

Aboriginal Cultural Heritage Act co-design
submissions
Department of Planning, Lands and Heritage
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Dear Sir/Madam

Aboriginal Cultural Heritage Act 2021: co-design submission

Thank you for the opportunity to make a submission to phase 2 of co-design for the *Aboriginal Cultural Heritage Act 2021* (ACH Act).

As part of its assessment of social surroundings, the EPA is required to consider cultural heritage where it is directly affected by physical and biological surroundings. If the ACH Act instruments were also designed to clearly require consideration of physical and biological disturbance which affect cultural heritage, the EPA believes it could reasonably consider the ACH Act adequately deals with these impacts instead. This would mean the EPA does not then need to separately assess cultural heritage matters.

Benefits to cultural heritage protection of the EPA being able to consider the ACH Act

Consistent with its submission to phase 1, the EPA believes that if the ACH Act instruments explicitly and consistently consider cultural heritage which is affected by physical and biological disturbance, this would have the following benefits:

- Increase the thoroughness of the ACH Act tools being developed, by considering potential impacts to heritage from the holistic traditional owner view of country. This is more consistent with cultural heritage protection than a view which separates heritage and environment into separate processes and disciplines;
- Facilitate a single, integrated and comprehensive cultural heritage assessment and protection process, rather than having cultural heritage considered under both heritage and environmental processes. This single comprehensive process is likely to be more efficient for both traditional owners, proponents and government;
- Facilitate relationship building between proponents and traditional owners, especially in cases where cultural heritage affected by environmental effects are at the heart of traditional owners' concerns;
- Allow more efficient and effective project design, for example because areas to avoid both heritage and environmental impacts of significance could be identified and avoided early; and
- Address some potential concerns with assessment under the EPA's social surroundings factor, including that it involves the EPA (rather than traditional owners) determining heritage significance, and that the EPA process is not able to result in binding agreements with traditional owners, and in particular can't deal with issues of compensation or funding.

EPA decision whether it can take the ACH Act processes into account

Due to recent amendments to the *Environmental Protection Act 1986* (WA), when deciding whether or not to assess a proposal, and if so whether social surrounds is a relevant factor in assessment or condition setting, the EPA can take into account other statutory decision making processes that can mitigate the potential impacts of the proposal on the environment.

The matters which the EPA takes into account when deciding whether other statutory decision-making processes (such as the ACH Act processes) are appropriate for the EPA to consider are set out in the EPA's

[Interim Guidance Taking decision making processes into account in EIA.pdf](#)

(epa.wa.gov.au). In relation to the ACH Act processes, the EPA would need to be able to have reasonable confidence in the following:

1. Can the ACH Act processes consider cultural heritage which is directly affected by physical and biological surroundings?
2. What is the process, including the consultation, decision making, and role of supporting instruments and policy, for decision-making for the ACH Act?
3. Does the decision-making process adequately require consideration cultural heritage which is directly affected by physical and biological surroundings, including consideration of whether the EPA's social surrounds objective is likely to be met?
4. What is the outcome of the decision-making process? Are arrangements likely to be in place to protect cultural heritage which is directly affected by physical and biological surroundings?

Re question 2, the EPA believes the modern consultation and decision making processes under the ACH Act, in particular the central role of traditional owners and knowledge holders in many processes, is likely to satisfy the EPA that it is an appropriate decision-making process for it take into account.

Re questions 1, 3 and 4, the EPA considers the co-design instruments should be designed to include clear and consistent consideration of cultural heritage which is affected by harm to the physical and biological environment.

EPA submits there should be early and consistent consideration of cultural heritage which is affected by physical and biological disturbance in ACH Act instruments

The EPA advises that in its experience, many cultural heritage concerns are specifically connected to environmental effects. This includes: drawdown of culturally significant waterholes, change to culturally significant watercourse flow (increase or decrease) or water quality, dust affecting the amenity of a culturally significant place, visual impacts of or from a culturally significant landscape, disturbance of culturally significant vegetation, and disturbance of culturally significant fauna. Culturally significant areas which have already been harmed by one activity may also be subject to additional harm from another activity, for example by additional water drawdown, or disturbance of rehabilitated areas.

The EPA outlined the tools which it considers the ACH Act processes could usefully adopt (in the activity categories, ACH management plans, and the ACH management code in particular) in its submission to phase 1 submission.

The EPA further advises that in its experience, the best way to consider whether cultural heritage could be affected by disturbance to the physical and biological environment or not is 1) as early as possible, and 2) on a case by case basis.

The decision points where the EPA could consider the ACH Act in its own processes is attached for your information. The main benefits of the EPA being able to take the ACH Act processes into account are likely to come if the ACH Act processes are clearly in place as early as possible, and in particular before the EPA makes a decision whether to assess a proposal or not (stage 1 in the attachment). If the EPA has confidence that the ACH Act processes will mitigate potential impacts on social surrounds because those processes consider cultural heritage impacts from physical and biological disturbance, the EPA can decide at this early point that social surroundings aren't relevant for its assessment.

