



# Aboriginal Cultural Heritage Act 2021

## **Phase Three Submission**

December 2022

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## 1.0 Executive Summary

WALGA supports and is committed to the successful implementation of the *Aboriginal Cultural Heritage Act 2021* (ACH Act). As land managers and land use planning decision-makers, Local Government plays an important role in many activities that have the potential to impact Aboriginal cultural heritage.

Throughout the ACH co-design process WALGA has consulted extensively with the Local Government sector on the guidance materials supporting the legislation. A clear message from these consultations is that the ACH Act must balance the need to protect Aboriginal cultural heritage with the requirements on Local Government to deliver essential infrastructure works and emergency activities efficiently and effectively to maintain public safety and comply with its other legislative responsibilities. Further recommendations are provided in the submission that will ensure this balance can be achieved.

The ACH Act will have a significant impact on the resources of Local Governments, including increased demands on staff time and training requirements. Works undertaken by Local Governments are for the benefit of the community and with no commercial gains. The State Government should subsidise the increased costs that Local Governments will be required to bear as a result of the new legislative ACH Act. There are also concerns that the LACHS will not have the capability or capacity to meet the demands from Local Government seeking advice, permits and plans. For the implementation of the ACH to be successful it is also critical that adequate resourcing is provided to the establishment and ongoing functioning of the new Aboriginal heritage system.

WALGA's [2023-24 State Budget Submission](#) seeks funding to support:

- Detailed consultation and engagement with Local Governments and other relevant stakeholders;
- Training and assistance for Local Governments to fulfil their obligations under the new legislative framework; and
- The establishment and ongoing functioning of the new Aboriginal heritage system, with respect to Aboriginal Cultural Heritage Council (ACHC), Local Aboriginal Cultural Heritage Services (LACHS) and Local Governments.

This investment will enhance the performance and efficiency of the Local Government sector, ensure equitable levels of service across the State, and maximise the benefits of reform.

An overarching and key theme from the consultations, which extends beyond the Local Government Sector, is that the system is not ready for the ACH Act to commence in July 2023 as has been proposed. There is substantial evidence which suggests that successful regulatory reforms are implemented in a phased approach with adequate transition periods to allow for education programmes to be delivered, key stakeholders to build the required capacity and for problems to be discovered and review to occur if significant issues are found.

WALGA supports a delay in the commencement of the Act to allow time for the key bodies under the structure, being the LACHS and Aboriginal Heritage Council, for capacity building and to be adequately established.

This submission was endorsed by WALGA State Council on 23 December 2022.

## 1.1 Summary of Recommendations

### Recommendation 1

*Activity Tiers and Table:* The definitions of ‘*new and additional ground disturbance*’ and ‘*like for like or less*’ in the Activity Table (page 12) be moved to the front of the Activity Table for ease of reference and understanding.

### Recommendation 2

*Activity Tiers and Table:* Definition is required for the terms ‘inland and coastal waterways’ and ‘waterbodies’

### Recommendation 3

*Activity Tiers and Table:* Guidance be provided as to the process for proponents to follow where an activity is interpreted as listed under two different categories and/ or tiers of the Activity Table.

### Recommendation 4

*Activity Tiers and Table:* Specific amendments sought to the Activity Tiers and Table:

- Exempt emergency activities bullet point 2: delete the words ‘*response to*’ (as this has a technical emergency management meaning and is covered by the previous bullet point), and replace with ‘*urgent recovery activities*’; delete the words ‘*urgent recovery activities and*’.
- Tier 1 Emergency activities: bullet point 5 ‘*Compliance with a Local Government firebreak notice under section 33 of the Bushfires Act 1954, or other hazard reduction notice*’: This should be moved to exempt.
- Tier 1 Infrastructure and land development activities (additional activity): Road widening of sealed or unsealed roads, construction of pathways, cycleways and tracks in the road verge which has been previously cleared and shaped and does not require excavation below natural ground level.
- Tier 1 Infrastructure and land development activities (additional activity): road drainage, which may be below ground level, associated with Road widening of sealed or unsealed roads, construction of pathways, cycleways and tracks in the road verge which has been previously cleared and shaped;
- Tier 2 Infrastructure and land development activities (additional activity): Sealing of an unsealed road
- Exempt Infrastructure and land development activities (additional activity): Widening of existing seal on to an existing constructed shoulder –
- Exempt Infrastructure and land development activities (additional activity): Shoulder sealing of road.
  
