



c/o JJ McDermott (AACAI WA Secretary)  
PO Box 196  
585 Little Collins Street  
Melbourne VIC 3000  
[wa.chapter@aacai.com](mailto:wa.chapter@aacai.com)

c/o Dr Joe Dortch (President)  
School of Social Sciences  
The University of Western Australia  
35 Stirling Hwy  
Perth, WA, 6009, AUSTRALIA  
[president@australianarchaeology.com.au](mailto:president@australianarchaeology.com.au)

---

27 May 2022

Department of Planning, Lands and Heritage  
Locked Bag 2506  
Perth WA 6001

To Whom It May Concern,

**RE: Submission on the proposed co-design of regulations, statutory guidelines, and operational policies for the *Aboriginal Cultural Heritage Act 2021***

The **Australian Association of Consulting Archaeologists Inc. (AACAI)** is the national accreditation body for consulting and professional archaeologists across Indigenous as well as historic and maritime archaeology in Australia. It aims to promote the highest standards of compliance, management, and public education in the heritage arena. The **Australian Archaeological Association Inc. (AAA)** is the largest archaeological organisation in Australia, representing a diverse membership of professionals, researchers, students, and others with an interest in archaeology. Together, AACAI and AAA have been deeply invested over several decades in supporting and profiling increased standards for Australian archaeological practice.

AACAI and AAA have each been asked to comment on the proposed co-design of regulations, statutory guidelines, and operational policies to accompany the *Aboriginal Cultural Heritage Act 2021* (the ACHA). Representatives of both organisations were invited by the Department of Planning, Lands, and Heritage (DPLH) to attend a workshop relating to this proposal on 10-11 May 2022. Both organisations have commented extensively on aspects of the ACHA since consultations on new legislation began in 2018, and have consistently advocated for legislative change that is balanced and reasonable, acknowledges Aboriginal rights and ownership, is based upon modern heritage management principles, and ensures that Aboriginal cultural heritage is recognised, conserved, and celebrated.

Here, we restrict our commentary to the processes discussed at the workshop, following the points raised by various “fact sheets” provided by DPLH. We specifically draw attention to key concerns raised by workshop participants and note that there was general agreement among the organisations represented about the shortcomings of the proposed “co-design” process and the practical problems of implementing the new legislation.

### **Fact Sheet 1 – Activity Categories**

Fact Sheet 1 seeks to identify and organise 'all activities that may cause harm to ACH (Aboriginal Cultural Heritage)' into Tiers. The assigned Tiers will then determine what approval pathway will be required to harm ACH.

AACAI and AAA take the position that Aboriginal people and Traditional Owners should be empowered to decide what activities may cause harm to ACH; what the type and level of harm may be; and what mitigative actions must be undertaken. Aboriginal people and Traditional Owners should decide on a case-by-case basis which Tier a particular activity belongs to and what "approvals pathway" should be followed.

The Activity Tiers, as currently presented, are complex, too prescriptive, and the overarching logic for assigning activities to particular Tiers is unclear in many cases (e.g., how does one define 'passive' seismic survey [as listed in Tier 1]; and are erosional processes set-off by coastal engineering considered 'erosion control activities' [as listed in Tier 3]?). There are also many cascading landscape and environmental processes that are not fixed at the time of initial impact. Consideration of longer time-scale process and potential impacts on ACH must be included as part of the due diligence assessment.

AACAI and AAA are concerned that some of the identified Tier 1 and Exempt activities, such as visitation by inappropriate people, photography, and some recreational activities, may still cause cultural harm to ACH. These types of cultural impacts and harm are well known and should be familiar to the State Government. They constitute many of the first order concerns raised by Aboriginal Communities, and therefore must be better addressed within the Activity Tiers.

AACAI and AAA further take the view that archaeological excavation should be undertaken under an Aboriginal Cultural Management Plan (ACHMP). Similarly, we think that the categorisation of environmental surveys and sampling within the Tiers should be further carefully thought through.

