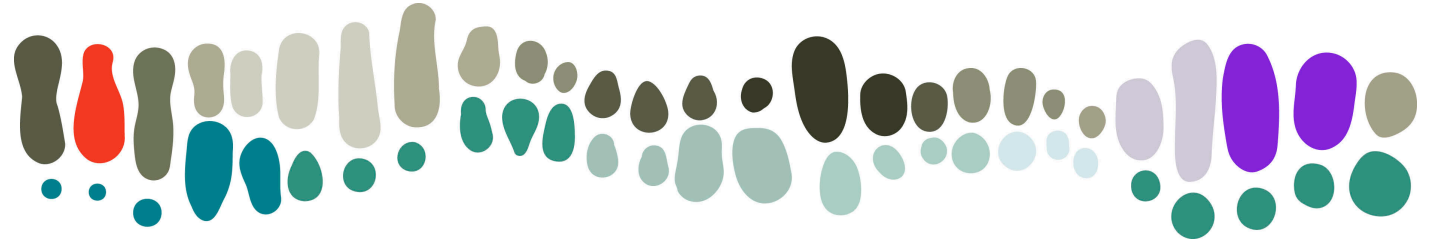




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Aboriginal Cultural Heritage Act 2021



Aboriginal Cultural Heritage Act 2021

History of Reform



Five years of extensive consultation

- Consultation Paper (2018), Discussion Paper (2019), draft Bill (2020).
- More than 175 workshops in 35 locations State-wide, 380 submissions.
- Act passed by Parliament in December 2021
- Co-design process (2022-23) to develop Regulations and statutory guidelines. More than 90 workshops in 33 locations, 220 formal submissions.
- Hundreds of stakeholder meetings, industry briefings and meetings on Country
- 33 education sessions from May to August 2023 to support implementation. Over 4,000 people registered to attend to date.



Consultation Outcomes: Key Features of the Act

- Aboriginal people determine the importance of Aboriginal cultural heritage (ACH)
- Proponents required to undertake due diligence assessment (DDA) prior to undertaking activities
- Approvals process requires engagement with Aboriginal people
- Aboriginal organisations may be appointed as a local ACH services (LACHS)
- Established roles for native title holders, knowledge holders and traditional custodians
- Substantially increased penalties for breaches
- New suite of protection mechanisms such as stop activity and prohibition orders





Similarities and differences

<i>Aboriginal Heritage Act 1972</i>	<i>Aboriginal Cultural Heritage Act 2021</i>
Blanket Protection – all Aboriginal cultural heritage places are protected	Blanket Protection – all Aboriginal cultural heritage places are protected
Does not include exemptions for specified activities	Includes exemptions for specified activities
One size fits all approach for approvals to harm Aboriginal cultural heritage	Tiered approach for approvals to harm Aboriginal cultural heritage
All activities that will harm Aboriginal cultural heritage require an approval	Only tier 2 and tier 3 activities that will harm Aboriginal cultural heritage require an approval
Does not provide for which Aboriginal persons need to be consulted or notified.	Identifies Aboriginal persons that need to be consulted or notified.
Does not require publication of decisions	Requires publication of decisions
Applies across all forms of tenure	Applies across all forms of tenure



Land Use Approvals [Part 6]



Policy Objectives

- Approval only required when proposed activity ***may harm heritage***
- Aboriginal people and proponents ***work together to reach agreements*** regarding the management of Aboriginal cultural heritage
- Land use activities managed to ***avoid or minimise harm*** wherever possible
- System that ***provides clarity and certainty*** of process and consultation for all stakeholders
- System that facilitates the making of well ***informed decisions***
- Approval process where the effort required to seek an approval is commensurate with the ***level of impact*** an activity may cause
- Aboriginal people to ***be involved*** in the decision making process



Due Diligence Assessments



- Due diligence assessment (DDA) now clearly set out in ***Management Code***
- Unnecessary for ***exempt activities***
- Where a DDA determines ***no risk of harm – no approval*** required
- Different levels of DDA dependent on ***activity impact*** – lower the impact, lower the DDA required
- Undertaking a DDA in accordance with Code is a ***defence***



Exempt Activities



Exemptions introduced for the **first time**, including:

- Undertaking activities within **same parameters** (area, height, depth)
- **Emergency management** activities to prevent imminent loss of life, prejudice to the safety, or harm to the health, of persons or animals
- Residential properties under **1100m²**
- Minor residential **development and maintenance** activities irrespective of lot size e.g. granny flat, verandah, garage, pool (aligns with planning system)
- **Maintaining** existing infrastructure where no new disturbance
- **Recreational** activities
- Subdivisions resulting in **5 lots less than 1100m²**
- Residential development where **subdivision subject to a management plan**
- Temporary **camps and driving** on existing disturbed area



Activity tiers - examples

- Marking out (pegging) a tenement – **Tier 1**
- Erecting or installing a fence in a way that does not involve new clearing – **Tier 1**
- Fire hazard reduction activities – **Tier 1**
- Providing or restoring essential services – **Tier 1**
- Complying with a notice given under the s33 of *Bush Fires Act 1954* – **Tier 1**
- Metal detecting and scrape and detect using handheld tools – **Tier 1**
- Drilling a bore up to 1m² (**Tier 1**) or up to 10m² (**Tier 2**)
- Construction of a residential building on a lot 1,100 sqm or larger – **Tier 2**
- Activities that result in land use that is no greater in surface area than existing use – **Tier 2**
- Catch-alls based on parameters relating to amount of disturbance



