



Aboriginal Cultural Heritage Act Update

February 2022

Acknowledgement of Traditional Owners



WALGA's work regularly takes us across the State and as such we would like to acknowledge the many traditional owners of the land on which we work throughout Western Australia.

We pay our respects to their Elders, past and present.

Pictured right: Artwork by Jade Dolman, a young Whadjuk/Ballardong Nyoongar, Eastern Arrente, Irish woman from Perth.

Welcome and Introductions



- Susie Moir, Manager Resilient Communities, WALGA
- Cesar Rodriguez, Manager Heritage Projects, Department of Planning, Lands and Heritage
- Glenn Shaw, Manager HPS Partnerships, Department of Planning, Lands and Heritage

The session will cover

- Overview of previous consultation conducted around the Aboriginal Cultural Heritage Act
- Overview of the Act
- Overview of the Noongar Heritage Agreement Templates
- Q & A

Housekeeping



- We are presenting in a Webinar format so please type questions into the Q&A function – these will be answered at the end of the presentation.
- Please feel free to use the chat function as well to ask questions or raise comments for the whole group to see.
- All materials from today’s session, including a recording of the webinar, will be available on WALGA’s website.



Susie Moir

Manager, Resilient Communities
WALGA

Consultation Overview

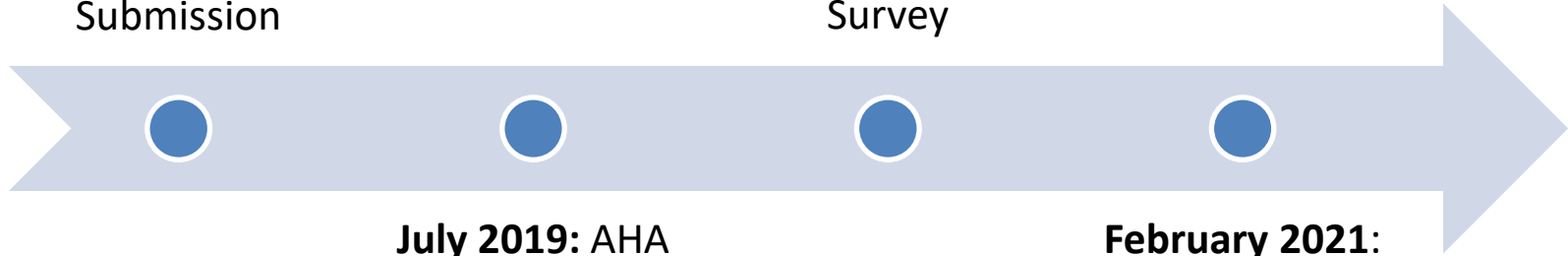


March 2018:
Review
Submission

**September
2020:**
Consultation
Survey

July 2019: AHA
Sector
submission

February 2021:
Online
Workshops



Online Workshops

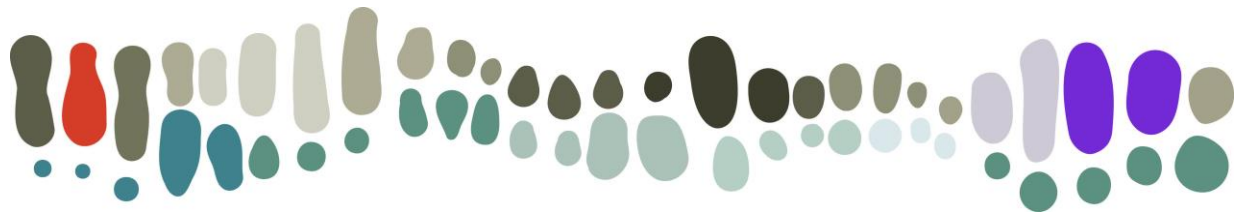


- Between 22 February and 2 March 2021 WALGA co-facilitated nine online workshops with the Department of Planning, Lands and Heritage (DPLH).
- 43 Local Governments participated in the workshops
- The purpose of these workshops was to contribute to the scoping of activity categories for the Regulations.
- Key themes that emerged from the workshops:
 - Need for clear and consistent language
 - Previous land disturbance
 - Financial Impacts of surveys
 - Guidelines and resources
 - Ongoing engagement