- Seed collection and pathogen treatment to be included under 4.1 ‘*Agriculture and natural resource management activities with no, or minimal, level of ground disturbance*’.
- Tier 3: Infrastructure and land development activities: Amend as follows -
  - *‘Activities that require the disturbance of previously undisturbed ground associated with the construction, extension or widening of:*
  - *Roads and roadway infrastructure, including private roads*
  - *Laydown areas*
  - *Bridges*
  - *Tunnels*
  - *Walkways, cycleways and tracks.*’

### **Recommendation 5**

*Activity Tiers and Table:* Compliance with all activities undertaken by a private landowner, lessee of Crown Land, Local Government Authority or contractor in order to comply with a Local Government firebreak notice under section 33 of the *Bush Fires Act 1954*, or other hazard reduction notice, including land preparation, slashing, chemical treatments, clearing/trimming of vegetation, mulching and burning should be exempt.

### **Recommendation 6**

*Activity Tiers and Table:* The activity categories be amended to address ongoing concerns around the application of the ACH Act to residential, freehold properties that are larger than 1100 square metres and located in cities and towns. All activities on freehold properties in cities and towns should be categorised as exempt.

### **Recommendation 7**

*General:* DPLH develop advice and guidance materials directed at the general community and small-scale property developers that Local Governments can share and distribute, as well as an appropriate Advice Note that Local Government can include on development and subdivision approvals.

### **Recommendation 8**

*General:* An online digital assessment tool, linked to the Aboriginal Heritage Directory, be developed to assist proponents in applying the due diligence process and activity tiers and table, and to assist with record keeping.

### **Recommendation 9**

*Management Code:* Further definition is required for the terms 'visual inspections' and 'surveys' to differentiate the requirement of each.

### **Recommendation 10**

*Management Code:* The term 'Protected Areas' to be clearly defined in the Management Code.

### **Recommendation 11**

*Consultation Guidelines:* Provide further guidance to support proponents to undertake appropriate consultation where there are disputes between two or more knowledge holders.

### **Recommendation 12**

*General:* The Department of Planning, Lands and Heritage (DPLH) to ensure that local Aboriginal community members are actively engaged in the formation and ongoing operation of LACHS.

### **Recommendation 13**

*Management Plan Template:* Consideration be given to developing different ACH Management Plan templates taking into account variations in the size of the area to be impacted, the complexity and purpose of the proposed activities and the resources of the Proponent.

### **Recommendation 14**

*Management Plan Template:* Consideration be given to developing an ACH Management Plan template specifically for Local Government.

### **Recommendation 15**

Prescribed Timeframes: DPLH to include an overall time frame (beginning to end) for; ACH permit, ACH plan (if an agreement is made between the proponent and Aboriginal parties) and ACH plans (if no agreement is made between the proponent and Aboriginal parties).

### **Recommendation 16**

*General:* DPLH and other relevant agencies collaborate to develop a process map outlining the step-by-step process (including the intersection between other legislation/ regulation, including building, development and environmental approvals) when applying for approvals.

### **Recommendation 17**

*LACHS Service (Fees) Guidelines:* The guidelines be amended to clearly state the circumstances in which LACHS can charge fees and that LACHS can only charge fees for works associated with the development and negotiation of a Management Plan (not for work relating to a Permit).

The additional proposed 15% Administration Charge and 20% uplift on all fees for regional and remoter areas and above the 26<sup>th</sup> parallel is not supported. These fees are excessive and will impact less well resourced, regional and remote Local Governments, and disincentivise investment and development in regional areas.

