



Aboriginal Cultural Heritage Act 2021

CO-DESIGN FACT SHEETS

Fact Sheet 1 – Activity Categories

A key function of the *Aboriginal Cultural Heritage Act 2021* (the Act) is to manage activities that may harm Aboriginal cultural heritage (ACH). The Act outlines Activity Categories which determine what tier proposed activities belong to, and to determine when land users may require an ACH Permit or an ACH management plan to lawfully proceed with the activity.

What is being Co-designed?

The purpose of this co-design process is to develop Activity Categories that will be included in regulations. The co-design process will assist in determining whether a listed activity falls into one of the following: **exempt activity, tier 1 activity, tier 2 activity** or **tier 3 activity**. Once the Activity Categories are finalised and included in the regulations, a proponent will need to ensure that an activity is carried out in accordance with the requirements of the Act relevant to the activity category.

About this Fact Sheet

This Fact Sheet includes information relevant to the co-design of **Activity Categories** and is designed to include information that will provide relevant context and information relating to the requirements under the Act. Appendix 1 to this document provides all the relevant sections of the Act.

The Fact Sheet also includes draft Activity Categories (**Attachment 1**). The draft Activity categories do not purport to represent what the final Activity Categories will look like but have been included to facilitate discussion on the types of activities that will need to be included in the finalised Activity Categories.

**A set of questions to assist with the co-design process
are found on page 5 of this fact sheet.**

Who needs to know about Activity Categories?

Proponents, including but not limited to, miners, urban developers, government agencies, prospectors and primary producers will be required to seek an approval prior to undertaking certain activities if the activity has the potential to harm ACH. The process for applications seeking an approval are set out in the Act. The co-design process is to establish what types of activities may require the grant of an ACH Permit or an approved or authorised ACH management plan by establishing tiers of activities, or Activity Categories.

What are the Activity Categories as defined in the Act?

Section 100 of the Act defines the follow activity categories:

exempt activity means any of the following activities —

- (a) construction, renovation or demolition of a building occupied, or intended for occupation, as a place of residence, or a building ancillary to such a building, on a lot as defined in the *Planning and Development Act 2005* section 4(1) that is less than 1 100 m²;
- (b) development of a prescribed type carried out in accordance with the *Planning and Development Act 2005*;
- (c) travel on an existing road or track;
- (d) the taking of photographs for a recreational purpose;
- (e) recreational activities carried out on or in public waters or in a public place;
- (f) burning carried out —
 - (i) for fire prevention or control purposes or other fire management works on Crown land; and
 - (ii) by a public authority;
- (g) clearing of a kind set out in the *Environmental Protection Act 1986* Schedule 6 item 10, 10A, 11 or 12;
- (h) other activities, if any, prescribed for the purposes of this paragraph;

tier 1 activity means an activity involving no, or a minimal level of, ground disturbance that is prescribed for the purpose of this definition;

tier 2 activity means an activity involving a low level of ground disturbance that is prescribed for the purpose of this definition;

tier 3 activity means an activity involving a moderate to high level of ground disturbance that is prescribed for the purpose of this definition.

What is the 'approval' pathway and requirements for each Activity category?

Under the Act, persons may be authorised to carry out an activity that may harm ACH, if:

110. Authority to carry out tier 1 activity that may harm Aboriginal cultural heritage

- (a) the activity is a tier 1 activity; and
- (b) the area where the activity is carried out does not include any area that is part of a protected area; and
- (c) a due diligence assessment is undertaken in relation to the carrying out of the activity; and
- (d) the person takes all reasonable steps possible to avoid, or minimise, the risk of harm being caused to Aboriginal cultural heritage by the activity.

111. Authority to carry out tier 2 activity that may harm Aboriginal cultural heritage

- (a) the activity is a tier 2 activity; and
- (b) the area where the activity is carried out does not include any area that is part of a protected area; and
- (c) a due diligence assessment is undertaken in relation to the carrying out of the activity; and
- (d) the person carries out the activity in accordance with —
 - (i) an ACH permit; or
 - (ii) an approved or authorised ACH management plan.

