

# Aboriginal Cultural Heritage

Matilda Lloyd & Philip Brunner

The content of this presentation does not constitute legal advice, is not intended to be a substitute for legal advice and should not be relied upon as such. This presentation is designed and intended to provide general information in summary form on legal topics, current at the time of publication, for informational purposes only. The material may not apply to all jurisdictions. You should seek legal advice or other professional advice in relation to any particular matter that you or your organisation may have.

# What's New

- Aboriginal Cultural Heritage Act 2021
- Aboriginal Cultural Heritage Regulations 2022
- Aboriginal Cultural Heritage (Cost Recovery) Regulations 2023
- ACH Guidelines
- ACH Directory (Aboriginal Cultural Heritage Inquiry System)
- ACHKnowledge ICT System

# Aboriginal Cultural Heritage

## Section 12

### *Aboriginal cultural heritage -*

- (a) means the ***tangible and intangible elements*** that are important to the Aboriginal people of the State, and are recognised through social, spiritual, historical, scientific or aesthetic values, as part of Aboriginal tradition; and
- (b) includes the following —
  - (i) an area (**an Aboriginal place**) in which tangible elements of Aboriginal cultural heritage are present;
  - (ii) an object (**an Aboriginal object**) that is a tangible element of Aboriginal cultural heritage;
  - (iii) a group of areas (**a cultural landscape**) interconnected through tangible or intangible elements of Aboriginal cultural heritage;
  - (iv) the bodily remains of a deceased Aboriginal person (**Aboriginal ancestral remains**), other than remains that are buried in a cemetery where non-Aboriginal persons are also buried or remains that have been dealt with or are to be dealt with under a law of the State relating to the burial of the bodies of deceased persons.

***Intangible Aboriginal cultural heritage*** means the intangible elements of Aboriginal cultural heritage, including knowledge, or oral expression, of Aboriginal tradition.