### **Recommendation 18**

*General:* The State Government to subsidise Local Government for the increased costs that Local Governments will be required to bear as a result of the new legislative ACH regime.

### **Recommendation 19**

*General:* Clarification be provided on the interrelationship between Local Government service delivery requirements and State significance areas.

### **Recommendation 20**

*General:* The State Government provide sufficient funding to support the efficient establishment and ongoing functioning of the new Aboriginal heritage system, in particular with respect to the ACH Council, LACHS and Local Governments.

### **Recommendation 21**

*General:* The State Government to ensure that a sufficient transitional period is provided upon commencement of the new ACH Act in order to prevent delays and allow for capacity and capability building of newly established bodies.

### **Recommendation 22**

*General:* The *Aboriginal Cultural Heritage Act* and Regulations should be reviewed after 5 years.

### **Recommendation 23**

DPLH to consider developing the following support documentations;

- DDA documentation example for Local Government
- How to guide to determine how to assess if a place or object (such as a plant) has cultural significance
- Example ACH management Plans for Local Government

## 2.0 Introduction

The Western Australian Local Government Association (WALGA) is the united voice of Local Government in Western Australia. The Association is an independent, membership-based organisation representing and supporting the work and interests of 139 Local Governments in Western Australia, comprising 1,222 Elected Members and approximately 22,600 Local Government employees, as well as over 2 million constituents of Local Governments in Western Australia.

Western Australian Local Governments vary greatly in:

- size, ranging from less than 1.5 to over 370,000 square kilometres,
- population, just over 100 to more than 220,000 people,
- the number of staff employed, from less than 10 to over 1000,
- in revenue received, which in 2019-20 ranged from just over \$2 million to just over \$225 million.

This submission provides feedback on the Phase Three Co-Design process that the Department of Planning, Lands and Heritage (DPLH) is undertaking to develop materials and guidelines to support the implementation of the *Aboriginal Cultural Heritage Act 2021* (ACH Act).

WALGA supports the conservation and protection of Aboriginal cultural heritage in Western Australia and the modernisation of Western Australia's Aboriginal cultural heritage legislation.

As land managers and land use planning decision-makers, Local Government plays an important role in many activities that have the potential to impact Aboriginal cultural heritage. Local Government also acknowledges the role of Aboriginal people as community members, residents, ratepayers, and Elected Members in local communities.

### **WALGA's 2023-24 State Budget Submission**

The *Aboriginal Cultural Heritage Act 2021* is a significant legislative reform. It is essential that the implementation of the Act is appropriately resourced.

WALGA's [2023-24 State Budget Submission](#) seeks funding to support:

- Detailed consultation and engagement with Local Governments and other relevant stakeholders;
- Training and assistance for Local Governments to fulfil their obligations under the new legislative framework; and
- The establishment and ongoing functioning of the new Aboriginal heritage system, with respect to Aboriginal Cultural Heritage Council (ACHC), Local Aboriginal Cultural Heritage Services (LACHS) and Local Governments.

This investment will enhance the performance and efficiency of the Local Government sector, ensure equitable levels of service across the State, and maximise the benefits of reform.

## 2.1 Sector Consultation

WALGA's submission has been informed via consultation with the Local Government sector. However, the limited consultation period of 7 weeks has impacted the level of engagement with the sector

WALGA's Local Government Aboriginal Heritage Reference Group met on Thursday, 24 November 2022 to provide input to this submission following review of the suite of 9 draft guidelines and documents. The Reference Group also reviewed WALGA's draft submission for a short 4 working day period.

WALGA and DPLH delivered an online co-design workshop for the sector on Friday, 9 December 2022 attended by representatives from 25 Local Governments.

Following the Phase 2 co-design process, WALGA representatives participated in a 2 day workshop in September 2022 and the Activity Category Working Group facilitated by DPLH in November 2022.