112. Authority to carry out tier activity that may harm Aboriginal cultural heritage

- (a) the activity is a tier 3 activity; and
- (b) the area where the activity is carried out does not include any area that is part of a protected area; and
- (c) a due diligence assessment is undertaken in relation to the carrying out of the activity; and
- (d) the person carries out the activity in accordance with an approved or authorised ACH management plan.

The table below provides what approval will be required for each activity category:

Tier Category	Description	Approval Pathway
Exempt Activity <i>Activities specified in the ACH Act</i>	'Small Scale Residential', 'Emergency Services', 'Recreational Activities'	Does not require Approval <i>Proponent encouraged to avoid ACH</i>
Tier 1 <i>Activities will be specified in the Regulations</i>	Minimal Ground Disturbance Activities	Does not require Approval <i>Proponent takes all reasonable steps possible to avoid or minimise risk of harm ACH</i>
Tier 2 <i>Activities will be specified in the Regulations</i>	Low Ground Disturbance Activities	Requires issue <u>ACH Permit</u> by ACH Council <i>Proponent takes all reasonable steps possible to avoid or minimise risk of harm ACH</i>
Tier 3 <i>Activities will be specified in the Regulations</i>	Moderate to High Ground Disturbance Activities	Where Aboriginal Party and Proponent reach agreement <u>ACH Council approves ACH Management Plan.</u> Where Aboriginal Party and Proponent are unable to reach agreement it is <i>the decision of the Minister whether or not to authorise an ACH Management Plan</i>

Will all tier 2 and tier 3 activities require an approval?

An approval for a tier 2 or tier 3 activity is only required where the proposed activity may cause harm to ACH. To assist proponents to determine whether harm is likely to occur the Act provides for due diligence to be conducted in accordance with the **ACH Management Code**.

The **ACH Management Code**, will outline the process for undertaking a due diligence assessment and will include guidance on the due diligence requirements for tier 2 and tier 3 activities.

The ACH Management Code is also the subject of the co-design process. Further information is available in **Fact Sheet 2 – Co-design ACH Management Code**.

Considerations

- The Activity Categories will apply throughout the State.
- To provide certainty to all stakeholders, the Activity Categories need to capture all activities that are undertaken in Western Australia that may cause harm to ACH.
- Given the number and breadth of activities that this will necessarily involve, there will be a wide range of opinions as to which activity needs to go in which Activity Category and/or require a specific type of approval.
- Aboriginal people are recognised as custodians of their cultural heritage [s9]. Aboriginal people carrying out an activity in accordance with traditional rights, interests and responsibilities cannot harm ACH [s90] and therefore are not required to seek an approval to carry out the activity.
- The person undertaking the activity must undertake a due diligence assessment in accordance with the ACH Management Code. An existing agreement between the parties that deals with the management of ACH may be used to satisfy some due diligence requirements [s106].
- Although a due diligence assessment is not required in relation to an exempt activity [s103], proponents are required to make an assessment about whether the area where it is intended that the exempt activity be carried out includes any area that is part of a protected area. A proponent may request the CEO of the Department of Planning, Lands and Heritage to provide a letter of advice to confirm whether the proposed activity is an exempt activity [s104].
- Section 98(1) provides a defence to a charge of causing harm to ACH if the person that harmed the ACH had made an assessment, in undertaking a due diligence assessment in accordance with the ACH Management Code, in relation to carrying out the activity that there was no risk that any ACH would be harmed, and further that the person had undertaken all reasonable steps possible to avoid or minimise the risk of harm to ACH.