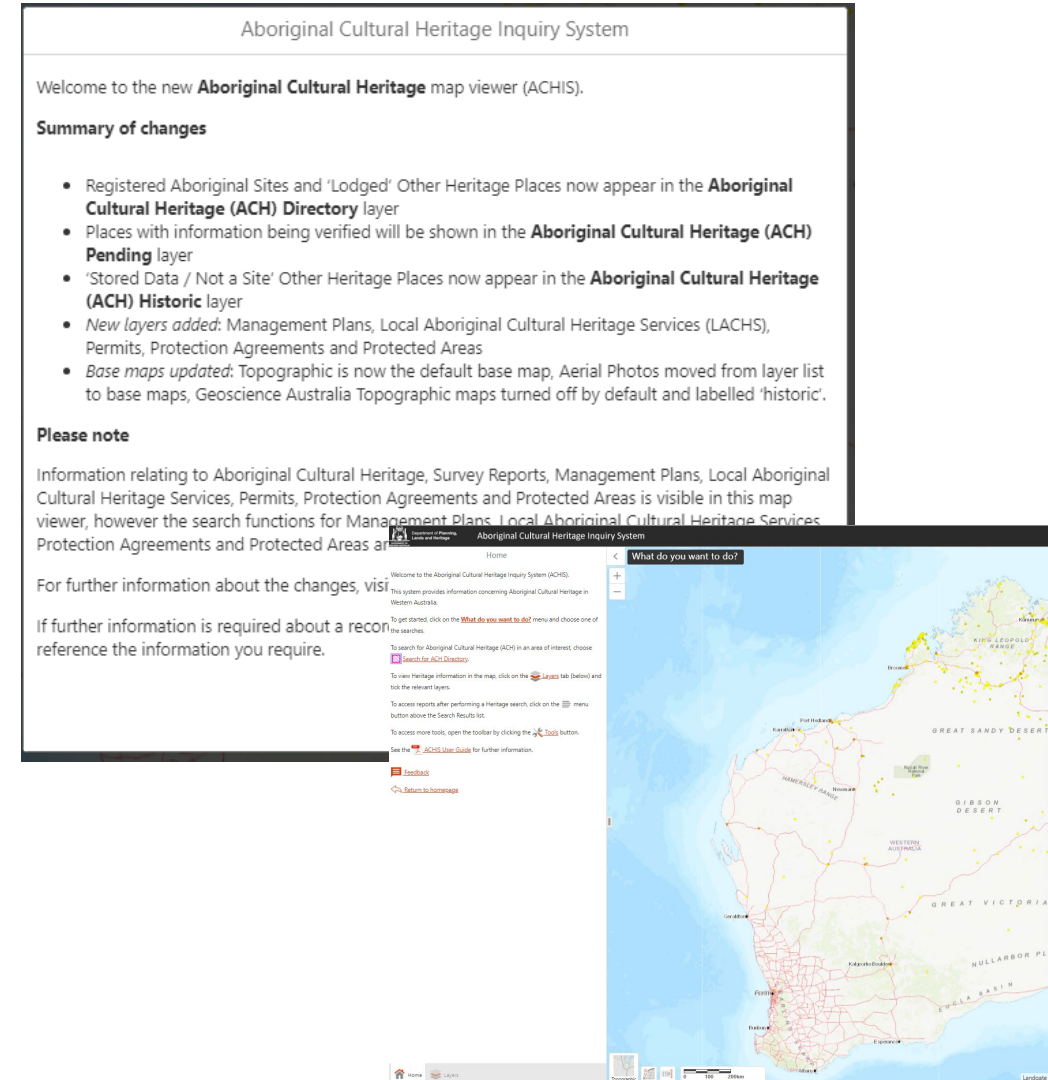
# ACH Directory

The Act establishes an ACH Directory of information and documents relevant to Aboriginal cultural heritage, including information about:

- Protected areas;
- ACH permits;
- ACH management plans; and
- Aboriginal cultural heritage.

Intangible Aboriginal cultural heritage - recordings (including photographs, films, audio, video, digital and other recordings).

If there is ACH registered over an area of land, a proponent **must** undertake a DDA prior to undertaking any activities in that area.



Aboriginal Cultural Heritage Inquiry System

Welcome to the new **Aboriginal Cultural Heritage** map viewer (ACHIS).

**Summary of changes**

- Registered Aboriginal Sites and 'Lodged' Other Heritage Places now appear in the **Aboriginal Cultural Heritage (ACH) Directory** layer
- Places with information being verified will be shown in the **Aboriginal Cultural Heritage (ACH) Pending** layer
- 'Stored Data / Not a Site' Other Heritage Places now appear in the **Aboriginal Cultural Heritage (ACH) Historic** layer
- **New layers added:** Management Plans, Local Aboriginal Cultural Heritage Services (LACHS), Permits, Protection Agreements and Protected Areas
- **Base maps updated:** Topographic is now the default base map, Aerial Photos moved from layer list to base maps, Geoscience Australia Topographic maps turned off by default and labelled 'historic'.

**Please note**

Information relating to Aboriginal Cultural Heritage, Survey Reports, Management Plans, Local Aboriginal Cultural Heritage Services, Permits, Protection Agreements and Protected Areas is visible in this map viewer, however the search functions for Management Plans, Local Aboriginal Cultural Heritage Services, Protection Agreements and Protected Areas are not available.

For further information about the changes, visit [ACHIS User Guide](#).

If further information is required about a recording, please refer to the information you require.

**What do you want to do?**

- Home
- Search for Aboriginal Cultural Heritage (ACH) in an area of interest, choose one of the searches:
  - [Search by ACHIS Database](#)
  - [Search by ACHIS Database](#)
- To search for Aboriginal Cultural Heritage (ACH) in an area of interest, choose one of the searches:
  - [Search by ACHIS Database](#)
  - [Search by ACHIS Database](#)
- To view Heritage information in the map, click on the [Layers](#) tab (below) and tick the relevant layers.
- To access reports after performing a Heritage search, click on the [Reports](#) menu button above the Search Results list.
- To access more tools, open the toolbar by clicking the [Tools](#) button.
- See the [ACHIS User Guide](#) for further information.
- [Feedback](#)
- [Return to homepage](#)

