



# ABORIGINAL HERITAGE ACT 2021

Briefing paper

Prepared for the meeting of the Regional Cities Alliance WA  
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# **Briefing paper: Aboriginal Cultural Heritage Bill 2021**

## **Executive Summary**

The Aboriginal Cultural Heritage Act 2021 significantly expands the scope of Aboriginal cultural heritage covered by State legislative protection and places Aboriginal people at the centre of decision making and in support of cultural maintenance and protection. The Act potentially increases knowledge and certainty and should improve the value placed on Aboriginal Heritage by the broader community.

The inclusion of Cultural landscapes and traditional and contemporary social, spiritual, historical, scientific, or aesthetic cultural values will require unprecedented engagement with local Aboriginal people to ensure the heritage information required to manage an efficient and effective protection and approvals system is available to Local Governments and all landholders.

Local Government will need to be actively engaged with the State Government in the co-design process for the required regulations, key documentation, and tiers of activity to ensure the new Act can be administered appropriately without placing land development and works approvals under cost and time risks.

Local Government will likely to be exposed to increased costs associated with Aboriginal Heritage consultation, permits and management plans and compensation for any significant heritage impacts. Informed consent by traditional owners will require significant local engagement in the concept and planning stage of developments prior to the development approval phase which will then include third party approvals processes through the Aboriginal Cultural Heritage Council.

Local Government is not an approvals authority under the Act but may be engaged through regulations in a compliance role adding further administrative burden to existing approval processes.

Other consequences for local government relate to heritage protection obligations and are detailed later in the paper.

The following recommendations are proposed to enable the Regional Cities Alliance WA (RCAWA) to engage with the strategic opportunities and risks associated with the introduction of the ACHA.

### **This paper recommends.**

- 1. That RCAWA seek to be engaged by the Department of Planning, Lands and Heritage (DPLH) as a key stakeholder in the consultation phase of the development of the regulations and other documentation that gives effect to the Act.**
- 2. That RCAWA advocate for Regulations to allow for a single Aboriginal Cultural Heritage Plan to be applied to all land areas and activities within a city or shire boundary.**
- 3. That RCAWA request DPLH to provide any cost modelling undertaken on consultation fees, permit fees and impact compensation, that might apply to Local Government activities, to assist with strategic budgeting as required under the Local Government Act.**
- 4. That RCAWA requests priority be given to the establishment of the Local Aboriginal Cultural Heritage Services (LACHS) in Regional city jurisdictions.**
- 5. That RCAWA authorise the executive officer to write to the Acting Director General of DPLH seeking ongoing engagement during the implementation of the Act.**

## Background

The Aboriginal Cultural Heritage Act 2021 (ACHA) is a new Act replacing the existing Aboriginal Heritage Act 1972 (AHA) through transitional arrangements that ensures continuity of exiting Aboriginal heritage protection and approval processes over the next two years.

The State Government has committed to convening a working group of traditional owners, industry, and Government representatives to oversee the co-design process for the required regulations, key documentation and tiers of activity for the future Aboriginal Heritage consultation and agreement making processes. The AHA will be fully repealed once the new regulations are in place.

The Aboriginal Heritage Act 1972 (AHA) was primarily concerned with the historical evidence of pre-colonial Aboriginal life inclusive of ceremonial sites, burial grounds, fish traps, camping areas, sacred and traditional use objects, and protected areas such as the Burrup and Abydos Woodstock rock art areas. The AHA based its evidence on anthropological and archaeological science as well as traditional knowledge. Only limited information was held in the existing Aboriginal Heritage sites register which created significant uncertainty for land holders and developers working in areas of Aboriginal heritage significance.

The passing of the Native Title Act 1993 (NT Act) created inconsistencies between the rights of traditional owners under the NT Act and the rights of site informants under the AHA many of whom were not traditional owners.

The process to gain Native Title determination led to the documentation of the cultural significance of river systems, song lines, landscapes, inter tidal areas, sea resources, islands and other natural resources previously unprotected under the AHA.