Cesar Rodriguez

Manager Heritage Projects
Department Lands and Heritage



Aboriginal Cultural Heritage Act 2021

Overview

[Aboriginal Cultural Heritage Act 2021 - \[00-00-00\].pdf](#)
[\(legislation.wa.gov.au\)](#)

Aboriginal Heritage Act 1972 Review

2018
Phase 1

- Review announced, Consultation Paper released
- Workshops across WA – 35 locations including some Remote Communities
- 130+ submissions

2019
Phase 2

- Discussion Paper released
- Information sessions, workshops across WA – 35 locations including some Remote Communities
- 70+ submissions

2020
Phase 3

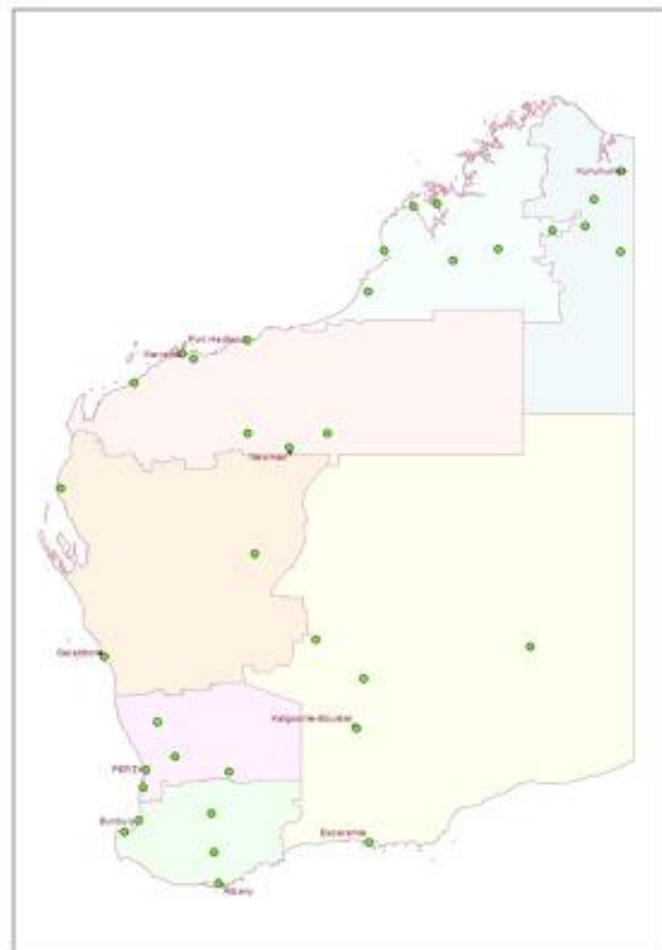
- Bill drafted, stakeholder engagement continued
- Consultation Bill released
- Stakeholder briefings, information sessions across WA – 16 locations
- 160+ submissions received

2021

- Review all submissions received
- Amend consultation draft based on submissions received
- Continued engagement
- 14 December 2021 – legislation passed by Parliament



Aboriginal Heritage Act 1972 Review



Key Outcomes from Consultation

- Aboriginal people should determine what Aboriginal cultural heritage is protected
- Increased transparency
- Greater protection
- Bigger penalties
- Certainty about consultation
- Aboriginal people should be involved in decisions about their heritage, *and at a local level.*