### **Fact Sheet 2 – ACH Management Code**

As stated above, AACAI and AAA take the position that Aboriginal people and Traditional Owners should be authorised to make decisions about activities that affect their respective Countries and cultural heritage.

For Aboriginal people, the whole landscape contains ACH, together with cultural and social obligations. The presence of ACH should thus be assumed everywhere in the State, and all project planning must include considerations for the management of ACH. All due diligence decisions therefore must involve Traditional Owners, with Traditional Owners being consulted for *all three Activity Tiers* through their Local Aboriginal Cultural Heritage Service (LACHS). It is also important that the ACH Management Code acknowledges and includes provisions for Customary Law.

With regards to the duration of permissions given to impact ACH, AACAI and AAA consider it inappropriate for approvals to harm ACH to last for ten years (as suggested for consents carried over from the *Aboriginal Heritage Act 1972*), as proposals, circumstances, knowledge, and Traditional Owner sanctions change over time.

### **Fact Sheet 3 – Consultation Guidelines**

AACAI and AAA believe that consultation must be genuine and preferably face-to-face. Consultation must be:

- A formalised process in all regions;
- Measurable;

- Documented; and
- Properly resourced.

#### ***Fact Sheet 4 – Knowledge Holder Guidelines***

AACAI and AAA hold considerable concern about the terminology used in this Fact Sheet. We find that the term ‘knowledge holder’ is poorly considered and too broadly defined.

The Knowledge Holder guidelines must distinguish between talking *about* and talking *for* Country and ACH. Any knowledgeable person may talk *about* ACH; however, only the relevant Traditional Owners may talk *for* heritage. This is a fundamental issue that will likely require facilitation and mediation by the ACH Council.

In accordance with our respective codes of ethics, AAA and AACAI consider that this topic is a matter of primary concern for Aboriginal people and Traditional Owners to discuss and determine.

#### ***Fact Sheet 5 – ACH Management Plans (ACHMP)***

AACAI and AAA make the point that the ACHMPs identified by the ACHA do not equate with the conservation instrument known as a 'Cultural Heritage Management Plan' within the broader cultural heritage industry. ACHMPs in the context of the ACHA are essentially negotiated approvals to harm heritage; effectively having the same function as Section 18 consents under the *Aboriginal Heritage Act 1972*.

AACAI and AAA recommend that LACHS should play an active role in developing and deciding on specific ACHMP formats; as well as principally researching and writing each ACHMP, with the proponent funding this work. Traditional Owners and LACHS should be the only parties to finalise and approve Impact Statements.

Predicted ground disturbance should not be the only trigger for an ACHMP, as harm to heritage may also be caused by: restrictions or limits on access to lands, places, or cultural heritage by Traditional Owners; restrictions to Traditional Owners’ abilities to meet cultural obligations, or the practice of Aboriginal Law; reduced amenity; inappropriate access by non-authorized people; and activities causing spiritual harm. Environmental impacts are inextricably linked to heritage impacts.

AACAI and AAA recommend that rather than having a single standard, state-wide template for ACHMPs, a set of minimum requirements be developed for each region. This will account for different cultural traditions of site disclosure and avoidance; encourage careful consideration and tailored plans for the care of ACH; and discourage ACHMPs from being a perfunctory, “box-ticking” exercise. All ACHMPs must provide for the communication of changes to the project; the discovery of new ACH information; and for the protection of Intergenerational equity (i.e., protecting heritage for future generations).

#### ***Fact Sheet 6 – Timeframes***

AACAI and AAA submit that setting timeframes for responding to proposals must include sufficient flexibility to allow for seasonal climatic events and impacts, cultural business, sorry business, family obligations, and access to country.

We also re-emphasize the statement made by a workshop participant that ‘*time limits mean nothing without proper resourcing*’. This is of particular concern, given that LACHS can only charge proponents for Tier 3 activities, and there is to be no funding for reviewing permits at lesser Tier Levels. Free Prior and Informed Consent (FPIC) requires the convening of groups with cultural authority, and this is

known to be resource intensive. If LACHS are not properly resourced, FPIC cannot be achieved and timeframes will not be met.