The new Aboriginal Cultural Heritage Act 2021 (ACHA) follows many failed attempts to draft and pass new Aboriginal Heritage legislation. The ACHA provides a broad definition of Aboriginal cultural heritage that incorporates its living, historical and traditional nature, as well as its tangible and intangible (law, Lore, spiritual, social, and aesthetic) elements. Under the ACHA, Aboriginal cultural heritage includes Aboriginal places, Aboriginal objects, cultural landscapes and ancestral remains.

The inclusion of Cultural Landscapes is likely to have greatest impact on land holders and land developers and approval authorities. Contemporary Aboriginal cultural heritage is likely to include buildings and other public and private infrastructure such as missions, hostels and public health buildings not previously protected under the AHA.

The ACHA apart from significantly increasing the scope of what is considered Aboriginal heritage also moves the evidential base from anthropological and archaeological science to traditional and contemporary Aboriginal knowledge and cultural authority from site informants to Traditional owners and Native title holders and their representatives. The Act introduces mechanisms and powers for Aboriginal people to manage their own heritage.

The ACHA focuses on avoidance and minimisation of risk of harm to heritage and requires early engagement with Aboriginal parties prior to undertaking activities that may harm Aboriginal cultural heritage. The key point is that the cultural heritage does not need to be recorded to be protected so due diligence procedures will be incorporated into regulations under the Act to provide land holders with an avoidance process to follow as part of development approvals. The ACHA maintains

Ministerial powers of direction and the application of the public interest test though this is balanced by the requirement to consider Aboriginal public interests as well as the broader community.

The ACHA had already been drafted when the Juukan Gorge incident exposed the vulnerability of the Section 18 process. As a result, Aboriginal people sought a veto right over such approvals in the future, this has not been included. The ACHA was amended prior to being passed by Parliament to include a requirement for proponents to provide to Aboriginal interests the full and proper disclosure of the proposed development method and other feasible methods for carrying out activity that minimises impacts to heritage; existing s18 approvals will expire in ten years unless the purpose has substantially commenced; State agencies can now be prosecuted for offences and broadscale clearing is no longer an 'exempt activity'. The transitional arrangements allow for the continuation of AHA approvals processes till the ACHA regulations, standards and guidelines are developed. These will be subject to public comments and consultation with land holders.

## **Purpose of the Aboriginal Cultural Heritage Act**

The ACHA seeks to value and protect Aboriginal cultural heritage and incorporate a balanced approach to the management of activities that may harm Aboriginal cultural heritage, to ensure beneficial outcomes for both Aboriginal people and the wider Western Australian community. The act recognises the role of Aboriginal cultural heritage in the lives and wellbeing of Aboriginal people, confirms that Aboriginal people are the primary custodians of their heritage and provides a statutory role for Aboriginal people in identifying, protecting and managing their heritage.

The ACHA replaces the existing AHA and amends other legislation to give effect to the intended reforms.

## **What are the key provisions of the Aboriginal Cultural Heritage Act?**

A definition of Aboriginal cultural heritage drawing from the principles set out in the Australia ICOMOS Burra Charter, 2013 ('Burra Charter'). Incorporating **tangible and intangible** elements that are important to Aboriginal people and which are recognised through cultural values (whether **social, spiritual, historical, scientific or aesthetic**), as part of Aboriginal tradition.

Provides for a **statutory role for Aboriginal people in identifying, protecting and managing** their heritage.

Establishes the **Aboriginal Cultural Heritage Council (ACH Council)**, a majority Aboriginal advisory body, to provide strategic oversight of the Aboriginal cultural heritage regime.

Creates local **Aboriginal Cultural Heritage Services (LACHS)**. These incorporated local Aboriginal bodies will act as a single point of contact on Aboriginal cultural heritage matters in their area of designation.

Creates a **tiered approval system** to allow proponents to determine how proposed activities may be authorised and managed to avoid or minimise risk of harm to Aboriginal cultural heritage. The proposed Act **mandates notification and consultation with Aboriginal parties for Tier 2 and Tier 3**.

Protection for Aboriginal cultural heritage of outstanding significance through the **declaration of protected areas**. Protected areas will not be vested with the Minister for Aboriginal Affairs but rather managed by traditional owners and holders of native title.