Questions

To assist the co-design process for the Activity Categories, your views are sought on the following questions:

- 1. Having regard to Attachment 1, which activities (if any) do you consider belong in a different category and why?**
- 2. What activities other than those in Attachment 1 should be included in the Activity Categories list?**
- 3. Within which category should additional activities be placed?**
- 4. What other factors, such as frequency of activity and repetition of a proposed activity, need to be considered for the Activity Categories?**

Appendix 1. Sections of the Act relevant to Activity Categories

<p>Section 9</p>	<p>Principles relating to Aboriginal cultural heritage</p> <p>The principles relating to Aboriginal cultural heritage are as follows —</p> <ul style="list-style-type: none"> (a) Aboriginal people should be recognised as having a living relationship with, and as being the primary custodians of, Aboriginal cultural heritage; (b) Aboriginal people should, as far as practicable, be involved in — <ul style="list-style-type: none"> (i) the recognition, protection, conservation and preservation of Aboriginal cultural heritage; and (ii) the management of activities that may harm Aboriginal cultural heritage; (c) as far as practicable — <ul style="list-style-type: none"> (i) Aboriginal ancestral remains should be in the possession, and under the custodianship and control, of Aboriginal people; (ii) secret or sacred objects should be in the possession, and under the custodianship, ownership, and control, of Aboriginal people; (iii) Aboriginal ancestral remains and secret or sacred objects that are not in the possession, and under the custodianship and control, of Aboriginal people should be returned to Aboriginal people.
<p>Section 90</p>	<p>Meaning of harm to Aboriginal cultural heritage</p> <p>(1) To <i>harm</i> Aboriginal cultural heritage includes to destroy or damage the Aboriginal cultural heritage.</p> <p>(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.</p>
<p>Section 98</p>	<p>Other defences</p> <p>It is a defence to a charge of an offence under Division 2 to prove that the activity that harmed the Aboriginal cultural heritage was carried out —</p> <ul style="list-style-type: none"> (a) by a person — <ul style="list-style-type: none"> (i) after the person made an assessment, in undertaking a due diligence assessment in relation to the carrying out of the activity, that there was no risk of harm being caused to Aboriginal cultural heritage by the activity; and (ii) who took all reasonable steps possible to avoid, or minimise, the risk of harm being caused to Aboriginal cultural heritage by the activity; <p>or</p> <ul style="list-style-type: none"> (b) by a person in accordance with a remediation order; or

	<p>(c) by a person in accordance with the <i>Coroners Act 1996</i> in the course of determining whether human remains are Aboriginal ancestral remains; or</p> <p>(d) by a person in an emergency situation for the purpose of preventing, or minimising, loss of life, prejudice to the safety, or harm to the health, of people; or</p> <p>(e) by a person of a prescribed class, in a prescribed situation or while carrying out a prescribed activity.</p> <p>Note for this section:</p> <p>The duty to mitigate set out in paragraph (a)(ii) applies in relation to Aboriginal cultural heritage in an area even if an assessment was made, in undertaking a due diligence assessment, that Aboriginal cultural heritage was not located in the area.</p>
<p>Section 101</p>	<p>Consultation about proposed activities</p> <p>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 —</p> <ul style="list-style-type: none"> (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.
<p>Section 102</p>	<p>Due diligence assessment</p> <p>For the purposes of this Act, a person undertakes a due diligence assessment in relation to a proposed activity that is intended to be carried out in an area if the person, in accordance with the ACH Management Code, makes an assessment about the following —</p> <ul style="list-style-type: none"> (a) whether the area where it is intended that the proposed activity be carried out includes any area that is part of a protected area; (b) whether the proposed activity is a — <ul style="list-style-type: none"> (i) a tier 1 activity; or (ii) a tier 2 activity; or (iii) a tier 3 activity; (c) whether Aboriginal cultural heritage is located in the area where it is intended that the proposed activity be carried out; (d) whether there is a risk of harm being caused to Aboriginal cultural heritage by the proposed activity;