# Due Diligence Assessment

A DDA, is an assessment about:

- (a) whether the area of the proposed activity includes any area that is part of a **protected area**;
- (b) whether the proposed activity is a -
  - (i) a **Tier 1 activity** (no or minimal ground disturbance);
  - (ii) a **Tier 2 activity** (low ground disturbance);
  - (iii) a **Tier 3 activity** (moderate to high ground disturbance);
- (c) whether **ACH is located in the area** of the proposed activity;
- (d) whether there is a **risk of harm being caused to ACH** by the proposed activity;
- (e) in relation to a Tier 2 activity or a Tier 3 activity - the identity of the persons to be notified or the persons to be consulted about the proposed activity.

# 'Like for Like' Activities

## *Schedule 1 — Exempt activities and tier 1, 2 and 3 activities*

### Division 1 - Subdivision 1 — Exempt general activities

6. Maintaining existing infrastructure in a way that does not involve disturbance to ground beyond that which was disturbed during the construction of, or earlier works in relation to, the infrastructure.
8. Undertaking an activity in an area that results in land use or development that —
- (a) is no greater in surface area or height than existing land use or development in the area; and
  - (b) is either —
    - (i) no greater in depth than existing land use or development in the area; or
    - (ii) only greater in depth than existing land use or development in the area in a part of the area in which the depth of the existing land use or development extends 10 m or lower below natural ground level.

# Other Agricultural Activities

## Schedule 1 – Division 1 - Subdivision 2 — General tier 1 activities

- 18. Temporarily placing a structure on an existing area of ground disturbance.
- 19. Removing plant and equipment.
- 20. Maintaining existing infrastructure in a way that does not, over the course of 1 calendar year, involve any of the following —
  - (a) removing more than 4 kg of material;
  - (b) disturbing more than 10 m<sup>2</sup> of ground in total;
  - (c) disturbing more than 1 m<sup>2</sup> of contiguous ground;
  - (d) excavating to a depth of more than 0.5 m.
- 22. Erecting or installing a fence in a way that does not involve clearing.
- 23. Driving a vehicle in a way that does not result in a new track being formed.
- 24. Clearing for tracks in a way that does not, over the course of 1 calendar year, involve any of the following —
  - (a) removing more than 4 kg of material;
  - (b) disturbing more than 10 m<sup>2</sup> of ground in total;
  - (c) disturbing more than 1 m<sup>2</sup> of contiguous ground;
  - (d) excavating to a depth of more than 0.5 m.



# Other Agricultural Activities

## Schedule 1 – Division 1 - Subdivision 3 — General tier 2 activities

- 32. Erecting or installing a structure on undisturbed ground in a way that does not involve building foundations for the structure.
- 33. Maintaining existing infrastructure, other than as described in item 20, in a way that does not involve any of the following —
  - (a) removing more than 20 kg of material;
  - (b) disturbing more than 200 m<sup>2</sup> of ground in total;
  - (c) disturbing more than 10 m<sup>2</sup> of contiguous ground;
  - (d) excavating to a depth of more than 1 m.
- 35. Undertaking an activity in an area that results in land use or development that is no greater in surface area than existing land use or development in the area.
- 36. An activity that will, through repetition by the proponent, result in a new track being formed.
- 37. Clearing for tracks, other than as described in item 24, in a way that does not involve any of the following —
  - (a) removing more than 20 kg of material;
  - (b) disturbing more than 200 m<sup>2</sup> of ground in total;
  - (c) disturbing more than 10 m<sup>2</sup> of contiguous ground;
  - (d) excavating to a depth of more than 1 m.



# Other Agricultural Activities

## *Schedule 1 – Division 1*

### Subdivision 4 — General tier 3 activities

- 45. Maintaining existing infrastructure, other than as described in item 20 or 33.
- 47. Clearing for tracks, other than as described in item 24 or 37.