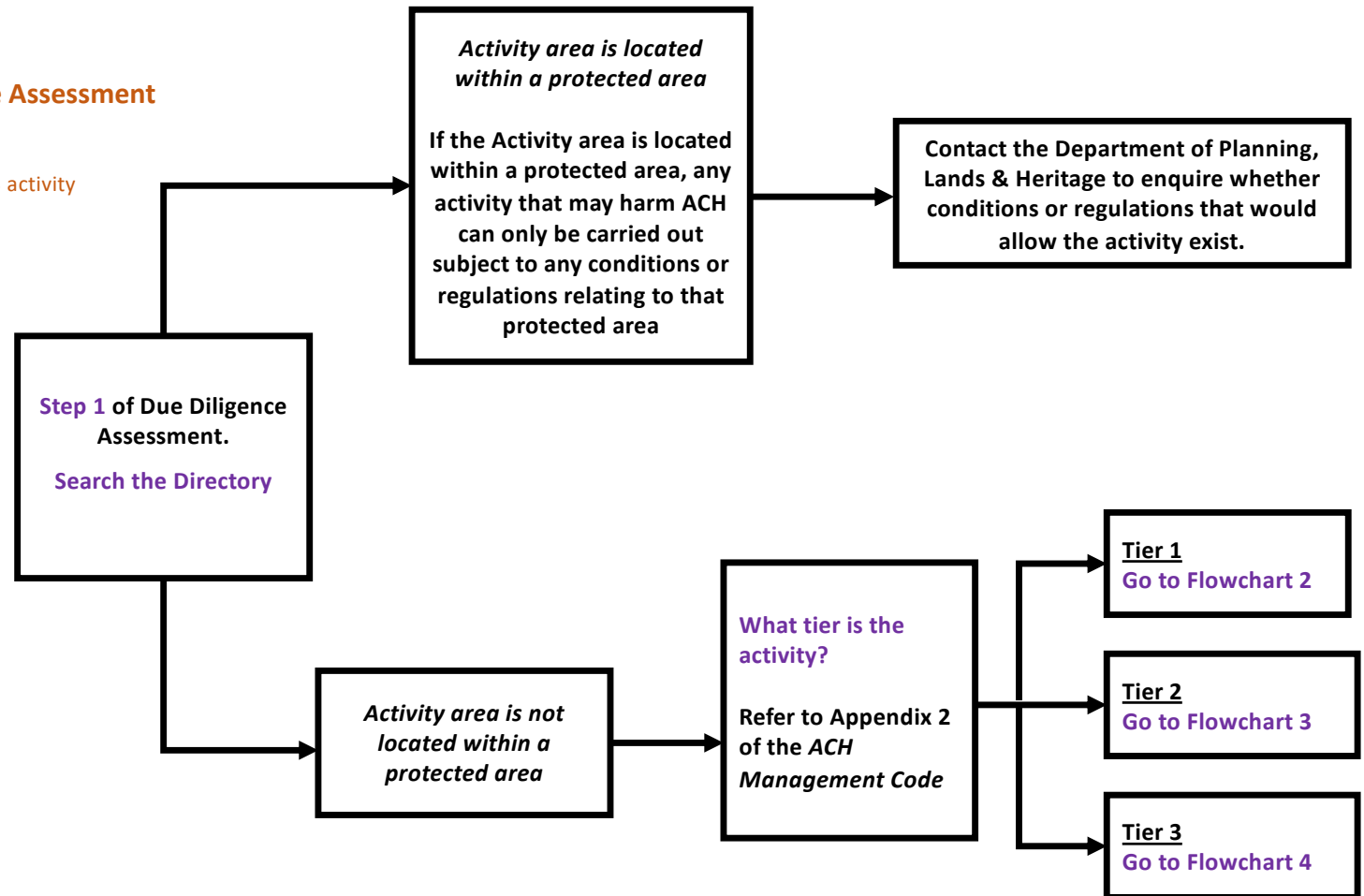
ACH Management Code

Flowchart 1 – Commencement of Due Diligence Assessment

- Whether there is a Protected Area
- Whether the proposed activity is an exempt activity
- Whether the proposed activity is a Tier 1, Tier 2 or Tier 3 activity