Three levels of harm under the legislation: serious harm, material harm and harm with **significant penalties for contraventions**. Such offences are also supported by stronger powers to secure

compliance with new Ministerial **powers to issue stop activity orders, prohibition orders and remediation orders**

Establishes an **Aboriginal Cultural Heritage Directory (ACH Directory)** which is a central depository for information and documents about Aboriginal cultural heritage in the State.

Encourages **landowners** and other interested persons to enter into **voluntary Aboriginal cultural heritage protection agreements** with Aboriginal people to enable the protection, preservation or conservation of Aboriginal cultural heritage. These agreements may be submitted to the council for endorsement and lodgement on the new directory.

**All proponents are required to undertake a due diligence assessment** to understand whether their proposed land use will impact Aboriginal cultural heritage and the likely level of impact.

The **return of secret and sacred objects is mandatory for government agencies** and encouraged for everyone else, but otherwise those objects cannot be sold or removed from the state.

Identifies six Ministerial decisions made under the Act which are **reviewable by the State Administrative Tribunal** in accordance with this Part ('reviewable decisions') and the person eligible to apply for such a review.

Enables the **CEO of the Department** to designate in writing a public service officer or a person employed or engaged under section 100 of the PSM Act by the Department, as an **inspector for the purposes of the Act**. It also enables the appointment of an **Aboriginal person to be an Aboriginal inspector** for an area of the State. An Aboriginal inspector has, in respect of the area appointed, the **powers conferred by or under the Act** that are specified in the appointment and to that extent is taken to be an inspector.

## **How is an Aboriginal heritage place defined?**

An **Aboriginal place** is an **area** in which tangible elements of Aboriginal cultural heritage are present with a **cultural landscape** being a **group of areas interconnected** through tangible and intangible elements of Aboriginal cultural heritage. For Aboriginal cultural heritage to be recognised and **protected** from activities that may cause harm to it, a **protected area order** is required.

## **How will Aboriginal Cultural heritage information be made available?**

The legislation establishes an **Aboriginal Cultural Heritage Directory (ACH Directory)** which is a central depository for information and documents about Aboriginal cultural heritage in the State. This will be a planning and research tool that will be administered by the ACH Council with culturally sensitive information made available only with the explicit consent of relevant knowledge holders.

The ACH Directory is to contain the information specified in the regulations in relation to: a protected area; a local Aboriginal Cultural Heritage (LACH) service for an area; a native title party for an area; the knowledge holders for a particular area and particular Aboriginal cultural heritage; an ACH protection agreement; an ACH permit; an approved or authorised ACH management plan; a determination that Aboriginal cultural heritage is of State significance; and a Part 7 order.

The ACH Directory will be a single point of truth and should reduce the need for duplication of heritage surveys over the same land areas.

## How is Aboriginal cultural heritage protected?

- Providing that Aboriginal people are the custodians of Aboriginal ancestral remains and are entitled to the possession and control of those remains
- Providing that Aboriginal people are the custodians of secret or sacred objects
- Providing a process for the return to Aboriginal people of Aboriginal ancestral remains
- Imposing a duty to report Aboriginal cultural heritage to the ACH Council
- Through the protection of areas in which Aboriginal cultural heritage of outstanding significance is located and heritage places.
- Through Offences, penalties and compensation for harm to Aboriginal cultural heritage
- Through the management of activities that may harm Aboriginal cultural heritage (tangible and intangible)
- Stop activity orders
- Prohibition orders
- Remediation orders

## Who are the approving authorities under the ACHA?

The legislation establishes the **Aboriginal Cultural Heritage Council (ACH Council)**, a majority Aboriginal advisory body, to provide strategic oversight of the Aboriginal cultural heritage regime. The ACH Council's functions include providing **advice to the Minister** on heritage matters, **designating local Aboriginal cultural heritage services** (local ACH services) and **approving Aboriginal cultural heritage permits** ('ACH permits') and **Aboriginal cultural heritage management plans** ('ACH management plans',) endorsing ACH protection agreements and making recommendations in relation **to prohibition and remediation** orders. The ACH Council also has an important role in developing guidelines for best practice Aboriginal cultural heritage management and approving deposits into the ACH directory. The ACHA enables the ACH Council to endorse **Aboriginal cultural heritage protection agreements** which are voluntary agreements with Aboriginal parties that focus on proactive actions to recognise, protect, conserve, preserve and manage Aboriginal cultural heritage in an area. An ACH protection agreement cannot permit harm to Aboriginal cultural heritage in the area.

