definition and guidance be provided as to what constitutes a ‘developed’ area. For example, are natural reserves that include BBQ’s and benches classified as developed areas?
- What is definition of minimal/low/moderate/high?
- What is the definition of community utilities?
- Reference to minimal digging in tier 2 while tier 1 references minimal ground disturbance - isn't this the same thing?
- What is a waterway - does it include the sea?
- However, in our view, the various examples currently listed in the Phase 2 consultation documentation can fit into multiple categories and further guidance is required in relation to defining low, moderate and high ground disturbance. As such, we hold concerns that the current documentation does not make clear how to differentiate between the activity tiers.
- Activity categories could be determined based on level of ground disturbance, irrespective of the purpose for which an activity is undertaken.
- With regard to the Activity Categories, request consideration of the following:
    - Definition of low, moderate and high ground disturbance.
    - Creation of thresholds that determine level of ground disturbance.
- Strongly recommend that the Activity Categories document be revised to ensure that each activity is listed by reference to disturbance and is neutral to the industry undertaking it. Also recommend the Activity Categories table be updated to better reflect the range of scale of some activities, by reference to disturbance.
- The term ‘developed area’ is problematic because Local Governments are responsible for maintaining areas of mixed land condition, such are natural foreshore and coastal areas that include both developed park/ recreation facilities such as benches and BBQ’s.
- Clear definitions to be included as part of the tiers to ensure clarity and understanding.

- Minimal, low and high should be defined by way of something metric e.g., m3 or tonnes
- Water and environmental impacts (no direct disturbance but impacts of water level changes)
- For example, where a tier 3 activity “could” include “mining exploration activities consisting of vehicle track creation and drill pads”, it is arguable that it is open to conclude that “mining exploration activities consisting of vehicle track creation and drill pads” could fall into a different activity tier in some circumstances. This creates uncertainty regarding classification of activities.
- tier 1: “minimal ground disturbance” definition? E.g., bore installation & pumping: parameters and dimensions may be useful
- Clarify meaning of “Already disturbed areas”
- Need a broader definition of mining activity

Imprecise Language

- The use of the word “could” in the Table (e.g., “this could include but is not limited to”). This uncertain language leaves the activities included in the lists that follow open to interpretation.

Inconsistences in table

- A lot of the activities and which tier they are in do not have any practicality on the ground. The requirement for a tier 2 permit for the replacement of signage (creating an additional disturbance as the footprint of the signage is slightly wider and deeper to the ground) is done on an ad-hoc basis and is a road safety concern if signage cannot be moved, relocated.
- Does not consider ‘scale of activity’
- Specify existing footprint? Many of the activities can be in many different tiers
- Recommend the due diligence process for tier 1 involve a simple checklist process which, when followed, allows a proponent to form a substantiated view as to whether their proposed activity involves a risk of harm to ACH. This is necessary for the operation of the due diligence defence under s98 of the Act.
- The purpose for which an activity is undertaken, the industry undertaking it, or the end use is not relevant to the threshold of disturbance contemplated.

Recommend that the listing and descriptions of activities and groupings be updated to focus on the activity in question to allow a broad range of industries to identify within the table, by reference of their proposed disturbance and risk of harm rather than the specific industry or end use.

- An example within the current table where this inconsistency is illustrated is in establishment of a water bore. Establishing a water bore for 'development' purposes is considered a tier 2 activity, however if it's being established for the purpose of supporting mining it's a tier 3. This is inconsistent with the intent of the Act. Strongly recommend that the Activity Categories document be revised to ensure that each activity is listed by reference to disturbance and is neutral to the industry undertaking it.
- Also recommend the Activity Categories table be updated to better reflect the range of scale of some activities, by reference to disturbance. This could be done by providing an empirical threshold of disturbance for an activity in each respective tier. This would assist with clarification for proponents where the same activities are listed in multiple tiers. For consistency, it is also important that this measure of scale is subsequently aligned across different activities.
- Each of the categories in the Draft Activity Category Table includes the following chapeau: Activities related to xxxxxx with minimal / low / moderate to high ground disturbance. This could include but is not limited to: The subjectivity involved in establishing what constitute 'minimal/low/ moderate to high' ground disturbance, respectively, unless clearly defined this may lead to dispute.
- Recommends that an empirical / measurable indicator of ground disturbance should be specified to enable developers and Aboriginal parties to clearly understand the level of ground disturbance that applies in each circumstance. Note that the 'tonnage limits' imposed on tenements through the Mining Act 1978 (WA) and associated Regulations are a good example of disturbance limits that could apply.
- Internal inconsistencies in the categorisation tables with the same activity falling into different tiers according to the purpose of the activity for example, use of hand tools. This could have the effect of pushing proponents into a higher tier based on the purpose for which the activity is being undertaken.