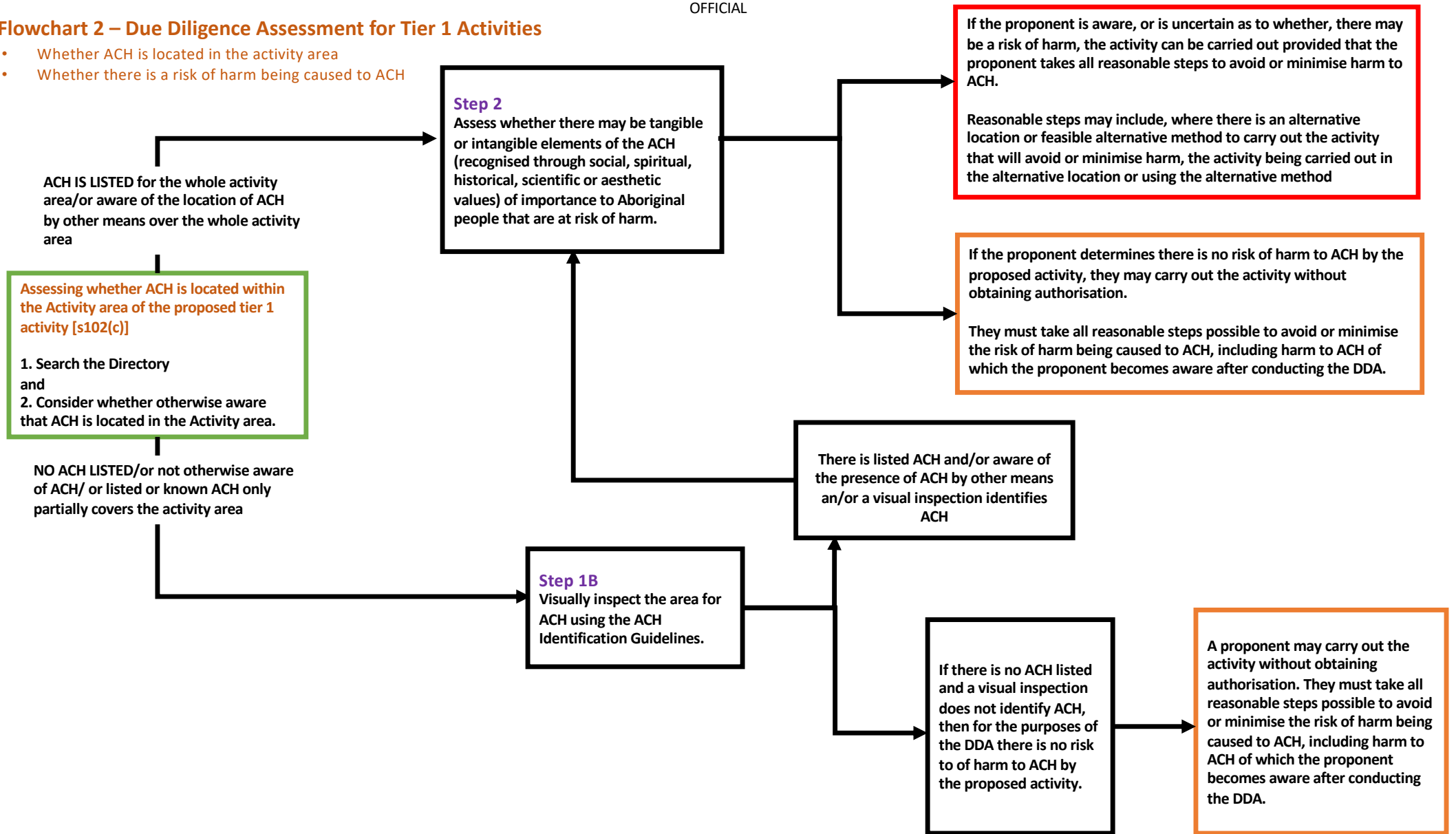
Flowchart 1 assumes the proponent has already established whether the proposed activity is an exempt activity noting that:

- Activities that are 'like for like' or less, are exempt activities.
- Exempt activities may proceed without completion of a due diligence assessment.
- Exempt activities cannot be undertaken within a protected area unless conditions or regulations associated with the protected area order permit the activity.
- The proponent of the activity must take responsibility to establish whether the proposed activity is planned to be carried out is within a protected area by checking the ACH Directory.