**The Minister** can give directions to the ACH Council as to the performance of its functions and the ACH Council must give effect to such direction. However, the Minister cannot give a direction in relation to: a particular person or matter; a particular ACH permit or an approved or authorised ACH management plan; an application for an ACH permit or for the approval or authorisation of an ACH management plan; the evaluation of the characteristics or significance of Aboriginal cultural heritage.

**Ministerial decisions** which are to be made on the grounds of what is in the **interests of the State**. These decisions are: whether to **declare an area a protected area**; whether **to reverse a decision** of the ACH Council in respect of an existing or proposed **ACH permit**; whether to reverse a decision of the ACH Council refusing to approve an **ACH management plan** or approve the amendment of an ACH management plan; whether to authorise an ACH management plan, being a management plan

where the proponent and the Aboriginal party have not reached an agreement, or if the management plan relates to authorising activities that Aboriginal Cultural Heritage Bill 2021 identifies may harm Aboriginal cultural heritage determined to be of State significance; whether to give a **prohibition order**; and whether to extend the term of a prohibition order.

## What are Local Aboriginal Cultural Heritage Services (LACHS)?

Aboriginal people are empowered to have an active role in the management of their cultural heritage through the creation of local ACH services. These **incorporated local Aboriginal bodies** will act as a single point of contact on Aboriginal cultural heritage matters in their **area of designation**. Local ACH services will be responsible for **facilitating agreement making** in relation to ACH management plans and for engaging knowledge holders to ensure that their views are captured in decisions that affect their cultural heritage.

knowledge holder refers to an Aboriginal person, who in accordance with Aboriginal tradition, holds particular knowledge about the Aboriginal cultural heritage in an area and has traditional rights, interests and responsibilities in respect of that heritage. In some cases, knowledge holders may be native title parties but this may not always be the case. LACHS will also have roles in preserving and maintaining heritage, holding cultural objects and promoting heritage values.

The ACH service **may charge a fee for services** related to its functions as a local ACH service. The fee will **apply to a proponent** who wants to undertake an activity that may impact Aboriginal cultural heritage, reasonable costs associated with obtaining approvals to undertake are to be recovered, this includes but is not limited to fees for services provide by local ACH services. Such fees will be stipulated by **supporting guidelines** but may include services such as completing cultural heritage investigations, facilitating consultation and notification with the Aboriginal community and others.

## What is the Tiered approval process?

The ACHA introduces a three tier approval process for activities that may cause harm to Aboriginal Cultural Heritage. It is only applicable to proponents who are persons intending to carry out of activities that may cause harm.

- **tier 1** activity means an activity involving no or a minimal level of ground disturbance.
- **tier 2** activity means an activity involving a low level of ground disturbance.
- **tier 3** activity means an activity involving a medium to high level of ground disturbance.

There is an obligation on a proponent seeking an ACH management plan in relation to a proposed tier 2 or 3 activity, to consult with persons specified in the Act. See attachment 1

In the absence of any classification in the regulations as to a proposed activity or a lack of certainty as to the correct classification for a proposed activity, a proponent may request that the CEO of the Department confirm the proposed activity is either an exempt, a tier 1, tier 2 or tier 3 activity.

These tiers will potentially impact residential and commercial land development, civil works, farming, recreation and other such activities on all lands over 1100sqm if Aboriginal cultural heritage is recognised on those lands.