***Fact Sheet 7 – LACHS Fees Guidelines***

AACAI and AAA are deeply concerned about resourcing for LACHS and their inability under the proposed fee guidelines to adequately levy fees for numerous demands on their time and resources, including responding to initial contacts, due diligence processes for Tier 1 and 2 activities, and ACHMPs. These are major workload implications that do not seem to have been properly scoped or recognised by Government. We return to these points below.

***Fact Sheet 8 – State Significance Guidelines***

AACAI and AAA view the process of an individual (i.e., the Minister for Aboriginal Affairs) making decisions over diverse and culturally significant Aboriginal sites, across the entirety of WA, and claiming them on behalf of the State, is fundamentally flawed. We predict that this process will be challenged, given there is no arbitration function beyond the mediation role that the ACH can fulfil or delegate.

***Fact Sheet 9 – Protected Area Order Guidelines***

In accordance with our respective codes of ethics, AACAI and AAA consider that this topic is a matter of primary concern for Aboriginal people and Traditional Owners to discuss and determine.

We also note that the concept of 'outstanding significance' and the proposed process where non-Aboriginal people rank significance of different ACH is seen as offensive to Aboriginal people. This was demonstrated in the workshop that we attended where several Traditional Owners expressed their offense and left the workshop during this discussion.

AACAI and AAA take the view that, if the intention of the new legislation is to acknowledge that ACH must be defined by Aboriginal people then it follows that any discussion involving the defining of 'outstanding significance' for the purpose of declaring Protected Areas can only be undertaken by Aboriginal people within a specific context.

***Fact Sheet 10 – Substantially Commenced (projects approved under previous legislation)***

Fact Sheet 10 sets out to outline a definition for 'substantially commenced' as it relates to historical Section 18 consents that were previously granted under the *Aboriginal Heritage Act 1972* for projects or developments.

As mentioned above, AACAI and AAA consider ten years to be too long for approvals under Section 18 of the *Aboriginal Heritage Act 1972* to remain in place. There must be safeguards against proponents undertaking works just to maintain the status of already permitted Section 18 consents. This will lead to unnecessary harm to ACH. We question whether Ministerial discretion in (re)activating these consents or their transfer to another party is the most transparent mechanism available.

We recommend that 'substantially commenced' should be defined in terms of known or likely future impacts. We recommend that the definitions used by town planners and the EPA should be looked to for guidance.

***Other Important Matters***

AACAI and AAA provide the following feedback on related matters that arose out of the workshops:

### **1. Resourcing of LACHS**

Resourcing is a fundamental issue that must be addressed *as soon as possible* if the ACHA, its regulations and the supporting systems are to be successful.

AACAI and AAA, along with Traditional Owners, industry proponents and other interested groups, have all previously expressed their deepest concerns about the capacity for LACHS to effectively and sustainably perform their functions. At the workshop we attended, **all** participants were alarmed about the resourcing of LACHS. A DPLH representative in that workshop admitted that the State Government had carried out no financial modelling for the operation for LACHS. AACAI and AAA are astonished by this claim. It appears that the process is set up to fail. The State Government demonstrates little grasp of what will be required on the ground or how processes would be resourced. The one-off \$10 million allocation for set-up and capacity building across Western Australia is manifestly insignificant in the context of more than 70 Prescribed Body Corporates seeking to establish their LACHS. There appears to be no plan for the sustainable operation of LACHS and we see this as a very high risk that will undermine more progressive aspects of the ACHA.