If amendments are not made to the ACH Act instruments to deal with cultural heritage impacts from physical and biological disturbance, or the EPA can only consider the ACH Act in its later assessment stages, the EPA will still be able to take the final outcomes of the ACH Act processes (such as an actual agreed ACH management plan) into account. However, agreement on an ACH management plan would usually only come *after* the EPA process is largely complete, and so too late to provide any of the above benefits for traditional owners, proponents and government.

One way to implement the above "1) as early as possible, and 2) on a case by case basis" approach in the ACH Act instruments would be to 1) require broad consideration of cultural heritage impacts from physical and biological disturbance in the instruments; 2) include examples of common types of impacts (see above examples for reference); 3) explain the benefits of early consideration (such as the ability to avoid an impact altogether, if the potential impact is identified in project scoping and before referral of proposals to the EPA); and 4) recommend use of the EPA tools (described in the EPA co design phase 1 submission) to identify impacts on a case by case basis.

If there are constraints on the ACH Act to consider cultural heritage which is affected by physical and biological disturbance- these should be made clear

The EPA understands that one of the primary reforms the ACH Act introduced was requiring the consideration of harm to cultural heritage of based on considering the impacts of an activity, instead of confining impacts to land tenure considerations.. This means there is no pre-determined limit or boundary of ACH Act considerations – the boundary is dependent on the harm caused by the individual activity.

If the EPA's understanding is incorrect however, and there are legal or practical boundaries or limits of the ACH Act, this should be made clear in the co-design instruments, so that the coverage of the ACH Act instruments is clear for traditional owners, proponents and other government agencies. If this is not done up front, there risks being significant confusion, gaps and overlaps between the ACH Act and the EPA's processes. For example, if the ACH Act processes are not likely to be able to consider harm outside of a certain footprint, even if the cultural heritage harmed by the activity is outside this footprint, this should be made clear.

If the ACH Act provides this clarity, the EPA will then be able to provide certainty to traditional owners and proponents about what the EPA will, and will not, assess, in its own procedure documents. In the meantime, the EPA advises that it would be incorrect to assume that the EPA can assess what the ACH Act doesn't. The EPA is only able to consider impacts to

cultural heritage where they are *directly* affected by physical or biological surroundings, which in many cases could be a more confined set of impacts that the broader ACH Act.

One area where the EPA considers it may continue to have a role is where cumulative impacts and multiple pressures are involved and the ACH Act is unlikely to be able to mitigate impacts of these, for example the effects of industrial emissions on rock art.

For completeness - the EPA commented in its submission in October 2020 that it considered it may still have a role for some impacts, for example groundwater drawdown impacts on significant waterholes outside of a development footprint area. This comment was before the ACH Act was finalised in 2021, and before the EP Act amendments in October 2021 were in force. The EPA now considers that if the ACH Act requires consideration of cultural heritage impact from groundwater drawdown impacts caused by an activity on significant waterholes, the EPA would not need to also assess this under social surroundings.

Way forward

The EPA is happy to consult further on the specific content of the activity categories, ACH management plans and the ACH management code to implement the substance of this submission. The EPA is also happy to consider providing joint guidance to traditional owners and proponents with the Department to ensure that the cultural heritage which is affected by physical and biological disturbance is considered early, and comprehensively, in project scoping and development, in as efficient and integrated way as possible.

Finally, the EPA notes that despite anything in the ACH Act processes which deal with cultural heritage impacts, the EPA welcomes traditional owner engagement in EIA processes dealing with other environmental factors where they have concerns or knowledge. For example, traditional owners may have concerns about security of drinking water, health impacts from dust, or valuable knowledge about ecosystem impacts and management. Traditional owners will continue to be able to engage with EPA processes as they choose on these matters.

Yours sincerely

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

Prof. Matthew Tonts
CHAIR, ENVIRONMENTAL PROTECTION AUTHORITY

23 August 2022

Attachment

EPA decision points where cultural heritage is considered

For your information, the EPA considers its social surroundings factor at the following decision points. It would need to be satisfied that the ACH Act processes considered cultural heritage which is affected by harm to the physical and biological environment at each of these points, to be able to take the ACH Act processes into account.

1. Whether to assess a proposal. Considerations include whether social surroundings effects are likely to be significant, and whether they can be mitigated by the ACH Act decision making processes. This is usually one of the first regulatory steps in proposal development. It would include considering whether the ACH Act processes considered cultural heritage which is affected by harm to the physical and biological environment
2. Level of assessment. Considerations include whether there should be a formal environmental review, and any additional consultation required. This could include additional consultation with traditional owners, if the ACH Act processes did not adequately consider cultural heritage which is affected by harm to the physical and biological environment.
3. Whether social surroundings is a key factor for assessment. This could be a key factor if the ACH Act processes did not adequately consider cultural heritage which is affected by harm to the physical and biological environment
4. Whether to recommend a proposal be implemented or not.
5. What conditions to recommend be attached to a proposal if it is implemented (for example, a heritage management plan if there is not one agreed under the ACH Act, or requirements for proponents to consult with traditional owners on other plans)