## What are Due Diligence assessments?

A due diligence assessment (undertaken in accordance with the **ACH Management Code**) has the purpose of enabling a **proponent to make an assessment** as to:

- **whether the area** where it is intended the proposed activity is to be carried out **includes any area which is subject to a protected area order**;
- the **categorisation of the proposed activity** as either a tier 1, tier 2 or tier 3 activity, which will determine how the proposed activity may lawfully be carried out;
- whether Aboriginal cultural heritage **is located where** it is intended the proposed activity is to be carried out;
- whether there **is any risk of harm** being caused to Aboriginal cultural heritage by the proposed activity;
- if the proposed activity is categorised as a tier 2 activity or a tier 3 activity, **the persons to be notified** or consulted about the proposed activities.

A due diligence assessment **is not required** for an activity listed as an **exempt activity**.

Due diligence would be undertaken by reviewing the ACH directory and consulting with the LACHS. Regulations and the ACH Management code are yet to be prepared that would give clarification on the processes to be used by landholders in undertaking due diligence prior to undertaking tier 1 and two works.

## Are there exemptions under the act?

An exempt activity includes any construction, renovation or demolition of a **residential or ancillary building** on a **lot of land less than 1,100 m<sup>2</sup>** and developments of a prescribed type carried out in accordance with the Planning and Development Act 2005. The 1100 m<sup>2</sup> size is based on lot sizes that are currently exempted from bushfire planning requirements. It recognises that owners of lots which are less than 1,100 m<sup>2</sup> in size will not have flexibility with regards to where on the lot they build, whereas owners on larger lots will have greater flexibility to minimise heritage impacts.

Exempt activities also **include travel on an existing road or track**; taking photographs for recreational purposes; **recreational activities in a public place**; **some fire prevention or control** activities on Crown land by a public authority; and some clearings of land permitted under the Environmental Protection Act 1986 ('EP Act'). These are clearings permitted or authorised under the Bush Fires Act 1954, undertaken under the section 54 of the Energy Operators (Powers) Act 1979 or under section 34(a), (c) or (h) of the Fires Brigades Act 1942.

Owners of lots bigger than 1,100m<sup>2</sup> will have obligations to not harm Aboriginal Cultural Heritage activity categories prescribed in regulations, the ACH Management Code and other Guidelines that will be developed.

Further exemptions are anticipated in the development of regulations and guidelines under the act.

## When will you require an Aboriginal Cultural Heritage permit?

The act provides that where a proponent intends to carry out a **tier 2 activity that may harm** Aboriginal cultural heritage, **the proponent must notify** in writing each of the persons to be notified under clause 107 of the Act, with details of the proposed activity including its location, and provide

an opportunity to the persons notified, to submit to the proponent, within a specified period in the regulations of the Act, a statement as to the person's views about the risk of harm being caused to Aboriginal cultural heritage located in the area. Where a local ACH service exists for an area, the proponent is **only required to notify** the local ACH service. If so, advised a due diligence assessment will be required. The final requirement, to be authorised by the **ACH council** to undertake a tier 2 activity **that may harm Aboriginal cultural heritage** in an area, is that the person must carry out the activity either in accordance with an **ACH permit**, granted under Part 6 Division 5, or an approved or authorised **ACH management plan** under clause 151(1) and 165(1) respectively of the Act.

## **When will you require an Aboriginal Cultural Management Plan?**

This act provides an approved or authorised **ACH management plan** is required for carrying out a **tier 3 activity that may harm** Aboriginal cultural heritage. Generally, an ACH management plan may be approved if the proponent and any interested Aboriginal party have reached agreement on its terms, but if agreement is not reached, the proponent will need to apply to have the plan authorised by the **ACH Council**. If the relevant Aboriginal cultural heritage is **of State significance**, the ACH management plan **must be authorised** even if the parties to the management plan agree on the management plan. A proponent may choose to seek an approved or authorised ACH management plan to authorise a tier 2 activity, rather than applying for an ACH permit this will probably apply to exploration companies and others doing ongoing works within a prescribed area.