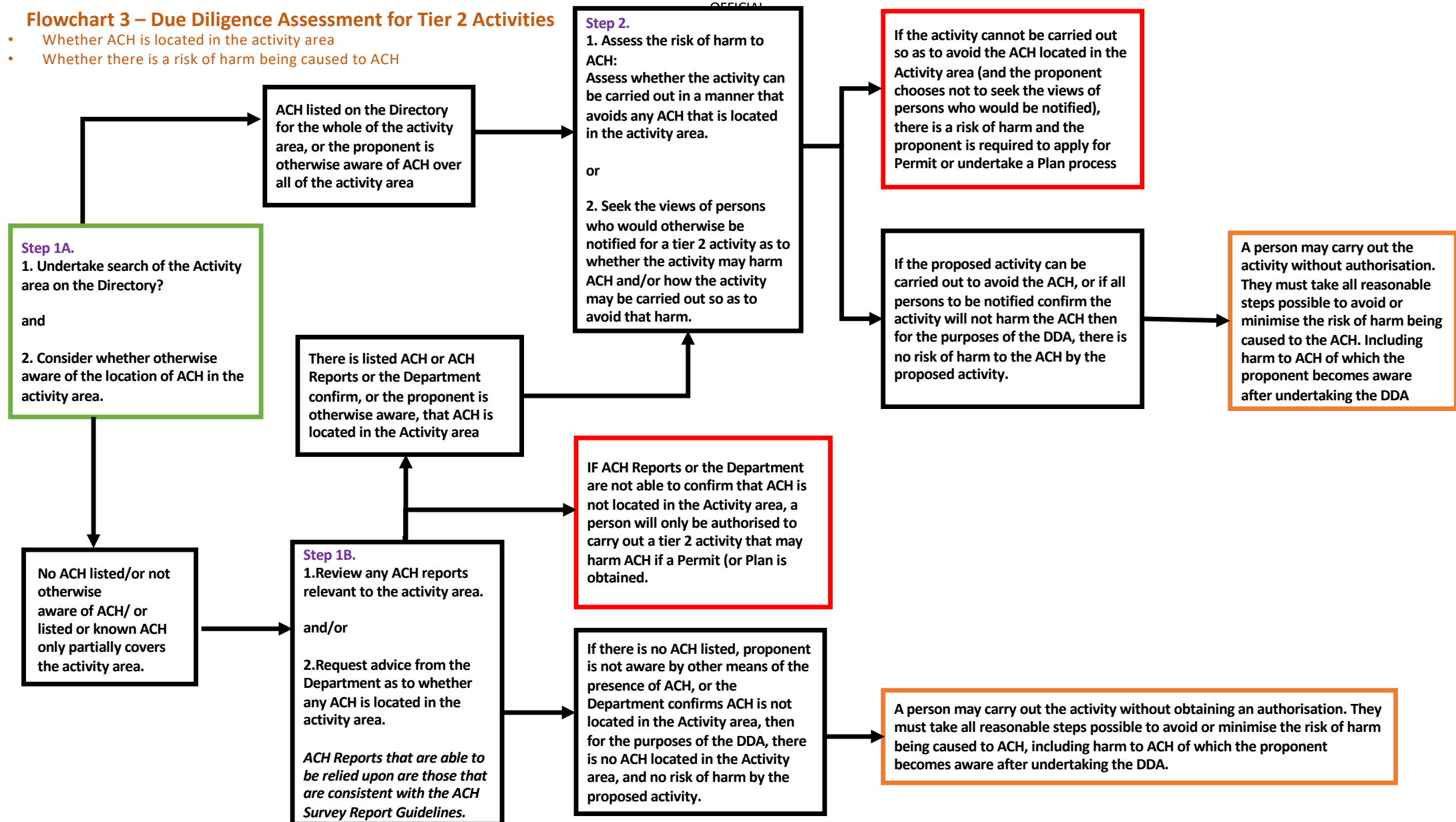
Flowchart 2 – Due Diligence Assessment for Tier 1 Activities

- Whether ACH is located in the activity area
- Whether there is a risk of harm being caused to ACH



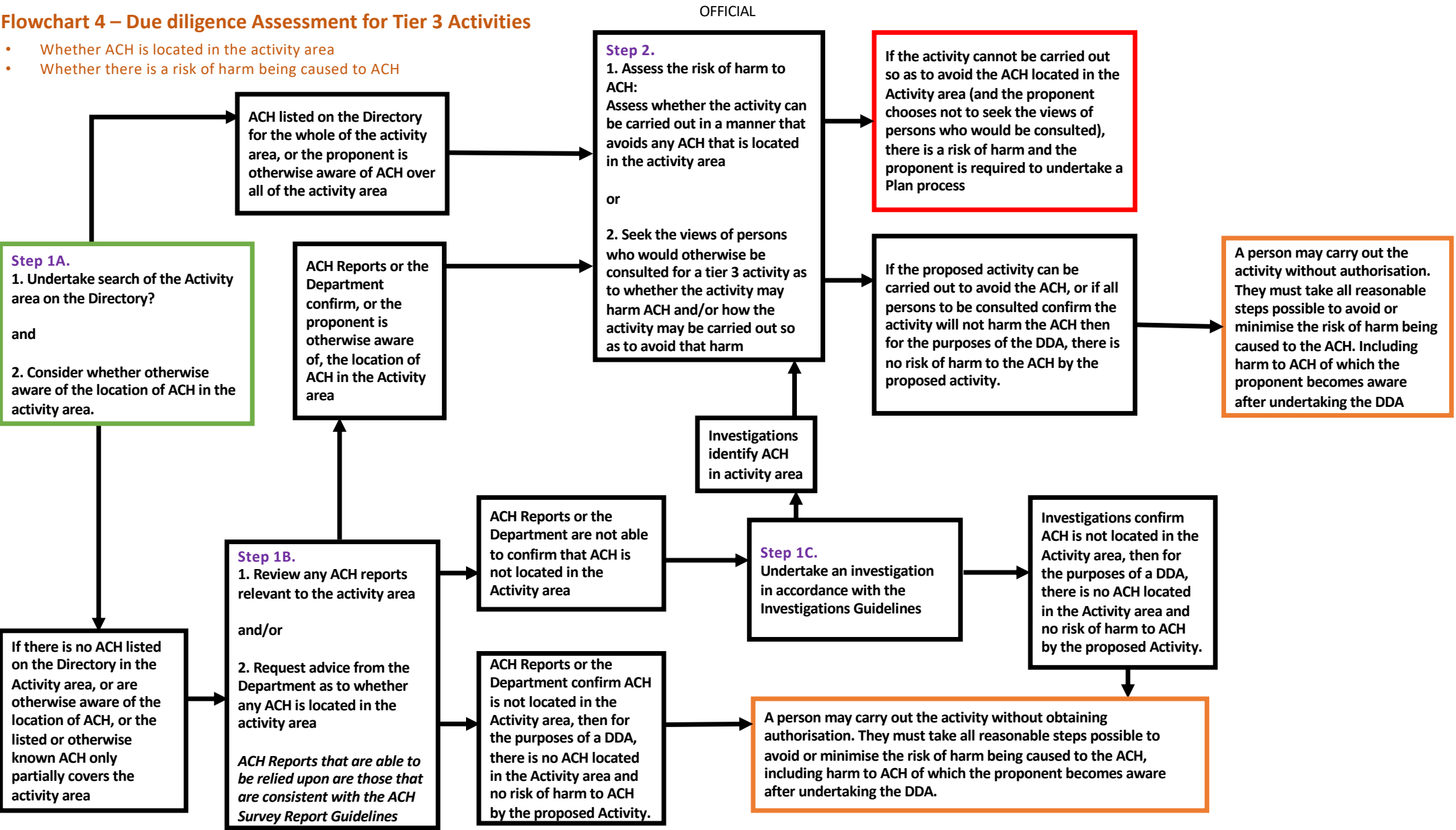
Flowchart 3 – Due Diligence Assessment for Tier 2 Activities

