

Aboriginal Cultural Heritage Act
co-design submissions
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ABORIGINAL CULTURAL HERITAGE ACT 2021: CO-DESIGN SUBMISSION

Thank you for the opportunity to make a submission on the co-design elements of the *Aboriginal Cultural Heritage Act 2021* (ACH Act).

The Environmental Protection Authority (EPA) considers that there is a close and inherent connection between cultural heritage and the environment. This is reflected in the *Environmental Protection Act 1986* (EP Act) definition of social surroundings as “aesthetic, cultural, economic and other social surroundings to the extent to which they directly affect or are affected by physical or biological surroundings”. The environmental and heritage characteristics of an area or landscape are also intrinsically linked through the concept of place.

As such, ACH Act instruments being co-designed should consider, recognise and reflect the intrinsic connection between cultural heritage and the environment. Consideration of the environment as part of cultural heritage assessment and management would have additional benefits including:

- Increasing the thoroughness of the ACH Act tools being developed. In considering potential impacts to heritage and place from an environmental effects perspective a more holistic view of overall impacts can be understood. This approach has the potential to capture indirect environmental effects which have heritage implications, for example downstream impacts on water sources of importance to Aboriginal people.
- Providing a more integrated approach, through a combined cultural heritage assessment and protection process. This will result in greater confidence that cultural heritage can be adequately protected and enable efforts and resources to protect heritage through one comprehensive process.
- Facilitate the building of better relationships between proponents and traditional owners. Proponents often engage in environmental consideration processes earlier than they do heritage processes. There may also be difficulties in revisiting environmental matters in a later stage heritage processes - even if

environmental effects are at the heart of traditional owners' concern. Considering the two together would allow more efficient and effective process.

- Providing better information about environmental effects, as it would utilise and value information about the environment from traditional owners which isn't otherwise available in current processes.

Consideration of environmental effects in ACH Act tools

The EPA recommends that incorporation of environmental effects considerations in ACH Act tools (the activity categories, ACH management plans, State significance and protected areas and the ACH management code in particular) should be based on the system which the EPA has in place for consideration of environmental effects. This would ensure consistency of environmental effects across the two processes, utilise the EPA established environmental assessment framework and be familiar to many proponents.

The EPA's framework includes:

- Specific consideration of relevant environmental factors. The EPA has established 14 environmental factors used as an organising principle for EIA and comprised of a number of values. Factors are in place for land, sea, water, air and people, and include for example: flora and vegetation, terrestrial environmental quality, inland waters, human health and marine environmental quality.
- Objectives are in place for each environmental factor. The EPA assesses the consistency of projects against these objectives, for example: the objective for flora and vegetation is to protect flora and vegetation so that biological diversity and ecological integrity are maintained.
- Consideration of cumulative impacts are the successive, incremental and interactive impacts on the environment of a proposal with one or more past, present and reasonably foreseeable future activities. Cumulative effects can also arise from pressures in the environment such as climate change and bushfires etc. The EPA recommends heritage impact or management aspects considers the cumulative pressures as well as individual activities.
- Consideration of holistic effects which is the connections and interactions between impacts, and the overall impact of the proposal on the environment as a whole. The EPA recommends a holistic view of impacts on heritage, rather than impacts from single issues or activities.
- Indirect, downstream and upstream impacts, such as downstream impacts on water sources of importance to Aboriginal people.
- Looking at all stages of projects, including proposed end land uses, particularly if land will be returned for some traditional use.

When prescribing the content of cultural heritage tools, the EPA also recommends including explicit reference to the key principles or objectives which the tools must be consistent with in. This will ensure any unintended gaps in specific prescriptions are still required to be dealt with. It also tends to encourage a focus on using the tools to achieve real and lasting outcomes which are consistent with the object of the ACH Act.

Consultation Guidelines

In respect of the Consultation Guidelines, the EPA recommends that these should include a requirement for proponents to show the outcome of the consultation, as well as the process which was undertaken. For example, the proponent should show what issues the traditional owners raised, and how the project responded to these, and for any issues which are not resolved – why these cannot be resolved.

Substantially commenced definition

In relation to section 18 consents granted under the *Aboriginal Heritage Act 1972* and the definition of substantially commenced, the EPA recommends that consideration be given to potential unintended consequences. For example, if land clearing alone constitutes substantial commencement, it has the potential to drive significant impacts on flora and vegetation, fauna habitat and inland water quality for the purpose of ensuring the section 18 consent remains, rather than for actual commencement of the project. The EPA recommends that substantial commencement should:

- be attached to construction of key infrastructure for the project, rather than just minor or preliminary physical disturbance or infrastructure; and
- also include that the proponent has complied with its obligations under the consent, in particular any requirements to consult, survey and protect.

EPA can consider whether ACH Act can mitigate the potential impacts of proposals on the social surroundings

The EPA is required give consideration to Aboriginal heritage matters to the extent that they may be directly affected by the impacts of the proposal on the physical or biological surroundings. This means the EPA assesses whether changes to the biological and physical environment resulting from proposed developments may significantly adversely affect matters of heritage significance to Aboriginal people.

The EPA advises that, due to recent amendments to the EP Act, when undertaking assessments, it can now take into account other statutory decision-making processes which can mitigate the potential impacts of proposals on the environment. The matters the EPA considers when deciding what other statutory decision-making processes are appropriate to consider for a proposal are set out in the EPA's [Interim Guidance Taking decision making processes into account in EIA.pdf](#) (epa.wa.gov.au)

To assist the EPA's ability to take the ACH Act into account when assessing Aboriginal heritage matters, the EPA encourages the Department of Planning, Lands and Heritage to incorporate consideration of environmental effects associated with heritage impacts and management in the ACH Act tools, as set out above.

The EPA looks forward to the continued engagement on this important matter through the next phases of the co-design process.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Matt Tonts', with a stylized flourish extending to the right.

Prof. Matthew Tonts
CHAIR, ENVIRONMENTAL PROTECTION AUTHORITY

26 May 2022