



# Preparation and timetable for the development of an ACHMP

July 2023

# OVERVIEW

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This summary relies on the:

1. Aboriginal Cultural Heritage Act 2021 (**ACH Act**); and
2. Aboriginal Cultural Heritage Regulations 2022
3. Consultation Guidelines Prescribed Timeframes;
4. Knowledge Holder Guidelines; and
5. ACH Survey Report Guidelines as at 30 June 2023.

This document is not intended to be legal advice, nor is it an exhaustive guide for compliance. Proponents should review the documents independently and obtain independent advice if required

## PART A - OVERVIEW, INITIAL STEPS AND TIMEFRAME

1. Prior to carrying out Tier 3 work that may harm ACH, a Proponent must:
  - a. seek to negotiate a ACHMP (Plan) with the relevant LACHS, Aboriginal people or their proper representatives (referred to for the purpose of this paper collectively as the native title party or “**NTP**”) (s142 ACH Act); and
  - b. obtain approval of that Plan from the ACH Council or the Minister.
2. The establishment of a Plan involves a two stage process. The first stage is the consultation phase, to be undertaken in accordance with the Consultation Guidelines. The second stage is negotiating the terms of the Plan within a regulated timeframe.
3. In the consultation phase, the Proponent must “take reasonable steps to identify, and obtain an understanding of the characteristics of, the Aboriginal cultural heritage located in the area to which the plan is to relate” (s141 ACH Act). The guidance material published by DPLH does not assist with describing what might be “reasonable steps to identify” ACH. It is likely that “reasonable steps” will include undertaking ACH surveys in accordance with the Survey Guidelines.
4. There is no timeframe for completing consultation provided it has been properly commenced. A proponent’s requirement to make a genuine attempt to consult within a reasonable time is taken to be fulfilled if:
  - a. agreement is reached;
  - b. no less than three consultation meetings have occurred; or
  - c. following compliance with the Consultation Guidelines, an Aboriginal party is non-responsive for 14 weeks from initial contact (or 4 weeks in the case of LACHS).
5. The timeframes under the ACH Act may be subject to regulatory change and some may be extended at the discretion of the ACH Council.

### Consultation - initial contact

6. Identifying and understanding the ACH in the area involves firstly identifying each NTP (see below - Part B) and then consulting with each NTP (s139 ACH Act). Consultation must be in accordance with section 101 of the ACH Act and the Consultation Guidelines. Section 101 of the ACH Act states:

#### 101. Consultation about proposed activities

For the purposes of this Part, the consultation that occurs in relation to a proposed activity will depend on the circumstances of the activity but should include the following-

- a. the proponent making a genuine attempt to contact and consult, in a timely manner, each person to be consulted;
- b. the proponent providing sufficient information about the proposed activity to each person to be consulted to enable them to understand the proponent’s reasoning and intention;
- c. each person to be consulted having an opportunity to clearly state their position on the proposed activity and explain that position;
- d. the proponent and each person to be consulted disclosing relevant and necessary information about their position as reasonably requested;
- e. the proponent taking reasonable steps to follow up with a person to be consulted if there is no response to the initial contact or a reasonable request for further information.

7. Following the consultation process, and provided the Proponent has satisfied itself that it has also complied section 141 (see 3 above), the Proponent may issue a notice under section 142(2) to trigger a 140 day period in which to seek to agree a Plan with the NTP.
8. The prescribed 140 day period for reaching a Plan commences 5 days after the date the Proponent gives both the NTP and the ACH Council notice that it intends to undertake an activity in an area under a Plan (s142 ACH Act). The 140 days period to may be extended by agreement or by notice given by the ACH Council (s143(2)(b) ACH Act).
9. If agreed, the Plan must be approved by the ACH Council under section 144 of the ACH Act, which includes a further 28 day timeframe for that approval. If no Plan is agreed, an application may be made to the ACH Council to make a recommendation to the Minister to authorise or not authorise the Plan. (s145 and s157 ACH Act). The ACH Council has 90 days to make its recommendation to the Minister. There is no timeframe for the Minister to make his or her decision.
10. The ACH Act contains various provisions to address the situation where a Plan cannot be agreed upon, including the ACH Council having powers to request additional documents and to provide a mediation service.

## PART B – IDENTIFICATION AND INITIAL CONTACT

Note that the process in this Part B and in Part C (Meetings) below are relevant to the consultation process described above. That consultation process is a prerequisite to the commencement of the 140 day prescribed timeframe for the negotiation of a Plan.

### 1. IDENTIFICATION OF CORRECT PARTIES

101(a)

*the proponent making a genuine attempt to contact and consult, in a timely manner, each person to be consulted;*

- a. The Proponent must first identify the party or parties to be consulted. This is a staged process that can be completed as part of a due diligence assessment (s102(e)).
- b. If there **is a LACHS** for the area, then only the LACHS needs to be consulted (s107(1)(a)).
- c. If there **is no LACHS**, the Proponent must identify the relevant knowledge holders for the area in accordance with the Knowledge Holder Guidelines which includes:
  - i. search the ACH Directory to determine if there are knowledge holders listed for the area;
  - ii. seek the advice of each native title party or if there are none, each representative body for the area;
  - iii. contact DPLH to confirm the proponent's list of identified knowledge holders is complete;
  - iv. where the DPLH cannot ascertain the identity of a knowledge holder, there may be a requirement to give public notice to be published on a website maintained by or on behalf of the ACH Council.
- d. Persons self-identifying as knowledge holders have 2 weeks to respond to the public notice in step (iv), after which the Proponent may proceed to consult those knowledge holders that were identified. There is no timeframe within which the DPLH must respond in step (iii) or publish the notice in step (iv).