- Whether ACH is located in the activity area
- Whether there is a risk of harm being caused to ACH



Flowchart 4 – Due diligence Assessment for Tier 3 Activities

- Whether ACH is located in the activity area
- Whether there is a risk of harm being caused to ACH

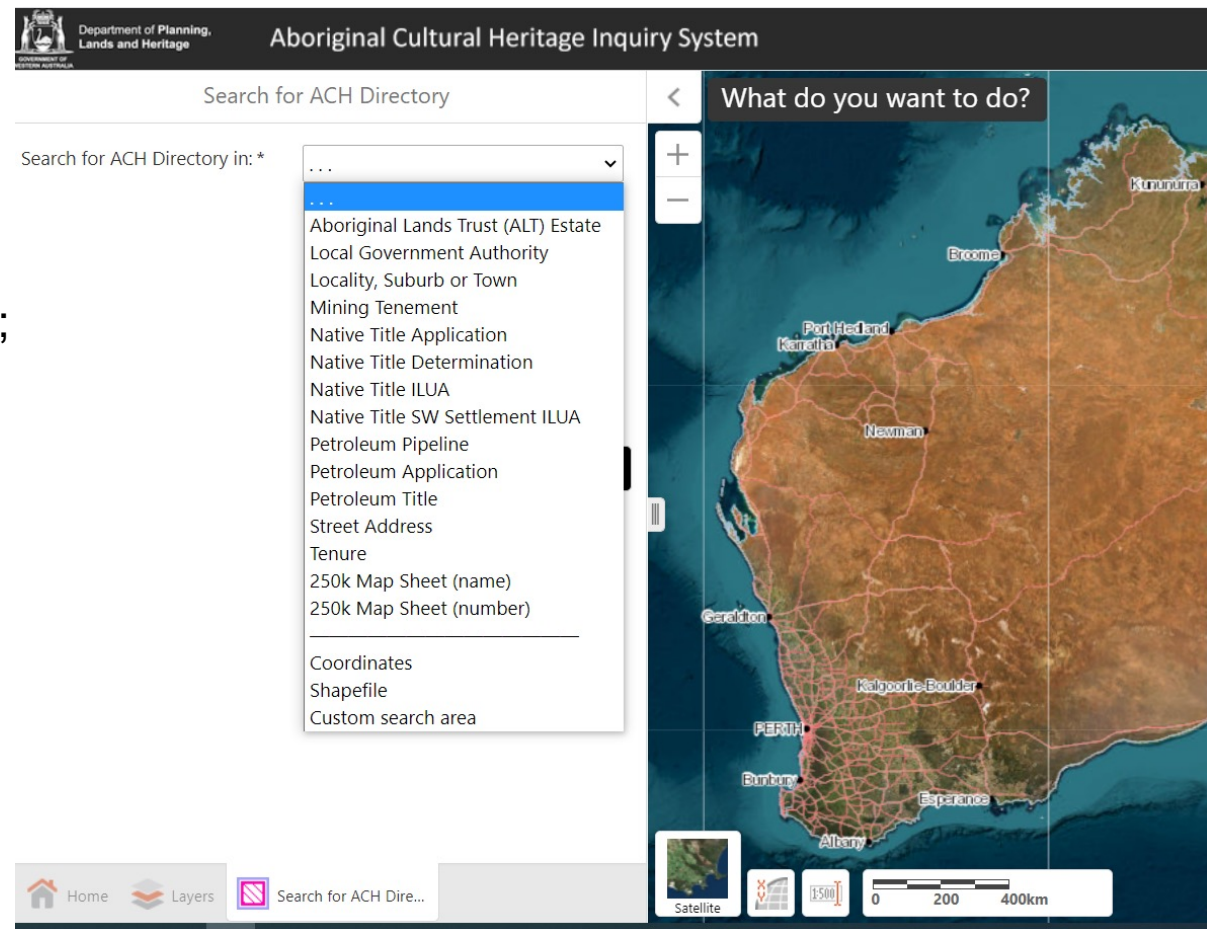


Aboriginal Cultural Heritage Inquiry System (ACHIS)

The ACH Directory is located on ACHIS.