Aboriginal Cultural Heritage Act 2021

Tools for protecting cultural heritage



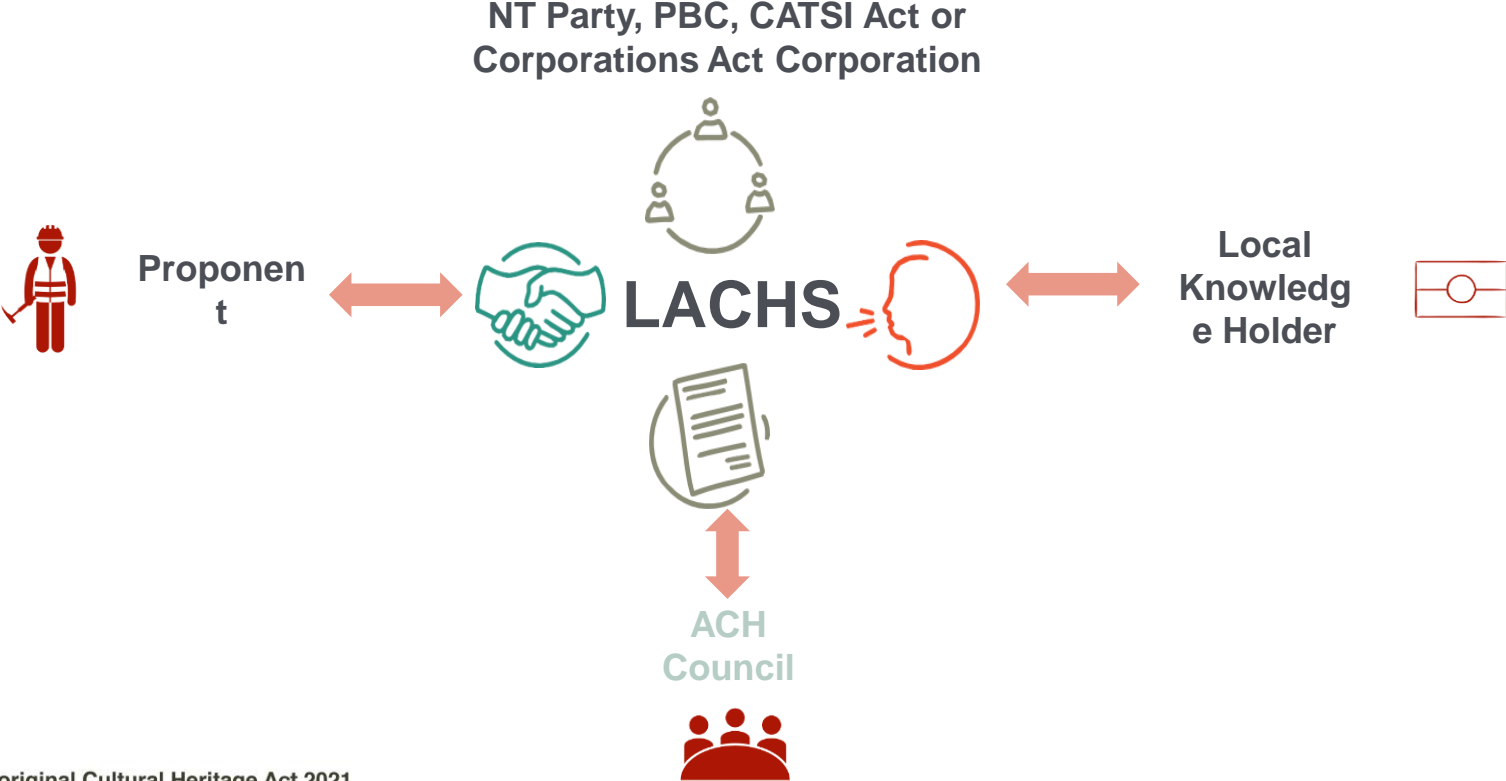
Who decides whether Aboriginal cultural heritage is protected? (Part 1)

Aboriginal people empowered to determine what ACH is protected

- No assessment by committees or third parties
- Threshold for protection is that heritage is important to Aboriginal people
- Blanket protection for Aboriginal cultural heritage
- Existing registered sites and lodged places transition to new Directory
- The ACH Act includes a new broadened definition of Aboriginal Cultural Heritage



LACHS and ACH Management System (Part 2)



Protected Areas (Part 4)

Protected Areas apply to ACH of Outstanding Significance to Aboriginal people that once declared are subject to special protection

- There are currently 78 existing protected areas – all of which will be transitioned under the ACH Act
- Exclusive vesting with the Minister will be removed which will result in:
 - Ability for more declarations of protected areas
 - Ability to issue Aboriginal groups tenure to manage their protected areas



Land Use Approvals (Part 6)

Replacing Section 18 Process

- No requirement to consult with Aboriginal people
- No alignment with Native Title
- Does not allow for new information on ACH
- One size fits all process
- Approvals are not time limited
- Approvals cannot be cancelled or suspended
- Decision making is not transparent



Land Use Approvals (Part 6)

Policy Objectives

- Aboriginal people and proponents *work together to reach agreements* regarding the management of ACH
- Land use activities managed in a manner that *avoids or minimises* harm to Aboriginal cultural heritage where 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
- Approval only required when proposed activity may harm heritage



Land Use Approvals (Part 6)

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>Proponents 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>Proponents 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 of <u>ACH Permit</u> by ACH Council <i>Proponents 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 ACH Council <u>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>