Aboriginal parties are required to give **informed consent** to an ACH management plan before a plan can be approved by the ACH Council or authorised by the Minister. Once approved or authorised, a proponent can carry out their proposed activities in accordance with their ACH management plan. However, **if new information about Aboriginal cultural heritage emerges** in relation to an area to which an ACH permit or approved or authorised ACH management plan relates, then the Minister has the discretion to issue a **stop activity order**, prohibition order and remediation order to prevent harm to Aboriginal cultural heritage.

## **What is required for informed consent by ACH Council and LACHS?**

Informed consent requires the proponent to provide the interested Aboriginal party **full and proper disclosure of information** about the activity the proponent intends to carry out under the plan, which requires a clear explanation of: the preferred method the proponent intends to use to carry out the activity; and if applicable, each **other feasible alternative method available to the proponent**. For each of these methods the proponent is to provide: a clear explanation of the risk of reasonably foreseeable harm being caused to Aboriginal cultural heritage by the activity with each method; and the nature of the harm to Aboriginal cultural heritage risked by each method. Further, in relation to the preferred method, the proponent is to provide a clear explanation as to **how the activity will be managed to avoid or minimise the risk of harm being caused to Aboriginal cultural heritage** and a clear explanation of the steps, if any, that will be taken to avoid or minimise that risk.

## **What are the powers of Aboriginal Cultural Heritage inspectors?**

Aboriginal and non-Aboriginal heritage inspectors are appointed by the CEO of the Department and are given broad powers to enter Aboriginal places, obtain information and conduct inspections for the purpose of ascertaining whether the Act or any instrument has been contravened. The act provides an inspector may apply to a magistrate for an entry warrant authorising entry to a place or vehicle for inspection purposes, even where under Division 3 the inspector may lawfully enter the place or vehicle without a warrant. As part of their powers, inspectors will have the power to enter

places, take samples or specimens, survey and mark out land, and make reasonable use of any equipment, facilities or services on or in a place or vehicle in order to carry out an inspection.

## **Who are landholders under the ACHA?**

In relation to **Crown land**, if the land is in a managed reserve as defined in the Land Administration Act 1997 section 3(1) — the management body of that reserve under that Act; if the land is vested in a person under a written law other than the Land Administration Act 1997; if the land is a road as defined in the Land Administration Act 1997 section 3(1) — whichever of the following has the control and management of the road under a written law, the local government in whose district the road is situated, the Commissioner of Main Roads or the Minister to whom the administration of the Public Works Act 1902 is committed; or if the land is held under a lease lawfully granted by the Crown, and does not have a landholder or if the land does not otherwise have a landholder.

In relation to land that **is not Crown land**, means a person who is registered under the Transfer of Land Act 1893 as proprietor of an estate in fee simple in the land; or a person who is the holder of the freehold in the land as evidenced by a memorial that is registered under the Registration of Deeds Act 1856; or an executor or administrator of, or a person appointed under a written law to act on behalf of, a person referred to in subparagraph (i) or (ii); or an agent or attorney of a person referred to in subparagraph (i) or (ii); or a mortgagee in possession of the land;

## **How is the ACHA consistent with Native Title determinations?**

The ACHA **prioritises the designation of registered Native Title bodies** to act as the LACHS, other Aboriginal corporations may be designated providing they have the support of the relevant determined Native Title holders or claimants, designation is voluntary – Native Title bodies or eligible Aboriginal corporations have no obligation to become a local Aboriginal cultural heritage service. Further, for the purposes of Act, **the term ‘native title party’** includes a regional corporation for the area which was established pursuant to a settlement ILUA, this includes: **the six Noongar regional corporations** established pursuant to the South West Native Title Settlement; **the Yamatji Southern Regional Corporation** Ltd established pursuant to the Yamatji Nation ILUA; and any other corporation prescribed in respect of another (future) settlement ILUA. The ACHA does not impact the Native Title Act 1993 so all requirements under the NT act remain.

## **What decisions are subject to review by the State Administrative Tribunal?**

The act identifies 6 decisions made by the Minister which are reviewable by the State Administrative Tribunal. Minister’s decision to cancel or suspend the approval of an ACH management plan; Minister’s decision to give a stop activity order; Minister’s decision to give a prohibition order; Minister’s decision to extend the duration of a prohibition order; Minister’s decision to give a remediation order; Minister’s decision to amend or cancel a prohibition order.