This submission was endorsed by WALGA State Council on 23 December 2022.

## 3.0 Background

### 3.1 Relevant WALGA Advocacy Positions

#### 3.1.3 Aboriginal Cultural Heritage Act 2021 and South West Native Title Settlement

*WALGA acknowledges Noongar people as the traditional owners of the South West Region. Local Government is supportive of conserving and protecting the State's Aboriginal cultural heritage.*

*WALGA supports the introduction of the Aboriginal Cultural Heritage Act 2021 which will provide a modern framework for the recognition, protection, conservation and preservation of Aboriginal cultural heritage and recognises the fundamental importance of Aboriginal cultural heritage to Aboriginal people. The State Government must ensure that:*

- 1. The legislation balances the need to protect Aboriginal cultural heritage with the requirement for Local Government to undertake activities in a timely and affordable manner;*
- 2. The implementation and ongoing operation of the legislative system for the protection of Aboriginal cultural heritage is adequately resourced to ensure that all parties have the capacity, capability and resources to discharge their statutory obligations;*
- 3. Support is provided to Local Governments to ensure that they have the resources, capacity and capability to comply with a complex legislative framework; and*
- 4. Local Governments have the ability to deliver essential infrastructure works and emergency activities efficiently and effectively in order to maintain public safety.*
- 5. WALGA advocate for and support the recognition of regional local Aboriginal people to be actively engaged in the Local Aboriginal Cultural Heritage Services (LACHS) groups; and*
- 6. the various Prescribed Body Corporates (PBCs) be required to actively seek out local regional members to be included in the consultation and decision-making process.*

(December 2022 – 393.8/2022)

### 3.1.2 Reconciliation

*The Association supports the efforts of the Local Government sector to recognise and respect Aboriginal cultural practices and places of meaning, through the development of Reconciliation Action Plans.*

(September 2012 – 118.5/2012)

## 3.2 Previous Submissions

WALGA has provided submissions in relation to each phase of the review of the *Aboriginal Heritage Act 1972* and the development of the ACH Act:

- **2018 Phase One:** [Aboriginal Heritage Act 1972 - 2018 Review Submission](#) endorsed by State Council in July 2018.
- **2019 Phase Two:** [Submission – AHA Review Consultation Phase Two](#), endorsed by State Council in July 2019.
- **2020 Phase Three:** in 2020 a [Survey response](#) was lodged based on previous submissions and internal advice. The short consultation timeframe did not enable detailed consultation with the sector however feedback received from members (including the Aboriginal Heritage Reference Group) was incorporated into WALGA's response.
- **2021 Identification of Activities Consultation:** WALGA and DPLH co-facilitated ten place based online workshops with Local Governments to identify activities regularly undertaken by Local Government, and provided to DPLH (attached as Appendix 2):
  - A Draft Composite Local Government Activity List
  - Consultation Report
  - Draft Activity Lists from City of Kalamunda, Town of Port Hedland and Shire of Augusta-Margaret River.
- **2022 Co-Design Phase One:** [Submission – ACHA co-design Phase One](#), endorsed by State Council on 26 May 2022.
- **2022 Co-Design Phase Two:** [Submission – ACHA co-design Phase Two](#), endorsed by State Council on 18 August 2022.

## 4.0 Response to Draft Documents

### 4.1 Draft Activity Tiers and Table

WALGA appreciated the opportunity for a Local Government representative to participate on the Activity Category Working Group established by DPLH in October 2022 and acknowledges the changes that have been made to the draft Activity Tiers and Table since the previous version.

In particular, through the addition of section 9 '*Other activities*', provision is made for maintenance works with no new or additional ground disturbance, or undertaking a like for like activity or less, to be exempt, which provides some comfort to the sector with respect to the maintenance of existing community and road infrastructure which is a key role of Local Government. These activities are defined at the end of the Activity Table; however it is

recommended that these definitions be moved to the front of the document for ease of reference and understanding before a proponent reads the Activity Tiers and Table.

