

# What is happening with the new *Aboriginal Cultural Heritage Act 2021*?

Despite extensive lobbying from Traditional Owners, the *Aboriginal Cultural Heritage Act 2021* (WA) (ACHA) was passed and assented to on 22 December 2021.

As of 1 July 2023, the ACHA has come into effect.

Many of the regulations and guidelines only started to be notified in April and May 2023, with several still in the process of being issued throughout June.

While there are many improvements on the *Aboriginal Heritage Act 1972* (WA) in the ACHA, it still falls short of the requirements of the United Nations Declaration on the Rights of Indigenous Peoples, in particular the failure to require free, prior and informed consent of Traditional Owners before cultural heritage can be damaged.

**To read about YMAC's advocacy work in relation to law reform, including the ACHA, visit our [website](#).**

## **New Aboriginal Cultural Heritage Council (ACHC)**

The new ACHC replaces the previous Aboriginal Cultural Material Committee (ACMC).

Members of the ACHC are appointed by the Minister. The Chair/s must be Aboriginal, and there is a preference for a majority of the other members to be Aboriginal.

Current members are: Irene Stainton, Mark Bin-Bakar, Merle Carter, Graham Castledine, Debbie Fletcher, Belinda Moharich, Kevin Walley, Ken Wyatt AM, Jonathon Griffin, Karen Oborn, and Denzyl Moncrieff.

The ACHC appoints Local Aboriginal Cultural Heritage Services (LACHS) (see following section), decides on permit applications, reviews and mediates in relation to Aboriginal Cultural Heritage Management Plans (ACHMPs), makes recommendations to the Minister on ACHMPs, protected areas, etc.

**For more information about the ACHC, email [achcouncil@dph.wa.gov.au](mailto:achcouncil@dph.wa.gov.au).**



## Local Aboriginal Cultural Heritage Services (LACHS)

LACHS are appointed by the ACHC for each area on application.

Preferences will go to existing Prescribed Bodies Corporate (PBCs)<sup>1</sup> or native title settlement Indigenous Land Use Agreement (ILUA) bodies, followed by other corporations representing local Aboriginal communities.

All LACHS applications need to demonstrate the endorsement of the relevant PBC/s or registered native title party/ies, and support of the local Aboriginal community/ies.

Where there is no LACHS, proponents will have to go directly to the PBC, claimants, knowledge holders or representative bodies. However, these bodies can't get the funding allocated for LACHS and can't bill proponents for their services (unless they reach agreement).

## Funding available for LACHS

There are readiness grants available of up to \$80,000 to assist bodies wanting to apply to be a LACHS to consider their preparedness and complete their application.

On establishment, LACHS can receive \$200,000 each to set themselves up.

The State Government has also announced funding of up to \$300,000 a year ongoing funding for LACHS (though this is subject to the government continuing to offer this in future years).

LACHS have significant functions, including:

- Consulting with native title parties, knowledge holders<sup>2</sup>, other LACHS;
- Responding to permit applications and negotiating ACHMPs and other agreements regarding heritage;
- Giving effect to agreements about Aboriginal cultural heritage management;
- Making submissions to the ACHC about proposals;
- Providing accurate information for the Aboriginal Cultural Heritage Directory;
- Maintaining and conserving Aboriginal cultural heritage; and
- Using best efforts to perform these functions in a timely manner.

LACHS can be cancelled or suspended by the ACHC for not performing properly.

LACHS can charge fees to proponents for performing services but cannot bill the Western Australian Department of Planning, Lands, and Heritage (DPLH) or the ACHC. Rates have to be set out in the LACHS' initial application and be within the prescribed schedule of fees.

<sup>1</sup> Note, for simplicity, YMAC uses the term "PBC" in most publications to refer to both Prescribed Bodies Corporate (PBCs) and Registered Native Title Bodies Corporate (RNTBCs). This is in line with terminology that is regularly used in the native title sector.