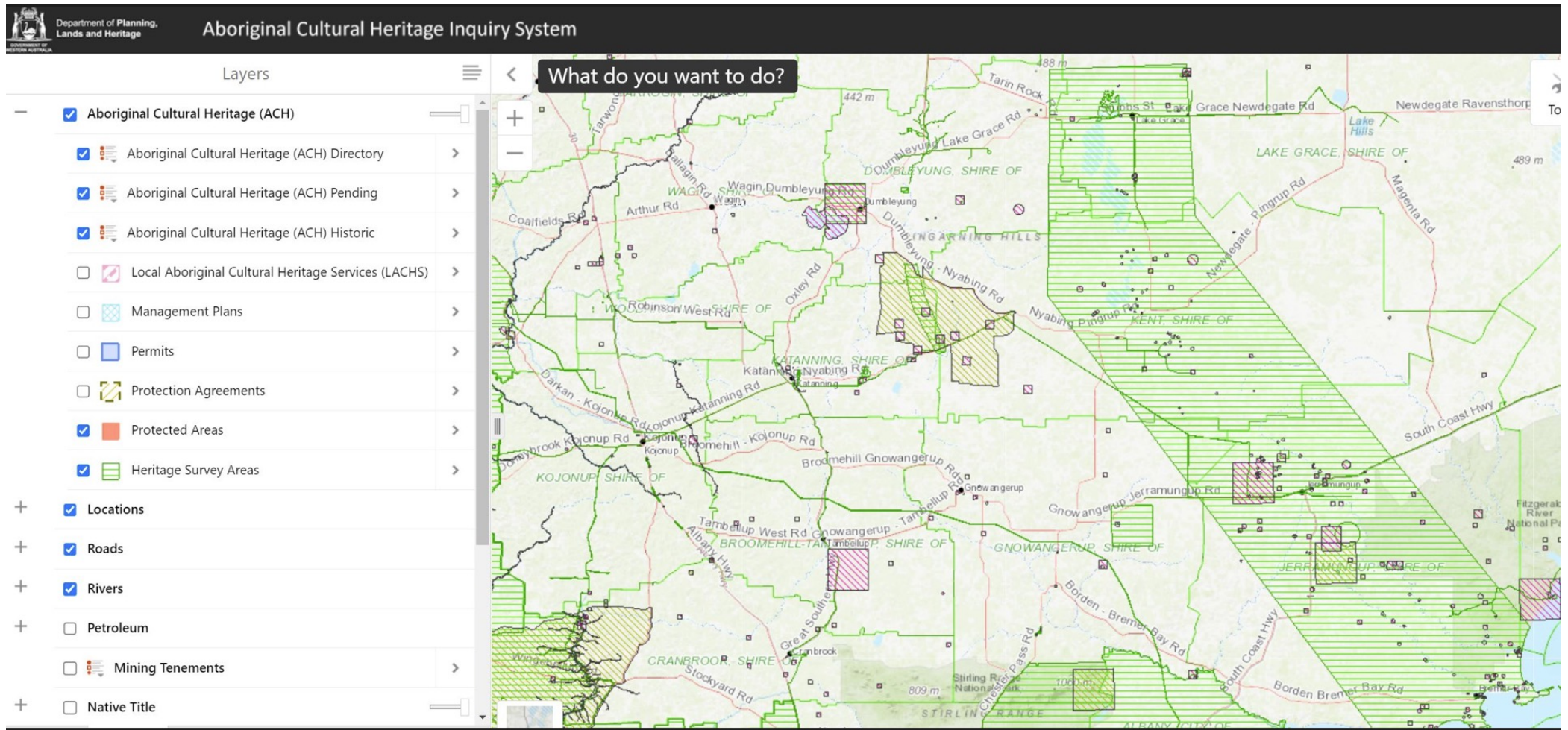
For the purpose of undertaking a DDA, the Directory includes information on:

- Aboriginal cultural heritage;
- protected areas;
- local ACH service;
- native title parties;
- knowledge holders; and
- native title representative bodies (NTRB).