Some activities appear to be listed in more than one section of the Activity Tiers and Table and in different Tiers. For example, '*hazard reduction in non-emergency situations*' is a Tier 1 Activity in the '*emergency activities*' section, whereas '*burning for conservation land management purposes*' is a Tier 2 Activity in the '*Agriculture and natural resource management*' section. This is confusing and requires correction.

Feedback from WALGA's Local Government Aboriginal Heritage Reference group is that it is essential that a user-friendly digital interface assessment tool be developed to assist proponents undertake the due diligence process and correctly apply the Activity Tiers and Table and Management Code.

Under the *Bush Fires Act 1954* Local Governments are required to issue an annual section 33 Firebreak Notice requiring land occupiers to clear and maintain a firebreak to assist with the prevention, control and extinguishment of bush fires or to prevent the spread or extension of a bush fire to any adjoining land. For example, the City of Wanneroo alone issues 85,000 section 33 Notices annually. The current Activity Table continues to categorise activities undertaken in compliance with section 33 Firebreak Notices as Tier 1, which would place an obligation on private landowners to undertake due diligence to determine if Aboriginal heritage is present. This categorisation raises significant issues:

- Compliance with firebreak notices may be compromised as landowners may not understand the due diligence process and as a result may refuse to comply, adversely affecting levels of bushfire mitigation activity.
- It is likely that landowners will seek advice and guidance from Local Governments relating to compliance with the ACH Act, resulting in a significant additional administrative burden on Local Government.

WALGA therefore strongly recommends that compliance with all activities undertaken by a private landowner, Local Government Authority or contractor in order to comply with a Local Government firebreak notice under section 33 of the *Bush Fires Act 1954*, or other hazard reduction notice, including land preparation, slashing, chemical treatments, clearing/ trimming of vegetation, mulching and burning should be exempt.

Page 7 of the Activity Table lists the following activities in Tier 3:

*'Activities associated with the construction, extension or widening of:*

- *Roads and roadway infrastructure, including private roads*
- *Laydown areas*
- *Bridges*
- *Tunnels*
- *Walkways, cycleways and tracks.'*

It is understood that these activities are listed under Tier 3 on the assumption that they entail the disturbance of previously undisturbed ground, however this is often not the case, in particular when undertaking extending or widening works.

Road widening of sealed and unsealed roads is often performed by widening the existing road formation by placing additional material on top of a previously cleared and shaped shoulder

or verge, and there is therefore no or minimal disturbance of undisturbed land or excavation below ground level. Similarly walkways, cycleways and tracks are often constructed on top of previously cleared and formed road verges or shoulders requiring no excavation below ground level.

Specific feedback with respect to the Activity Tiers and Table is as follows:

- Exempt emergency activities bullet point 2: delete the words '*response to*' (as this has a technical emergency management meaning and is covered by the previous bullet point), and replace with '*urgent recovery activities*'; delete the words '*urgent recovery activities and*'.
- Tier 1 Emergency activities: bullet point 5 '*Compliance with a Local Government firebreak notice under section 33 of the Bushfires Act 1954, or other hazard reduction notice*': This should be moved to exempt.
- Tier 1 Infrastructure and land development activities (additional activity): Road widening of sealed or unsealed roads, construction of pathways, cycleways and tracks in the road verge which has been previously cleared and shaped and does not require excavation below natural ground level.
- Tier 2 Infrastructure and land development activities (additional activity): Sealing of an unsealed road.
- Exempt Infrastructure and land development activities (additional activity): Widening of existing seal on to an existing constructed shoulder.
- Exempt Infrastructure and land development activities (additional activity): Shoulder sealing of road.
- Tier 3: Infrastructure and land development activities, amend as follows:
  - '*Activities that require the disturbance of previously undisturbed ground associated with the construction, extension or widening of:*
  - *Roads and roadway infrastructure, including private roads*
  - *Laydown areas*
  - *Bridges*
  - *Tunnels*
  - *Walkways, cycleways and tracks.*'

Local Governments will receive many enquiries from community members, landowners and property developers about the application of the new legislation. DPLH is requested to develop advice and guidance materials directed at the general community and small-scale property developers that Local Governments can share and distribute, as well as an appropriate Advice Note that Local Government can include on development and subdivision approvals.