- e. Once all relevant parties have been identified, the Proponent must consult with each NTP, each individual knowledge holder or, in the absence of which, each native title representative body (s107).
- f. A **“knowledge holder”** is a person who is identified as a knowledge holder for the area or part of the area, after reasonable steps have been taken to do so in accordance with the Knowledge Holder Guidelines.” (s107(2) ACH Act).
- g. A **“native title party”** includes registered native title claimants, bodies corporate, regional corporations under ILUAs, and former bodies corporate which native title rights were surrendered, extinguished or compulsorily acquired.
- h. A Proponent may request the assistance of the DPLH to identify the correct party to be consulted (s108 ACH Act).

## 2. INITIAL CONTACT

- a. Upon establishing the correct party or parties to be contacted, an initial contact must be made. The Consultation Guidelines permit contact via email, letter, telephone, text or similar direct message, social media, fax or in person. In-person communications should be documented contemporaneously. Once contact is established, the NTP may nominate, to the Proponent, its preferred contact method.
- b. More than one method of contact should be utilised when making the initial contact. The Proponent should, ensure that at least one initial contact notice is sent by post to:
  - i. the address provided by the person for the giving or service of notice; or
  - ii. if no address is provided as referred to in subparagraph (i) – to the last known address of the person; or
  - iii. to an address shown in the rate record kept by a local government under the Local Government Act 1995 as the address for the service of rate notices under that Act on that person.
 (see section 283 of the ACH Act).

- c. The initial contact must include:
  - i. the name of the Proponent;
  - ii. the name and position of the person making contact;
  - iii. details of the Project;
  - iv. contact details for the relevant person acting for the Proponent; and
  - v. an invitation to participate in consultation.

## 3. WHERE AN ATTEMPT TO CONTACT THE NTP HAS BEEN MADE AND NO RESPONSE HAS BEEN RECEIVED.

*101(e) the proponent taking reasonable steps to follow up with a person to be consulted if there is no response to the initial contact or a reasonable request for further information.*

- a. If no response is received to the initial contact, and that initial contact was made in accordance with the Consultation Guidelines, follow up contacts must be made.

- b. Where there is a LACHS, the follow up contacts must be made at least weekly for a further 3 weeks, and where there is no LACHS, at least:
  - i. fortnightly for a minimum of a further 8 weeks, then
  - ii. weekly for a minimum of a further 2 weeks.
- c. Cultural conventions or commitments are accounted for in the above periods
- d. Where the above has been complied with, the Proponent will be considered to have made a genuine attempt to consult within a reasonable time.
- e. Once contact has been established, each party must, throughout the consultation process, use their best endeavours to provide a substantive response to any reasonable requests for information from the other within a maximum of 4 weeks, unless otherwise agreed.

## PART C - MEETINGS

During the consultation period, the proponent must endeavour to hold a minimum of 3 meetings with the NTP with at least a 2 week gap between each.

The three required meetings (subject to the exception set out below at 4(f) and 5(b)) have specific purposes in line with s101 of the ACH Act.

It is the Proponent's obligation to provide a meeting venue. Other than participation by a LACHS (the fees for which are prescribed in the LACHS fees guidelines), the Proponent is not required to pay a fee to, or cover the costs of, a person being consulted unless there is a prior written agreement between the parties to do so.

### 1. FIRST CONSULTATION MEETING

*101(b) the proponent providing sufficient information about the proposed activity to each person to be consulted to enable them to understand the proponent's reasoning and intention.*

- a. The first meeting is for the Proponent to provide background, objections and proposed outcomes of the Project and an invitation to the second and third meetings.
- b. The proponent is to invite the persons to be consulted to participate in the first meeting. The invitation to the first meeting must include:
  - i. the name of the person and contact detail of the person who is making the invitation;
  - ii. the proponent;
  - iii. a summary of the project;
  - iv. two alternative meeting dates and venue(s) for the first meeting; and
  - v. if required, request contact details of the persons to be consulted.
- c. The first of the two meeting dates is to be organised at least two weeks from the date of the invitation/public notice. The second meeting date is to be held at least one week later
- d. At least one of these two meetings must, where practicable, be held in the area of the proposed activity, unless otherwise agreed by all those to be consulted that this is not required.

- c. If the NTP does not attend the first meeting, or if the parties agree, no further meetings are required.

## 2. SECOND CONSULTATION MEETING

*101(c) each person to be consulted having an opportunity to clearly state their position on the proposed activity and explain that position.*

- a. The Consultation Guidelines note that the second meeting is for the persons to be consulted to be able to state and explain their position on the proposed activity, including the identity and characteristics of the ACH located in the area of the activity and how impacts can be avoided or minimised.
- b. If the NTP does not attend the second meeting, or if the parties agree, no further meetings are required.

## 3. THIRD CONSULTATION MEETING

*101(d) the proponent and each person to be consulted disclosing relevant and necessary information about their position as reasonably requested.*

- a. The Consultation Guidelines note that the third meeting is for the proponent to discuss how the views provided in the second meeting have been addressed as part of the preferred method for carrying out the activity.

## PART D - CONSULTATION FRAMEWORK

The Consultation Guidelines contemplate the parties entering into a “Consultation Framework” and require the Proponent to give due consideration to a reasonable request to do so although it is not a mandatory requirement.