- Recommends that purpose should not be a relevant consideration in the categorisation of an activity, and that the level of disturbance should be the only indicator.
- The Draft Activity Categories Table (Table) must:
    - Be legally robust (i.e., consistent with the Act);
    - Be consistent (ensure that the same activities do not appear in multiple tiers);
    - Definitively identify what “tier” an activity is for the purposes of the Act; and
    - Cover the field for all potential land-based activities.
- Issues identified are best addressed by re-categorising activities based on a definitive, quantifiable and prescribed level of ground disturbance, rather than the current approach of categorisation based on the nature and/or purpose of the activity.

  This approach would align the categorisation of activities with the potential for harm to Aboriginal cultural heritage consistently across all potential land use activities, consistent with the objectives of the Act. It would also provide a legally robust, objective measure for categorisation of any land- use activity and minimise the potential for legal challenge to authorisations and approvals granted under the Act.
- Inconsistencies remain in the classification of activities into the different tiers. For example:
    - Vegetation sampling or measuring is a tier 1 activity when considered in relation to natural resource management activities with minimal ground disturbance;
    - However, removing flora samples of up to 20kg and up to a depth of 2m from the nature surface for the purposes of “field mapping and surveys” is a tier 2 activity.
    - There appears to be no reasonable basis for the distinction when the natural resource management vegetation sampling has the same potential for disturbance (and therefore the same potential for harm to Aboriginal cultural heritage).
- Rigid categories may be a problem

- More examples could be useful
- Remove duplication (e.g., handheld tools)
- Quantification for ground dust levels, m2, m3 or depth to quantify i.e., with buildings provide a size of disturbance metric. Buildings (extension or new) greater than XXm2
- The Table defines some activities by purpose, e.g.:

(a) environmental, biological monitoring and conducting tests for water, site contamination or other scientific or conservation purposes;

(b) widening access tracks/firebreaks for asset protection outside the existing treated/disturbed area;

(c) dredging of natural waterways (e.g., wetlands, rivers, foreshores) to remove sand that has been deposited over time from drainage pipes.

The purpose of an activity does not reflect the potential harm that an activity may pose to Aboriginal cultural heritage. For example, the dredging referred to in (c) above could have low potential for harm where only small quantities of sand are being removed, and very high potential for harm where large quantities are being removed. In those cases, there is high variability in the potential harm, despite the activity being for the same purpose. The categorisation of activities by purpose is also arguably inconsistent with the Act, which defines tier 1, tier 2 and tier 3 activities by reference to levels of ground disturbance (s 100).

The potential for harm is linked to the level of ground disturbance associated with the activity, and not the purpose of the activity itself.

Proscriptive or generic

- The Table is currently non-exhaustive. Because of the scheme of the Act, it is essential that all potential land use activities can be identified as exempt, tier 1, tier 2, or tier 3 with certainty. In the absence of that certainty, the following issues arise:

(a) there will be no legal certainty that activities not expressly prescribed in the Regulations/identified in the Table are exempt, tier 1, tier 2, or tier 3 activities that may be authorised under the Act; and

(b) The allocation of activities not expressly prescribed in the Regulations/identified in the Table will be subjective and open to legal challenge.

- A definitive “catch-all” is required for each activity category. This catch-all should be:

(a) objective (i.e., quantitative,
(b) independently measurable and verifiable), so as to limit the
(c) opportunity for different interpretations and legal challenge; and
(d) prescribed in the Regulations for each activity category, to ensure that any potential land use activity (including future unknown activities) is capable of identification as an exempt, tier 1, tier 2 or tier 3 activity.

Propose the “catch-all” be linked to specified quantities of ground disturbance, for example:

(a) tier 1: 1km2 or less ground disturbance;
(b) tier 2: more than 1km2 and no more than 5km2 ground disturbance; and
(c) tier 3: greater than 5km2 ground disturbance.

- “Ground disturbance” will need to be clearly defined for the purposes of the above “catch-all”.
- Where it is reasonably necessary for specific activities (or activities for specific purposes) to be carried out without the application of the harm mitigation measures specified under the Act, that activity should be prescribed as “exempt”.
- Any other activity should be categorised by reference to the potential for harm. While the Table does seek to categorise some activities by reference to minimal, low or moderate to high ground disturbance (e.g., mining activities), these descriptions are highly subjective in the absence of quantifiable definitions of “minimal”, “low”, “moderate” and “high” levels of ground disturbance.
- Shouldn’t try to define all activities – there will always be gaps. Use principles instead.
- The document tries to cover too many activities and should be condensed into a more generic form. The current prescriptive approach does not allow for the addition of new or changing activities. Other than an exhaustive list, this

Guideline could include a matrixed approach with more general guidelines and include examples of well known, regularly occurring activities for each category.

- The Table includes very broad descriptions of activities. For example:

(a) revegetation in degraded areas in mined areas, including fencing areas of vegetation;

(b) backfilling historic mine features using imported materials;

(c) mining exploration activities consisting of vehicle track creation and drill pads.

Again, there is high variability in the potential for harm to Aboriginal cultural heritage associated with each of the above activities, depending on the extent of the revegetation, backfilling or mining exploration activities. For example, the potential for harm associated with fencing areas of vegetation or backfilling depends on the size of the area to be fenced or backfilled (i.e., the level of ground disturbance).