Local Governments continue to hold concerns around the application of the ACH Act to residential, freehold properties that are larger than 1100 square metres and located in cities and towns. It is submitted that all activities on freehold properties in cities and towns should be categorised as exempt.

#### **Recommendation 1**

*Activity Tiers and Table*: The definitions of 'new and additional ground disturbance' and 'like for like or less' in the Activity Table (page 12) be moved to the front of the Activity Table for ease of reference and understanding.

## Recommendation 2

*Activity Tiers and Table:* Definition is required for the terms 'inland and coastal waterways' and 'waterbodies'

## Recommendation 3

*Activity Tiers and Table:* Guidance be provided as to the process for proponents to follow where an activity is interpreted as listed under two different categories of the Activity Table.

## Recommendation 4

*Activity Tiers and Table:* Specific amendments sought to the Activity Tiers and Table:

- Exempt emergency activities bullet point 2: delete the words '*response to*' (as this has a technical emergency management meaning and is covered by the previous bullet point), and replace with '*urgent recovery activities*'; delete the words '*urgent recovery activities and*'.
- Tier 1 Emergency activities: bullet point 5 '*Compliance with a Local Government firebreak notice under section 33 of the Bushfires Act 1954, or other hazard reduction notice*': This should be moved to exempt.
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- Seed collection and pathogen treatment to be included under 4.1 '*Agriculture and natural resource management activities with no, or minimal, level of ground disturbance*'.
- Tier 3: Infrastructure and land development activities: Amend as follows -
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  - *Roads and roadway infrastructure, including private roads*
  - *Laydown areas*
  - *Bridges*
  - *Tunnels*
  - *Walkways, cycleways and tracks.*'

## Recommendation 5

*Activity Tiers and Table:* It is submitted that compliance with all activities undertaken by a private landowner, lessee of Crown Land, Local Government Authority or contractor in order to comply with a Local Government firebreak notice under section 33 of the *Bush Fires Act 1954*, or other hazard reduction notice, including land preparation, slashing, chemical treatments, clearing/ trimming of vegetation, mulching and burning should be exempt.

### **Recommendation 6**

*Activity Tiers and Table:* The activity categories be amended to address ongoing concerns around the application of the ACH Act to residential, freehold properties that are larger than 1100 square metres and located in cities and towns. All activities on freehold properties in cities and towns should be categorised as exempt.

### **Recommendation 7**

*General:* DPLH develop advice and guidance materials directed at the general community and small-scale property developers that Local Governments can share and distribute, as well as an appropriate Advice Note that Local Government can include on development and subdivision approvals.

## **4.2 ACH Management Code**

The ACH Management Code is evolving into a useful guide for undertaking a due diligence assessment. Feedback from the Local Government sector is that an online due diligence assessment tool, linked to the new Aboriginal Heritage Directory, would assist Local Governments to comply with the new legislation as well as provide a record that a due diligence process has been undertaken. Training in the use of the due diligence assessment tool would be required to ensure effective and efficient application of the Management Code.

The Management Code refers to 'visual inspections' and 'surveys' without clear delineation between the two. WALGA recommends for these terms to be further defined.

Section 2.5 relates to 'Protected Areas'. This term should be defined in the Management Code to prevent confusion.

### **Recommendation 8**

*General:* An online digital due diligence assessment tool, linked to the Aboriginal Heritage Directory, be developed to assist proponents in applying the due diligence process and activity tiers and table and to assist with record keeping.

### **Recommendation 9**

*Management Code:* Further definition is required for the terms 'visual inspections' and 'surveys' to differentiate the requirement of each.