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Aboriginal Cultural Heritage Inquiry System (ACHIS)

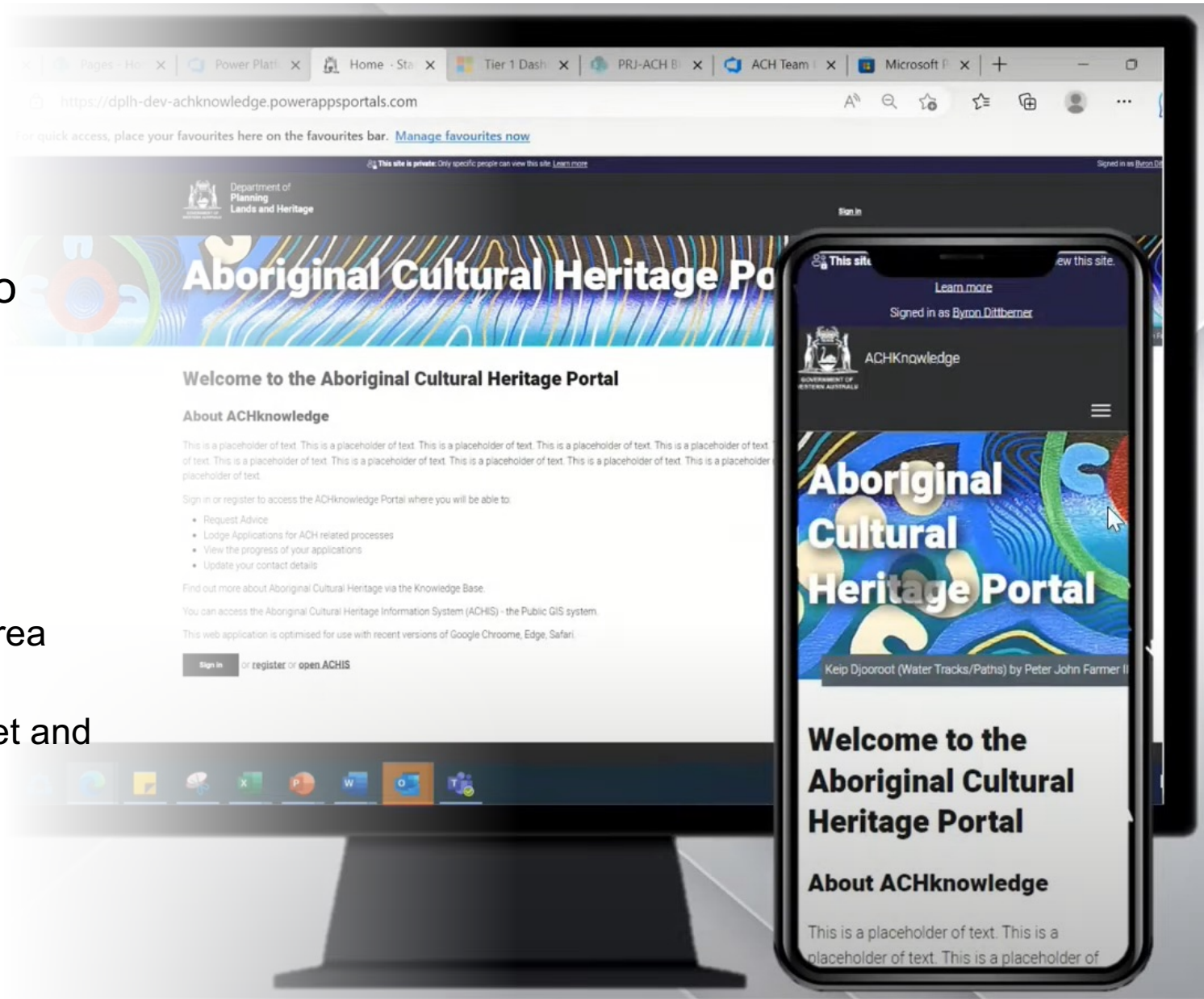


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Further Resources

ACHknowledge –portal to submit:

- advices
- ACH submissions
- permit applications
- management plans
- nominations for protected area
- information on Aboriginal ancestral remains and secret and sacred objects



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Thank you



Contact Details:
aboriginalheritage@dplh.wa.gov.au



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Activity Tiers

- Other activities subject to particular stakeholder concerns:
 - Marking out (pegging) a tenement – **Tier 1**
 - Erecting or installing a fence in a way that does not involve clearing – **Tier 1**
 - Complying with a notice given under the Bush Fires Act 1954 section 33(1) or a direction given under section 33(4)(a) of that Act – **Tier 1**
 - Metal detecting and scrape and detect using handheld tools – **Tier 1**.
 - Construction or renovation of a residential building on a lot 1100 m² or larger – **Tier 2**
 - General activities categorised based on the amount of disturbance (e.g. removing less than 4kg = **Tier 1**; 4kg to 20 kg = **Tier 2**; over 20 kgs = **Tier 3**).



Consultation Guidelines

- Consultation guidelines establish minimum requirements regarding making initial contact, and the consultation meetings that need to take place.
- These guidelines require three consultations for the purposes outlined in the table.
- Proponents and Aboriginal parties can negotiate for fewer, or more consultations should there be a requirement.
- Only LACHS are required to be paid for participation in consultations.