ACH Management Plans (Part 6)

Aboriginal people should have a statutory role in decisions that may harm Aboriginal cultural heritage

- Tier 3 (moderate to high level) ground disturbance activities require **consultation**
- Proponents and Aboriginal parties **negotiate** and agree on Aboriginal Cultural Heritage Management Plan



ACH Management Plans (Part 6)

ACH Management Plans need to:

- Set out how activity is managed to avoid or minimise impact to ACH
 - Include an ACH Impact Statement
 - Demonstrate **informed consent** from the Aboriginal Parties
 - full and proper disclosure of information by proponent
 - consent must be given voluntarily, without coercion, intimidation or manipulation
 - *ACH Act nullifies 'non-objection' clause found in native title agreements*
 - Ensure contingency arrangements for new information about ACH
-
- Where *Agreement is reached* between Proponent and Aboriginal Party, *ACH Council approves the Plan*
 - When Agreement *cannot be reached*, ACH Council required to consider the views of the Aboriginal party and the Proponent and *acts as a mediator*



ACH Management Plans (Part 6)

Minister's Role

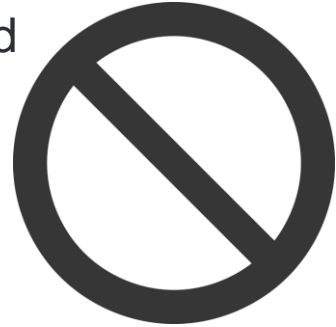
- Minister only makes decision where proponent and Aboriginal party cannot reach agreement
- Minister can only make a decision if Council satisfied that:
 - Consultation has been undertaken
 - Reasonable steps are in place to avoid or minimise the risk of harm to ACH
 - Minister must consider views of both parties and also if it is **'in the interest of the State'**
 - Definition includes ***economic and social interest of Aboriginal people and future generations.***
- Parties given notice of decision and reasons for the decision
- Consider objects and principles of legislation



Stop, Prohibition & Remediation Orders (Part 7)

Orders may be issued by the Minister

- Stop Activity Orders may be issued for a period of up to 60 days
- Prohibition Orders may be issued for a specified or indefinite period
- Stop Activity & Prohibition orders may be issued:
 - ACH is being harmed
 - There is imminent threat of harm to ACH
 - The Harm is not authorized, or there is new information about ACH
- Remediation Orders for harmed ACH to be restored



Aboriginal Cultural Heritage Directory (Part 9)

New ACH Directory will replace Register of Aboriginal Sites

- Will capture and securely display presence of ACH, Protected Areas, ACH Permits & Plans, LACHS, Knowledge Holders ...
- Duty for any person (Aboriginal people excepted) to report ACH
- Minimum recording standards developed by the Council for entries on Directory



Offences & Securing Compliance (Parts 5 & 10)

Greater protection for Aboriginal cultural heritage

- Three tiers of harm; Serious Harm, Material Harm and Harm
- Maximum penalties for offences causing harm to ACH up to \$10M
- Statute of limitations period increased to 6 years
- Appointment of Inspectors and Aboriginal Inspectors
- Compensation may be paid to Aboriginal people if ACH is harmed without authorisation



Repeals & Transitional (Part 14)

Transitional period expected to be 12 to 18 months

- Transitional section 18 consents will expire after 5 years but can be extended for further 5 years for State significant projects
- Historical section 18 consents will expire after 10 years from Proclamation day unless they are within that time substantially commenced
- *Provides for the repeal of the Aboriginal Heritage (Marandoo) Act 1992*



Key Differences 1972 Act vs ACH Act 2021

	1972 Act	ACH Act
Who decides whether ACH is protected?	Aboriginal Cultural Material Committee	Knowledge Holders
Who are considered the 'authorities' on ACH?	Aboriginal Cultural Material Committee	Local Aboriginal Cultural Heritage Services & Knowledge Holders – with oversight by ACH Council
Who has the final decision on land use applications?	Minister for Aboriginal Affairs	ACH Council if Parties in Agreement Minister for Aboriginal Affairs where there is no agreement
Aboriginal people to be notified or consulted	No	Yes
Requirement for Proponents to undertake Due Diligence Prior to conducting activities	No	Yes
Ability to deal with new information about ACH that comes to light following an approval	No	Yes
Vesting of protected areas	Exclusive vesting with Minister	Not vested
Requirement to negotiate using best endeavours and Aboriginal parties giving Informed Consent	No	Yes
Requirement to complete ACH Investigations	No	Yes
Ability for Minister to issue Stop Orders	No	Yes
Maximum Penalties for offences	\$100,000	\$10,000,000
Statute of Limitations	12 months	6 years
Requirement to return Ancestral Remains	No	Yes