### **Recommendation 10**

*Management Code:* The term 'Protected Areas' to be clearly defined in the Management Code.

## **4.3 Draft Consultation Guidelines**

WALGA recommended in its Phase Two submission that the Consultation Guidelines be amended to provide further guidance to support proponents to undertake meaningful engagement. It is pleasing that the Consultation Guidelines have been further refined to include helpful minimum standards for the application of the consultation principles.

Local Governments are concerned with respect to situations where Aboriginal knowledge holders have different views about Aboriginal cultural heritage. The Consultation Guidelines do not provide guidance when there is a disagreement between interested Aboriginal parties. The consultation guidelines would be further strengthened to ensure there is a register of LACHS and Knowledge Holders to enable an efficient process of consultation and contact by the proponent.

The ACH Act highlights the importance of ensuring Aboriginal people have a stronger say in managing their cultural heritage. Many Local Governments have existing structures in place to engage local Aboriginal people in decision making about matters that may impact cultural heritage, such as Aboriginal Advisory Groups. However these existing engagement structures are not considered within the Management Code. WALGA's Phase Two submission raised the concern that the process of engaging through Local Aboriginal Cultural Heritage Services (LACHS) could result in the erosion of existing local relationships, duplication of engagement structures and increased bureaucracy. To mitigate this risk, it is recommended that the LACHS seek representation from local Aboriginal community members, including those within Local Government Advisory Groups.

#### **Recommendation 11**

*Consultation Guidelines:* Provide further guidance to support proponents to undertake appropriate consultation where there are disputes between two or more knowledge holders.

#### **Recommendation 12**

*General:* The Department of Planning, Lands and Heritage (DPLH) to ensure that local Aboriginal community members are actively engaged in the formation and ongoing operation of LACHS.

### **4.4 Draft Knowledge Holder Guidelines**

As stated above, many Local Governments have developed strong relationships with their Aboriginal community through the establishment of structures such as Aboriginal Advisory Groups. These groups, comprising Aboriginal community members who are considered Elders and/or knowledge holders for their area, provide advice on matters affecting Aboriginal culture. Concerns have been raised that Aboriginal community members will not have the opportunity to form part of the LACHS and may have different views to the established LACHS.

The ACH Act sets out clear requirements that a designated person as the local ACH service must have (a) comprehensive knowledge of the local Aboriginal community in the area; and (b) has the endorsement of any registered native title body corporate, or registered native title claimant, for the area or a part of the area; and (c) has sufficient support of the local Aboriginal community in the area to enable it to provide local ACH service functions for the area. WALGA supports these requirements.

It is essential that DPLH ensures that local Aboriginal community members are actively engaged and have the opportunity to form part of the LACHS.

## 4.5 Draft ACH Management Plan Template and Guiding Notes

WALGA's Submission to the Phase Two Co-design process made recommendations with respect to the draft Management Plan Template and raised concerns around the level of detail required for developing a management plan. Smaller scale infrastructure works carried out by Local Governments are not comparable to large scale mining operations. As previously submitted, consideration should be given to developing different or scalable ACH Management Plan templates to account for variations in the size of the area to be impacted, the complexity and purpose of the proposed activities and the resources of the Proponent. WALGA considers there would be merit in developing a template specifically for Local Government.

### **Recommendation 13**

*Management Plan Template:* Consideration be given to developing different ACH Management Plan templates taking into account variations in the size of the area to be impacted, the complexity and purpose of the proposed activities and the resources of the Proponent.

### **Recommendation 14**

*Management Plan Template:* Consideration be given to developing an ACH Management Plan template specifically for Local Government.

## 4.6 Prescribed Timeframes

An understanding of the overall timeframe involved in obtaining a permit or management plan remains unclear. WALGA's Submission to the Phase Two Codesign process recommended the development of a flow chart to demonstrate the process and timeframes from day one to final day. Alternatively, overall timeframes could be included within the prescribed timeframe table for an ACH permit, ACH management plan (if an agreement is made between the proponent and Aboriginal parties) and ACH management plan (if no agreement is made between the proponent and Aboriginal parties).