	<p>(e) in relation to a proposed activity that has been assessed as a tier 2 activity or a tier 3 activity — the identity of 16 the persons to be notified or the persons to be consulted about the proposed activity.</p>
<p>Section 103</p>	<p>Due diligence assessment not required for exempt activity</p> <p>A due diligence assessment is not required in relation to an exempt activity.</p> <p>Note for this section:</p> <p>However, a proponent is required to make an assessment about whether the area where it is intended that the exempt activity be carried out includes any area that is part of a protected area, see section 109.</p>
<p>Section 104</p>	<p>Proponent may seek confirmation about proposed activity</p> <p>(1) A proponent who intends to carry out an activity in an area may request the CEO to provide a letter of advice to confirm whether the proposed activity is —</p> <ul style="list-style-type: none"> (a) an exempt activity; or (b) a tier 1 activity; or (c) a tier 2 activity; or (d) a tier 3 activity. <p>(2) A request under subsection (1) must —</p> <ul style="list-style-type: none"> (a) be in writing; and (b) contain details of — <ul style="list-style-type: none"> (i) the proposed activity; and (ii) the area where the proposed activity is intended to be carried out. <p>(3) On receipt of a request under subsection (1), the CEO must provide the proponent with the letter of advice if the CEO is satisfied that —</p> <ul style="list-style-type: none"> (a) subsection (4) applies; and (b) the proposed activity described in the letter can be confirmed as — <ul style="list-style-type: none"> (i) an exempt activity; or (ii) a tier 1 activity; or (iii) a tier 2 activity; or (iv) a tier 3 activity. <p>(4) A letter of advice under subsection (3) must only be provided by the CEO if the proposed activity described in the letter is an activity in relation to which there is uncertainty as to whether or not the activity is —</p> <ul style="list-style-type: none"> (a) an exempt activity; or (b) a tier 1 activity; or (c) a tier 2 activity; or (d) a tier 3 activity.

	(5) A letter of advice provided under subsection (3) may be used in evidence in proceedings for an offence under Part 5 Division 2 in relation to the carrying out of the activity described in the letter.
Section 109	<p>Authority to carry out exempt activity</p> <p>A person is authorised to carry out an activity that may harm Aboriginal cultural heritage if —</p> <ul style="list-style-type: none"> (a) the activity is an exempt activity; and (b) the area where the activity is carried out does not include any area that is part of a protected area.
Section 110	<p>Authority to carry out tier 1 activity that may harm Aboriginal cultural heritage</p> <p>A person is authorised to carry out an activity that may harm Aboriginal cultural heritage if —</p> <ul style="list-style-type: none"> (a) the activity is a tier 1 activity; and (b) the area where the activity is carried out does not include any area that is part of a protected area; and (c) a due diligence assessment is undertaken in relation to the carrying out of the activity; and (d) the person takes all reasonable steps possible to avoid, or minimise, the risk of harm being caused to Aboriginal cultural heritage by the activity. <p>Note for this section: The duty to mitigate set out in paragraph (d) applies in relation to Aboriginal cultural heritage in an area even if an assessment was made, in undertaking a due diligence assessment, that Aboriginal cultural heritage was not located in the area.</p>
Section 111	<p>Authority to carry out tier 2 activity that may harm Aboriginal cultural heritage</p> <p>A person is authorised to carry out an activity that may harm Aboriginal cultural heritage if —</p> <ul style="list-style-type: none"> (a) the activity is a tier 2 activity; and (b) the area where the activity is carried out does not include any area that is part of a protected area; and (c) a due diligence assessment is undertaken in relation to the carrying out of the activity; and (d) the person carries out the activity in accordance with — <ul style="list-style-type: none"> (i) an ACH permit; or (ii) an approved or authorised ACH management plan.
Section 112	<p>Authority to carry out tier 3 activity that may harm Aboriginal cultural heritage</p> <p>A person is authorised to carry out an activity that may harm Aboriginal cultural heritage if —</p> <ul style="list-style-type: none"> (a) the activity is a tier 3 activity; and (b) the area where the activity is carried out does not include any area that is part of a protected area; and



	<p>(c) a due diligence assessment is undertaken in relation to the carrying out of the activity; and</p> <p>(d) the person carries out the activity in accordance with an approved or authorised ACH management plan.</p>
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