Who should be consulted ?	Follow up if no response to Initial Contact	Consultation		
		Meeting 1	Meeting 2	Meeting 3
Each LACHS for the area or a part of the area	Where there is no response to the initial contact, further attempts at initial contact must be undertaken once per week for a minimum period of a further three weeks .	The first meeting is for the proponent to provide background, objectives and proposed outcomes of the project and an invitation to the second and third meetings.	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.	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.
If there is no LACHS for the area or a part of the area — each native title party and each knowledge holder for the area or the part of the area. If there is not a LACHS, native title party or knowledge holder — each NTRB for the area or the part of the area.	Where there is no response to the initial contact, further attempts at initial contact must be undertaken across a minimum period of a further 10 weeks as follows: <ul style="list-style-type: none">• once a fortnight for the first the first 8 weeks; then• once per week for the remaining 2 weeks.			
	Parties may agree on an alternative consultation framework			

Knowledge Holder Guidelines



Step 1: Search the Directory and contact the appropriate parties

- To identify the knowledge holders that are to be notified or consulted, the proponent must first:
 1. search the Directory to determine if there is a knowledge holder for the area; and
 2. seek the advice of each native title party or, where there is no native title party, the native title representative body (NTRB), for the area.

Step 2: Seek advice from the Department

- After completing Step 1, a proponent must contact DPLH for advice as to the identity and contact details of knowledge holders for the relevant area.
- If DPLH able to provide identity/contact details of all knowledge holders, Step 3 not required.
Privacy considerations mean DPLH is limited as to what contact details it can provide without the individual's consent.

Step 3: Public notice

- If DPLH advises cannot provide contact details of all knowledge holders for the area, proponent must give public notice on ACH Council's website requesting knowledge holders to contact proponent or Council.



Timeframes

	Prescribed Period	Section	Timeframe
Permits	In relation to a notice of intention to carry out a tier 2 activity, or an application for extension of a Permit, the period for persons given the notice to make a submission about risk of harm	113(b), 122(3)(b)	28 days
	Period for persons given notice to make a submission to Council about views	118(2), 125(2)	28 days
	Period for the Council to make a decision on an application	119(2), 126(2)	14 days
Plans	Period for proponent and each Aboriginal party to use best endeavours to reach agreement	143(2)	140 days
	Period for Council to decide whether to approve or refuse an agreed Plan	150(2)	28 days
	Period for Council to make recommendation to Minister whether to authorise or refuse a Plan	162(2)	90 days
	Period for a person to make a submission to Council about their views on whether the ACH is of State significance	175(3)(c)	28 days
	Period for Council to make a determination as to whether ACH of State significance	176(2)	35 days



LACHS Fee for Service Guidelines

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SERVICE PROVIDER	RATE	
	Hourly	Daily
LHO	\$80 - \$120*	\$600 - \$900*
LSHO	\$120 - \$160*	\$900 - \$1200*
Chief Operating Officer	\$160 - \$240*	\$1200 - \$1800*
Chief Executive Officer	\$240 - \$280*	\$1800 - \$2100*
Aboriginal Consultant	\$80 - \$120*	\$600 - \$900*
Senior Aboriginal Consultant	\$120 - \$160*	\$900 - \$1200*
Heritage Professionals	Rates as per professional standards	
Legal Professionals (including in-house)	Rates as per the Legal Profession (Solicitors Costs) Determination made under section 275 of the <i>Legal Profession Act 2008</i> .	
Other Expert Service Providers	Up to \$300	Up to \$2250
Administration fee	15%	
*Very Remote uplift is applicable		

Maximum fee for submission on Tier 2 permit application is \$500.



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Substantially Commenced

Criteria for determining whether purpose has been substantially commenced

For the purposes of section 325(3) of the Act, the criteria to apply include the following —

- (a) whether the land is being used for the purpose specified in the consent;
- (b) whether relevant licences, permits and approvals have been obtained to use the land for the purpose specified in the consent;
- (c) whether any of the following activities have been undertaken on or in relation to the land in preparation for the purpose specified in the consent —
 - (i) clearing or other site works to support the construction of key infrastructure;
 - (ii) construction of new roads, tracks, trails, pathways or parking areas to service key infrastructure;
 - (iii) installation of new services including power, water, sewer or telecommunications services to service key infrastructure;
- (d) whether activities referred to in paragraph (c) have been undertaken on or in relation to any other land in connection with a larger project of which the purpose specified in the consent forms a part.

- A section 18 consent will expire within 10 years following proclamation if fail to establish the activity substantially commenced.
- Application must be received at least 12 months before expiry.
- Criteria intended to discourage proponents from harming ACH to prove that the purpose is substantially commenced.



ACH Management Plan



- ACH Management Plan will need the following information:
 - Executive Summary
 - Details of the ACH subject of the Plan
 - Details and outcomes of consultation
 - Details of the proposed activities including descriptions, locations, proposed timeframes
 - Impact statement
 - Description of how the ACH is going to be managed
 - Evidence of informed consent from the Aboriginal party (where agreement is reached)
 - Contingencies about how ACH is going to be managed should new information come to light



Aligning Legislation

- Removing duplication between Environmental Protection Authority's (EPA) role and the Act
- DWER and DPLH working to ensure proponents' work for the Act meets EPA's legislative objectives
- EPA to consider impacts for places not covered under the Act
- EPA's Interim Technical Guidance to explain and support this approach
- Ongoing monitoring of effectiveness of approach to address duplication
- Legislative approach may be developed if required