Co-design - 2021

Minister to appoint an Aboriginal Cultural Heritage Reference Group to oversee the Co-design process

Time Frames	Activity Categories
Timeframes associated with engagement, consultation, negotiation, processing and decision making associated with ACH Permit applications and ACH Management Plan applications.	<p>Will provide a comprehensive list of land use activities and whether they are to be classified as a Tier 1, Tier 2 or Tier 3 activities.</p> <p>Will determine what types of activities when undertaken within Aboriginal cultural heritage will require either an ACH Permit, an ACH Management Plan or whether they can proceed without an approval.</p>
Management Plans	ACH Management Code
Contents and minimum standards for ACH Management Plans.	The Due diligence process that land users will need to undertake to ensure they are complying with the legislation.
Local Aboriginal Cultural Heritage Services & ACH Council	Other Guidelines and General
Matters relating to the appointment of the ACH Council and local Aboriginal Cultural Heritage Services.	<p>Guidelines that will be required under the legislation that include:</p> <ul style="list-style-type: none">• Consultation Guidelines• Knowledge Holder Guidelines• State Significance Guidelines• Protected Area Outstanding Significance Guidelines
ACH Directory & Access to Information	Recording Standards
Matters relating to access to the ACH Directory.	Recording standards associated with adding ACH to the Directory, or associated with ACH management Plans and or ACH Permit Applications





WALGA

WORKING FOR LOCAL GOVERNMENT

Questions



Glenn Shaw

Manager – HPS Partnerships and Agreements

Department of Planning, Lands and Heritage



Aboriginal Heritage and the South West Native Title Settlement

WALGA: 17 February 2022

SWS Heritage context

Heritage Agreement Provisions (since 8 June 2015):

- Since 8 June 2015 (SWS Agreement execution), State Government departments, agencies and other authorities and instrumentalities that are identified by the State Government (including the Development Commissions) are required to enter into a Noongar Standard Heritage Agreement (NSHA) with SWALSC on behalf of the relevant SWS Agreement group, when conducting an Aboriginal Heritage Survey in any SWS Agreement area
(426 NSHAs: 62 Government, 2 Local Government, 362 non-Government and 85 with industry proponents at February 2022)
- Since 8 June 2015 DMIRS has placed heritage conditions on all new mineral and petroleum titles requiring a Heritage Agreement or NSHA before tenement holders can exercise rights in the six ILUA areas
(854 with conditions on title and a total of 426 Heritage Agreements in place at December 2021)
- Parties not bound by the SWS Agreement (for example Local Government and Non Government Organisations) will need to determine if the NSHA is suitable for their needs and complies with the organisations rules
- Alternatively Local Government and Non Government Organisations may choose to follow the heritage principles of the NSHA

SWALSC position on the NHALG

- SWALSC and WALGA have negotiated the Noongar Heritage Agreement for Local Government (NHALG).
- Due to resourcing issues including the work required in the formation of the Regional Corporations, SWALSC is not yet in a position to roll out the NHALG across all of Local Government in the South West. Further consideration of the NHALG will occur after July 2022.
- SWALSC is asking Local Governments to instead adopt and follow the key heritage elements of the NSHA – see next slide.

Key Heritage Elements of the NSHA

- Undertaking early engagement with SWALSC/Regional Corporation once established
- Assessment of risks of proposed works damaging or altering an Aboriginal heritage site by using the **Aboriginal Heritage Due Diligence Guidelines**
- Issuing notices for works that may potentially damage or alter Aboriginal heritage sites in a format similar to the 'Activity Notices' within the NSHA
- If a heritage survey is to be completed, seeking the names of suitable Aboriginal survey participants from SWALSC
- Following the NSHA heritage survey processes
- Following the NSHA timelines
- Adhering to the NSHA heritage survey costs schedule
- Following the NSHA heritage survey reporting requirements
- Providing the heritage survey reports and Heritage Information Submission forms to the Department of Planning, Lands and Heritage (Clause 12.5)
- Providing notice to and consulting with SWALSC (acting on behalf of the particular Agreement Group) prior to lodging an Aboriginal Heritage Act (1972) Section 16 or Section 18 Application.