AACAI and AAA do not believe that the proposed fee-for-service model is sufficient to enable successful and sustainable operation of the LACHS. It does not account for a vast array of additional activities that LACHS will be required to perform that are not chargeable to proponents. For example, in any consultancy business, direct labour costs are usually multiplied by a factor of three or even four to cover employee on-costs, business overheads, liability and insurances, administration, cash flow, volatility in demand, and business development and sustainability. This also does not consider the impacts of remote locations and the vulnerability of supply chains within these areas. All other costs of projects (e.g., travel, accommodation, project consumables) should also be chargeable. Further, the reviewing of and responding to Permits, plus the monitoring of compliance with Permits and ACHMPs and investigation of breaches, will create a substantial amount of additional work which is not recoverable from proponent's fees. We ask again whether the State Government has considered these factors and urge them to prioritise investigation into alternative funding models.

If the Government persists with the proposed fee-for-service model, it must:

1. Allow LACHS to either charge, or be funded for, any service they provide in line with normal corporate operations in WA.
2. Allow for a surplus (profit) for re-investment back into the LACHS and into the ACH aspirations of the associated Aboriginal communities.
3. Cover permit- or compliance-related activities.
4. Allow for upfront charges (i.e., a retainer or subscription fee).

Traditional Owner rates also need to reflect their specific expertise as cultural authorities. This matter was dealt with by the AACAI National Executive Committee and Local Area Land Councils in NSW some 15 years ago where it agreed on both cultural and skill-based grounds that different charge rates should reflect: a) the seniority of the Traditional Owner; b) the level of organisational responsibility they were carrying; c) their respective level(s) of training and work briefs for specific exercises; and d) other matters of representativeness and cultural authority (e.g. are they signing off on specific works programs?).

To protect smaller projects, the system needs to ensure that work is not prioritised by LACHS based on the size of the fee or project. This will require use of robust and transparent planning tools. The LACHS funding model needs to be robust and endure for the foreseeable future.

Transition management will need to include modelling of different scenarios to assess the various demands on the LACHS in different regions. This modelling should help show what resources

organisations would need to become LACHS and can profitably include them in these scopings. As certain responsibilities are to be transferred from the State Government to LACHS, there are potential benefits and risks to Aboriginal communities and proponents. Some LACHS functions could therefore be funded by the State, perhaps through a levy on the project in proportion to its budget payable to the relevant LACHS. These models have been successfully implemented in Europe.

Overall, the State Government's focus on limiting fees and charges rather than ensuring effective processes appears divorced from actual experience and needs a complete rethink. We strongly recommend a professional corporate review entity be employed by the State to conduct a feasibility study, to identify the most effective and sustainable funding model for the LACHS.

## **2. *Inadequacy of Consultation***

At the recent workshop that AACAI and AAA representatives attended, it was noted that inadequate time had been allocated to discuss the ACH Management Code and Activity Tiers. Questions were specifically raised about the speed and inadequacy of consultations with Aboriginal communities. There were not enough Aboriginal people at the workshop in Perth which was of concern given the current and projected land-use impacts in the Perth metropolitan area. Concerns and frustrations about the "co-design" process and the lack of meaningful involvement by Aboriginal people were reiterated several times. Participants were generally dissatisfied with the responses of DPLH to questions at the workshop and it would have been more appropriate if the DPLH team tasked with designing the regulations, statutory guidelines and operational policies included more Aboriginal people with cultural authority and expertise and engaged senior heritage professionals in drafting the codes. This may require a considerable expansion of State Government resourcing of the current design process, which given the size and geographical extent of development and compliance portfolios in WA, seems entirely appropriate.

AACAI and AAA would also note that the new Federal Government has stated it is committed to implementing national heritage standards. Under the Samuel Review of the EPA there will be an amplified role for Indigenous science, co-management, and heritage protection. Such alignment should be entertained in this current drafting process.

Overall, AACAI and AAA are very concerned about this proposed "co-design" process and approaches to ACH. Our concerns are aligned with previous comments made by our organisations about the ACHA itself. We trust that the State Government will consider these matters more carefully in future and work harder to ensure more transparent, equitable, and effective systems and processes to protect and manage Aboriginal people's cultural heritage.

Yours sincerely



Dr Adrienne Ellis  
*President, AACAI*



Dr Joe Dortch  
*President, AAA*