## **Are there other compliances under the ACHA?**

The return of secret and sacred objects **is mandatory** for government agencies (with the exclusion of the WA Museum) and encouraged for everyone else, but otherwise those objects cannot be sold or removed from the state. Any person who is aware of the existence of Aboriginal place, object or ancestral remains **will be required** to report this to the ACH council, other than an Aboriginal person acting in accordance with their traditional rights and responsibilities or someone acting under instruction of such a person.

## How is local government bound by the ACHA?

Clause 14 of the ACHA binds the crown This clause declares the Act binds the State in all its capacities, which means that all departments and State agencies are subject to the Act, as well as the Crown in all its other. This means that the State, including its various governmental, commercial and industrial instrumentalities and Local Government as a public authority are required to comply with the Act and are not immune from prosecution.

**public authority** means —

- (a) a Minister of the State; or
- (b) a department or an organisation as those terms are defined in the *Public Sector Management Act 1994* section 3(1); or
- (c) **an entity listed in the *Public Sector Management Act 1994* Schedule 1;**

## Has Government committed to resourcing the ACHA?

The McGowan government has committed **\$10 million in the 2021–22 state budget** to provide capacity-building funding for LACHS. The ACH Council will be supported through the appropriation given to the Department of Planning, Lands and Heritage (DPLH). The CEO of the Department, with the written approval of the Minister, may provide funding to a LACH service to enable the LACH service to provide functions in relation to the relevant area. LACHS will also be funded through fee recovery on activities and access to funds derived from **heritage impact compensation**.

The ACHA establishes the **Aboriginal Cultural Heritage Account** ('ACH Account') administered by the CEO of the Department. The following monies are to be credited into the ACH Account: fees and charges paid or recovered under the Act; proceeds from the sale of any seized thing under clause 241(4)(b); any amount equal to an uncommitted amount paid to the ACH Council under a condition imposed under clause 51(4) of the proposed Act and any other amount made available for the purposes of the Account. The ACH Account can be deployed towards the costs of the administration and enforcement of the Act, including remuneration and allowances payable under the proposed Act; funding to local ACH services; to proactively assist in the recognition, protection, conservation, preservation and management of Aboriginal cultural heritage. The **Aboriginal Cultural Heritage Compensation Fund** ('ACH Compensation Fund' is to be administered by the CEO of the Department. All fines imposed under the proposed Act are to be credited into the ACH Compensation Fund, to be applied in the payment of compensation under clause 99 of the proposed Act, for harm caused to Aboriginal cultural heritage.

## Transitional arrangements between the existing AHA and the new ACHA.

**Stage 1** of the new laws came into operation on 22 December 2021 following Royal Assent. Stage 1 includes the commencement clause, an overview of the proposed Act, the objects and principles of the proposed Act, terms used, and the interaction with other legislation. On 23 December 2021, Section 18 of the *Aboriginal Heritage Act 1972* was amended to introduce a five-year limit on any new approvals applied for and granted after Royal Assent. Existing s18 approvals expire in ten years unless the purpose has substantially commenced. **Stage 2** will occur on a fixed date (anticipated to be prior to May 2023), after the regulations, statutory guidelines and operational policies have been prepared: The *Aboriginal Heritage Act 1972* will be further amended to ensure its operation is limited to dealing with any unfinished land use applications made under that Act. **Stage 3** The *Aboriginal Heritage Act 1972* will be repealed six months after the commencement of Stage 2.

This marks the end of the transition period and, more significantly, the end of approvals under Section 18 of the *Aboriginal Heritage Act 1972*.

The Minister is required **review the operation and effectiveness of the Act**, 5 years after this clause comes into operation, and thereafter at 5 yearly intervals.

## **What are the potential consequences for Local Government?**

The new Aboriginal heritage legislation will fundamentally change the relationship between local Government and the Local Aboriginal community and will require significant engagement to build productive relationships to avoid the complex dispute resolution mechanisms provided for under the Act if consent agreements are not reached.