Things other than ground disturbance that affect heritage

- The second section of the Activity Table provides examples of various levels of ground disturbance activities that impact waterways, however discussion of activities that specifically alter water flow is not clear.

  Concern regarding the alteration of water flow is often voiced by Aboriginal groups during surveys where proposed works within/around waterways are considered. Often such concerns are raised on the basis of 'alteration or no alteration' and not necessarily in relation to a degree of ground disturbance. Consideration should be given to including activities that alter water flow in this section under a tier 2 and/or tier 3 category.

How do activity categories interact with existing legislation and approvals?

- The Draft Activity Categories table, provided in the package of documents for consultation, identifies “jetty and boat ramp maintenance and redevelopment within area with existing infrastructure” will require an ACH permit, and “activities specifically impacting waterways with moderate to high ground disturbance, including but not limited to:

- Dredging of natural waterways (e.g., wetlands, rivers, foreshores) to remove sand that has been deposited over time from drainage pipes
- Erosion control activities associated with the ocean and significant waterways (includes walls, barriers, reshaping of beach areas, construction of groynes etc.)…"

Seek to understand from Department the implications of this on existing port facilities and infrastructure that have already been established (and are regularly maintained) under existing approvals obtained under section 18 of the *Aboriginal Heritage Act 1972* (AHA). Where an existing approval / consent has been granted under the AHA for the development of a shipping channel or berth, no new consent / approvals / management plan should be required under the Act to maintain this infrastructure. This would include maintenance dredging activities, which are required to remove accumulated sediments in order to maintain safe navigation. Ports are required to apply for and hold a valid Sea Dumping Permit for maintenance dredging activities under the Commonwealth *Environmental Protection (Sea Dumping) Act 1981* and implement comprehensive Long Term Dredging Environmental management plan for these works. Consultation with port stakeholders through forums such as the Technical Advisory and Consultative Committees and Community Consultation Committees (which include community members and Traditional Owners) is also undertaken as part of the process for applying for a Sea Dumping Permit.

- How do such works fit within the Activity Categories and how they might be undertaken under the Act?
  - In 'Port Waters' who needs to undertake the due diligence?
  - Where does an existing miner's right (prospecting/fossicking) sit?
  - Cross reference other government Acts: e.g., DWER (State); EPA (State); EPBC (Federal); DMIRS Mining rehabilitation fund activity report
  - Local govt development: timelines and budget impacts
  - Interaction with LG Act? Services LG provide? Residential developers (Greenfields – onus on them)

- Residential property exemptions?
- Water licensing process and impacts.
- Water allocation planning

Evidence of ACH

- Will there be a body that the LACHS need to report to terms of their performance and their interpretation on the level of investigations required?
- I understand this is for existing areas of cultural significance, and the protection of it. What is the process for new areas? What are the guidelines, what's to stop someone with the wrong intentions creating an area of cultural significance over existing infrastructure? Given only Aboriginal people can be on the ACH board, only Aboriginal people can do inspections, and next to no written history, what chance does a non-aboriginal person have in contesting anything? Especially given non-tangible evidence can be used?
- Evidence of an ACH must be documented and available to the public. It must be all available to ensure no ACH areas are damaged.
- It is noted that the ACH Directory may include information that contains spatial and other inaccuracies. Could the Department flag those records where it is likely this is the case so that people searching the directory are immediately aware, such as older site recordings that have accuracy issues.

Funding

- This needs to have State financial backing, with full time teams/offices. This can't be left to meander, contact with PBCs can often be hard or non-existent. They need funding and support to ensure this works for all parties involved. To ensure that the ACH are protected, but to also ensure information/support is available for those requesting assistance. Otherwise, this will lead to massive delays in the Local Government sector, causing massive delays, and extreme costs to any project. To ensure this works for all involved, and is time/cost effective for all parties, ACH groups and PBCs require state funding.
- Huge burden on Aboriginal groups to resource doing appropriate engagement e.g., for workshop, plan land management, planning, negotiate agreements
- Pastoral company may not be able to afford this overhead

Misunderstanding of requirements

- There appears to be a level of misunderstanding among stakeholders about the requirements for applications for permits and management plans. It is apparent that there is a low level of understanding that a Proponent is only required to apply for a Permit or management plan if the activity is likely to impact ACH. If a due diligence process is undertaken and it is determined that a tier 2 or tier 3 activity will not impact Aboriginal cultural heritage, the activity can proceed without a Permit or Management Plan. The Draft Activity Categories are contributing to this confusion because they state in the header row of the table that an ACH permit is required for a tier 2 activity and a management plan is required for a tier 3 activity. It is recommended that the Draft Activity Categories are updated to make this clear.
- The overarching concern for the Local Government sector in relation to the new Act is the potential for delays and additional administrative burden in relation to the conduct of infrastructure works, particularly maintenance and repair of existing infrastructure which is a significant part of Local Governments' day to day activities.
- Update the Draft Activity Categories to make it clear that a Permit is required for a tier 2 activity and a management plan for a tier 3 activity only where the activity is likely to or will impact Aboriginal cultural heritage.