# Other Agricultural Activities

## *Schedule 1 – Division 5 – Agriculture and natural resource management activities*

### Subdivision 1 — Tier 1 agriculture and natural resource management activities

88. Controlling feral or pest fauna without digging or excavating.

89. Managing weeds or flora in a way that does not, over the course of 1 calendar year, involve any of the following —

- (a) removing more than 4 kg of material (not counting the weeds or flora);
- (b) disturbing more than 10 m<sup>2</sup> of ground in total;
- (c) disturbing more than 1 m<sup>2</sup> of contiguous ground;
- (d) excavating to a depth of more than 0.5 m.

# Other Agricultural Activities

## *Schedule 1 – Division 5 – Agriculture and natural resource management activities*

### Subdivision 2 — Tier 2 agriculture and natural resource management activities

90. Controlling feral or pest fauna, other than as described in item 88.

91. Managing weeds or flora, other than as described in item 89, in a way that does not involve any of the following —

- (a) removing more than 20 kg of material (not counting the weeds or flora);
- (b) disturbing more than 200 m<sup>2</sup> of ground in total;
- (c) disturbing more than 10 m<sup>2</sup> of contiguous ground;
- (d) excavating to a depth of more than 1 m.

92. Erecting or installing new agricultural infrastructure on existing agricultural land.

Examples for this item:

1. Erecting or installing a stock watering point.
2. Erecting or installing a new yard.

# Other Agricultural Activities

## *Schedule 1 – Division 5 – Agriculture and natural resource management activities*

### Subdivision 3 — Tier 3 agriculture and natural resource management activities

- 93. Managing weeds or flora, other than as described in item 89 or 91.
- 94. Conducting agricultural activities in an area not previously subject to agricultural activities.
- 95. Establishing a new farm or pastoral station.
- 96. Establishing a new tree plantation.
- 97. Harvesting trees in an area not previously subject to tree harvesting.

# Regulations

## 40. Most specific description of activity applies

- (1) This regulation applies if an activity is described by more than 1 item in Schedule 1.
- (2) The activity is taken to be described by the most specific item, and not by any other item, in Schedule 1.
- (3) The most specific item is —
  - (a) unless paragraph (b) applies — the item in Schedule 1 that most specifically describes the activity; or
  - (b) if 1 or more of the items set out in Schedule 1 that describe the activity are under a Subdivision heading referring to exempt activities — the item in Schedule 1 under a Subdivision heading referring to exempt activities that most specifically describes the activity.

# Activity Tier System

| Tier Category     | Description   | Approval Pathway  |
|-------------------|---|---|
| Exempt Activities | Exempt activity (s 100)   | Does not require authorisation  |
| Tier 1            | Activity involving no, or a minimal level of, ground disturbance  | Does not require authorisation  |
| Tier 2            | An activity involving a low level of ground disturbance           | Requires issue of ACH <b>permit</b> by ACH Council  |
| Tier 3            | Activity involving a moderate to high level of ground disturbance | <p>Where Aboriginal party and Proponent reach agreement ACH Council approves <b>ACH Management Plan</b>.</p> <p>Where Aboriginal Party and Proponent are unable to reach agreement, it is the decision of the Minister whether or not to authorise an ACH Management Plan</p> |

# Offences

Three levels of offences for harming Aboriginal cultural heritage

## ***Section 91:***

Harm to Aboriginal cultural heritage is ***serious*** if the harm is –

- a) irreversible, of a high impact or on a wide scale; or
- b) to Aboriginal cultural heritage located in a protected area.

## ***Section 91:***

Harm to Aboriginal cultural heritage is **material** if the harm is neither trivial nor negligible.

## ***Section 90:***

- 1) To ***harm*** Aboriginal cultural heritage includes to destroy or damage the Aboriginal cultural heritage.
- 2) However, an act carried out in relation to Aboriginal cultural heritage by an Aboriginal person acting in accordance with the person's traditional rights, interests and responsibilities in respect of the Aboriginal cultural heritage cannot harm the Aboriginal cultural heritage.