Aboriginal employment in heritage maintenance and protection should increase in all regional areas in support of this legislation and the legislation identifies the State as having funding responsibility.

Some local Governments may seek to proactively invite the LACHS and Aboriginal Heritage inspectors to collocate with Council administration on appropriate commercial terms.

It would be in the interest of Local Government if there were more exemptions to the approvals process for minor works. These would need to be developed under regulations and guidelines and local government should seek to be engaged in the drafting of the regulations. It is assumed that Planning Schemes, Structure plans, environmental plans and other planning activities under the Planning and Development act will be exempt from the Tiered approval process at the planning stage.

The following impacts on Local Government could be anticipated based on our current interpretation of the Act.

### **For Local Government services**

- It would be anticipated that the inclusion of cultural landscapes and intangible heritage in the new act will significantly impact peri-urban areas, mining, agricultural, and pastoral areas, regional towns, and cities. To include these new areas of protection on the ACH directory will take significant time and resources and in the absence of their inclusion most tier 2 and 3 works by local government will require significant consultation with the LACHS to ensure due diligence has been undertaken to avoid impact of yet to be recorded places.
- The Act provides for an expansion of Aboriginal Heritage Protected areas, these could include land currently held as reserves by Local Government. Aboriginal people not Government or its agencies are to manage these protected areas.
- Local Government will need to meet the reasonable costs of consultation and agreement making with the LACHS.
- It is likely that regional cities within the existing State ILUA agreements will have a single regional corporation acting as the LACHS. Other cities may have multiple determinations within their Shires and will likely need to work with multiple LACHS organisations.
- Aboriginal Cultural Heritage permits, and plans may increase costs of development due to increased Consultation and monitoring or agreed off set arrangements.
- Potential increased liability under the act for unintentional impacts by local government or their contractors.

- Local Government might need to meet the cost of compensation for impacts on cultural heritage that arise from developments that impact a cultural landscape. For example, a recreation ground within a reserve area, beach access roads and car parks, landfill areas etc.
- Contemporary Aboriginal cultural heritage is likely to include buildings and other public and private infrastructure such as missions, hostels, sports grounds, and public health buildings not previously protected under the AHA.
- Local Government will need to disclose to the ACH Council their knowledge of Aboriginal heritage places. This knowledge may be held in heritage surveys previously undertaken by council.
- Local Government will need to disclose to the ACH Council their knowledge of collections of objects of potential Aboriginal heritage value. These may be held in libraries or community museums.

### **As an approvals authority**

- Regulations under the act may require local government to ensure ACH due diligence has been undertaken prior to a development approval being granted. This would be similar to the BAL rating requirement.
- *A dial before you dig* style of service will be developed by the Department for Planning, Lands and Heritage based on Landholder address data. This may not apply to non-residential property potentially increasing scope for Local Government to have to do its own due diligence on development applications.
- Aboriginal and non-Aboriginal Heritage inspectors will have significant powers to review the activities of local government and potentially to use local Government resources in undertaking their duties.
- Local Government will be a stakeholder in Ministerial decisions on Aboriginal Heritage protection decisions potentially creating divisions within the community.

### **Recommendations**

The following recommendations are proposed to enable the RCAWA to engage with strategic opportunities and risks associated with the introduction of the ACHA.

1. That RCAWA seek to be engaged by the Department of Planning, Lands and Heritage (DPLH) as a key stakeholder in the consultation phase of the development of the regulations and other documentation that gives effect to the Act.
2. That RCAWA advocate for Regulations to allow for a single Aboriginal Cultural Heritage Plan to be applied to all land areas and activities within a city or shire boundary.
3. That RCAWA request DPLH to provide any cost modelling undertaken on consultation fees, permit fees and impact compensation that might apply to Local Government activities to assist strategic budgeting as required under the Local Government Act.
4. That RCAWA requests priority be given to the establishment of the Local Aboriginal Cultural Heritage Services (LACHS) in Regional city jurisdictions.
5. That RCAWA authorise the executive officer to write to the Acting Director General of DPLH seeking ongoing engagement during the implementation of the Act.