<sup>2</sup> Section 11 of the ACHA defines a "knowledge holder" as:

- (a) in relation to an area, means an Aboriginal person who —
- (i) in accordance with Aboriginal tradition, holds particular knowledge about the Aboriginal cultural heritage of the area; and
  - (ii) has traditional rights, interests and responsibilities in respect of Aboriginal places located in, or Aboriginal objects or Aboriginal ancestral remains located in or reasonably believed to have originated from, the area;

and

- (b) in relation to Aboriginal cultural heritage, means an Aboriginal person who —
- (i) in accordance with Aboriginal tradition, holds particular knowledge about the Aboriginal cultural heritage; and
  - (ii) has traditional rights, interests and responsibilities in respect of the Aboriginal cultural heritage.

## Tiers and processes (outside protected areas)

Instead of a single section 18 application under the *Aboriginal Heritage Act 1972* (WA), the application process under the ACHA depends on the category of the activity. Activities are based on physical impact, not damaging impact on heritage values.

### **Exempt activity – permitted even if they harm cultural heritage.**

Examples:

- Development on residential lots of less than 1100sqm;
- ‘Like for like’ activities no deeper or larger than existing works (though, if below 10m, can dig deeper);
- Emergency management activities and burning for fire prevention and control;
- Recreational activities;
- Travelling on existing tracks or roads;
- Temporary camps;
- Maintaining existing infrastructure, etc.

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**Tier 1 activity – only need to undertake due diligence (i.e. reviewing the Aboriginal Cultural Heritage Directory and physically looking at the site to determine if rock art, artefacts, etc. will be damaged); no consultation required.**

Examples:

- Pegging tenements;
- Erecting fences, not clearing;
- Metal detecting and scraping using hand-held tools;
- Removing less than 4kg of soil, or disturbing no deeper than 0.5m, or no more than 1sqm contiguous ground, or 10sqm overall.

**Tier 2 activity – need a permit from the ACHC; need to give notice to LACHS or native title parties and give them opportunity to make submissions.**

Examples:

- Construction or renovation of residential building on lots larger than 1100sqm;
- Disturbing between 0.5 and 1 m deep, between 1sqm and 10sqm large or between 10-200sqm overall, and removing between 4-20kg;
- Seismic survey not using a seismic vibrator truck;
- Bulk leach extractable gold, reopening underground mine workings.

### **Process for Tier 2 applications:**

- Must do due diligence;
- Notice to be given to LACHS or alternative/s, and they have 28 days to provide submissions;
- Application to ACHC for permit must include any submissions received;
- ACHC then gives notice of the application and there is a further 28 days to respond;
- ACHC then makes decision.

## Tiers and processes (outside protected areas) (cont.)

**Tier 3 activity – need an ACHMP (either agreed or authorised by the Minister).**

Examples:

- New mines;
- Subdivision of land (where more than 5 lots of less than 1100sqm each);
- Should cover most physical exploration activities;
- Anything not covered by one of the other categories.



**Process for Tier 3 applications:**

- Must do due diligence;
- Consult first with LACHS or alternative/s. Must attempt at least three meetings if not agreed otherwise;
- Must be aware of Aboriginal cultural heritage in the area. (Not clear yet if a survey will be required);
- Informed consent is required. Parties must try to reach agreement within 140 days;
  - If agreement reached, ACHC can approve the ACHMP.
  - If not agreed, ACHC can mediate.
  - If still no agreement, the proponent can seek the Minister's authorisation of the ACHMP. ACHC can make a recommendation to the Minister (within 90 days). Minister decides. No appeal.

**To learn more about the ACHA, visit [dplh.wa.gov.au](http://dplh.wa.gov.au).**

Current at July 2023. Please note, information in this fact sheet is provided by YMAC in good faith on an "as is" basis; it does not constitute any form of legal advice. YMAC believes this information to be accurate and current at the date of publication, however, inadvertent errors can occur and the applicable laws, rules, policies and regulations often change. YMAC will not be liable for any loss or damage whatsoever suffered as a result of reliance upon this information, or through directly or indirectly applying it.

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