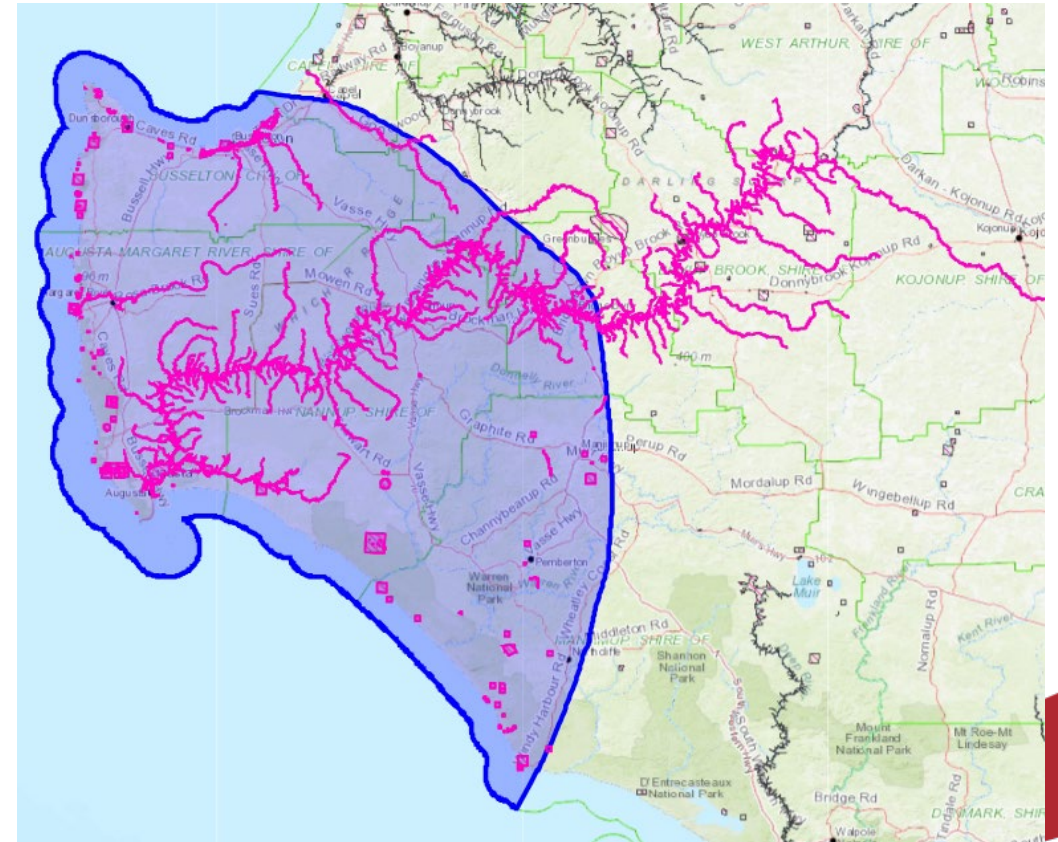


# Penalties

| Harm                            | Penalty  |
|---------------------------------|--|
| Serious Harm (s 92)             | Individual – imprisonment for 5 years or a fine of \$1,000,000, or both<br>Body corporate - \$10,000,000                           |
| Serious harm by accident (s 93) | Individual — a fine of \$500,000<br>Body corporate — a fine of \$5,000,000<br>It is immaterial that any event occurred by accident |
| Material harm (s 94)            | Individual — a fine of \$100,000<br>Body corporate — a fine of \$1,000,000   |
| Harm (s 95)                     | Individual — a fine of \$25,000;<br>body corporate — a fine of \$250,000;  |

# Since 1 July 2023 ...

Intangible ACH throughout waterways  
Geraldton tree planting event  
Canning River tree planting event  
Smoking ceremony on Mitchell Freeway  
Trespass



# Where to from here...

1. Extinguishment of Native Title
2. Harm to intangible ACH
3. Advocacy
4. Working Group





BailiwickLegal.

## CONTACTS

Philip Brunner  
[phil@bailiwicklegal.com.au](mailto:phil@bailiwicklegal.com.au)

Matilda Lloyd  
[matilda@bailiwicklegal.com.au](mailto:matilda@bailiwicklegal.com.au)

(08) 9321 5451