Positive Outcomes from the NSHA process

- Early engagement facilitates improved outcomes and builds strong relationships between proponents and Noongar people.
 - This also allows for works program clearances (including Surveys, if required) to be completed well in advance of scheduled commencement dates.
 - This also assists with considering reengineering options if available.
- Many proponents see site avoidance as a realistic option as opposed to managing impacts i.e. using existing infrastructure easements rather than creating new or increasing current easement size.
- Early engagement may find solutions that avoid impacting heritage and reduce the need to lodge s16 and s18 applications, which in turn may reduce overall project cost and project timeframes.

Progress of the South West Native Title Settlement – Key Dates

- 8 June 2015 – 6 Indigenous Land Use Agreements (ILUAs) signed by relevant Native Title Groups and State Government
- 25 February 2021 – Settlement Commenced
- 29 March 2021 – Noongar Boodja Trust (NBT) commenced, Trustee appointed
- 13 April 2021 – Native Title Act Future Act Regime ceased to apply
- 22 April 2021 – First annual transfer of funds to NBT
- 14 July 2021 – First land transfers to NBT
- Aug/Sept 2021 – Pre-Incorporation meetings to establish Regional Corporations; All 6 groups endorsed Interim Board, Draft Cultural Advice Policy, SWALSC to transition to the Central Services Corporation (CSC)

Next Steps

- The Registration of the Regional Corporations with the Office of the Registrar of Aboriginal Corporations (ORIC) is almost complete
 - As part of this process each Regional Corporation will also establish a Cultural Advice Committee of up to 12 Elders to provide the Corporations with cultural advice.
- Inaugural AGMs will be held in May/June 2022.
- Each RC will establish the relevant committees, appoint CEO and Staff in the third Quarter of 2022.
- Regional Corporations must then progress endorsement by the State and the Trustee before funding will commence.
- SWALSC will evolve into a Central Services Corporation and provide common services to the Regional Corporations such as centralised HR, Finance etc. with the scope of those services being defined.

Information Links

- **South West Native Title Settlement:** <https://www.wa.gov.au/organisation/department-of-the-premier-and-cabinet/south-west-native-title-settlement#noongar-heritage>
- **NSHA:** <https://www.wa.gov.au/government/publications/noongar-standard-heritage-agreement-south-west-native-title-settlement>
- **Aboriginal Heritage Due Diligence Guidelines:** https://www.wa.gov.au/system/files/2021-07/GD_Aboriginal_heritage_due_diligence.pdf
- **Aboriginal Heritage Inquiry System (AHIS):** <https://espatial.dplh.wa.gov.au/AHIS/index.html?viewer=AHIS>
- **AHIS User Guide:** https://www.wa.gov.au/system/files/2021-03/AH_AHIS_user_guide.pdf
- **South West Aboriginal Land and Sea Council (SWALSC):** <https://www.noongar.org.au/>
- **South West Native Title Documents (SWALSC website):** <https://www.noongar.org.au/formaldocuments>
- **Aboriginal Cultural Heritage Act 2021** <https://www.wa.gov.au/government/document-collections/aboriginal-cultural-heritage-act-2021>

South West Settlement Contacts

DPLH Aboriginal Heritage:

'Go to' agency for Aboriginal heritage information/advice

- **Glenn Shaw** Manager Partnerships and Agreements Glenn.Shaw@dplh.wa.gov.au, 0466 594 215
- **Jeremy Elliott** Director Partnerships and Agreements Jeremy.Elliott@dplh.wa.gov.au
- General Inquiries to SWSHeritage@dplh.wa.gov.au

DPC Aboriginal Engagement

Overseeing implementation of SWS Agreements

- **Contact:** SouthWestSettlement@dpc.wa.gov.au; 6552 5333
- **More information:** <https://www.wa.gov.au/organisation/department-of-the-premier-and-cabinet/south-west-native-title-settlement>

South West Aboriginal Land and Sea Council (SWALSC):

- **Heritage Inquiries:** heritage@noongar.org.au
- **General inquiries:** reception@noongar.org.au; 9358 7400
- **More information:** <https://www.noongar.org.au/> (Settlement info); <https://www.noongarculture.org.au/> (Cultural info)



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Questions