Proponents are required to comply with various legislative and regulatory requirements in addition to the ACH Act, including environmental, planning and building requirements. It is unclear how these legislative requirements interact with one another or the order in which approvals are required. WALGA recommends that a process map is developed setting out the step-by-step process required to be undertaken to comply with these various relevant legislative requirements.

As mentioned in WALGA's previous submissions, Local Governments often undertake infrastructure and road projects pursuant to grant funding. It will be essential for grants arrangements to allow sufficient time for Local Governments to comply with ACH processes, and for ACH processes to not cause undue delays to the delivery of grant funded projects.

### **Recommendation 15**

*Prescribed Timeframes:* DPLH to include an overall time frame (beginning to end) for; ACH permit, ACH plan (if an agreement is made between the proponent and Aboriginal parties) and ACH plans (if no agreement is made between the proponent and Aboriginal parties).

### **Recommendation 16**

*General:* DPLH and other relevant agencies collaborate to develop a process map outlining the step-by-step process (including the intersection between other legislation/ regulation, such as building, development and environmental approvals) when applying for approvals.

## **4.7 Draft Local ACH Service (Fees) Guidelines**

The Local ACH Service (Fees) Guidelines remain unclear in relation to what types of activities and services LACHS can charge for. In some sections of the Guidelines it seems that fees can only be charged for work associated with the development of a Management Plan (eg, bottom of page 3); however in others it refers to LACHS charging fees for services provided in connection with the provision of its functions which are set out in s.48 of the ACH Act and include advising proponents about ACH and engaging and negotiating with proponents which implies that LACHS could charge for all communications and engagement with proponents.

The Draft Management Code provides:

‘Undertaking a DDA may require engagement with an Aboriginal party in circumstances where it is unclear whether ACH is at risk of being harmed by a proposed activity...The most effective way to manage an activity so that it avoids or minimises the risk of harm to ACH is to engage early and meaningfully with the relevant Aboriginal persons. This includes LACHS where they have been established...’ (pg 20, Draft ACH Management Code)

The sector supports the principle of early engagement with interested Aboriginal parties with respect to ACH, however if LACHS will charge fees for all and any engagement this may pose a barrier to engagement because many Local Governments have limited funds available.

Concerns have also been raised in relation to the potential for the Service (Fees) Guidelines to be misapplied due to the lack of detail provided with respect to the application of fees. For example, proponents may be charged for an excessive number of Aboriginal knowledge holders to participate in surveys, or for travelling significant distances.

Clarification is sought as to the circumstances in which LACHS can charge fees, and whether it is only for works associated with the development and negotiation of a Management Plan (not for work relating to a Permit) as WALGA previously understood.

Greater transparency is sought in relation to the accountability and transparency of the financial arrangements of the LACHS. It is essential that LACHS provide receipts for services rendered and apply standard accounting practices.

Concerns have been raised in relation to the Service (Fees) Guidelines, fee schedules and the dollar value assigned to the work of ‘Heritage Professionals’ versus ‘Senior Aboriginal Consultant or Elder’. There is a view that these roles should be paid at an equal rate.

Of the 139 Local Governments in Western Australia, many have limited rate bases with little scope to take on additional expenditure. In 2017-18, 79 Local Governments had rates revenue of under \$5 million per annum, with 35 of them earning less than \$2 million per annum.

Many Local Governments can only access additional funds to pay for increased costs of undertaking activities by increasing rates levied upon ratepayers. In WALGA's Phase Two submission it was recommended that consideration be given to applying different fee structures for different types of proponents. An alternative approach is recommended in this submission, whereby the State Government subsidises the increased costs to Local Governments of the ACH legislative regime.

#### **Recommendation 17**

*LACHS Service (Fees) Guidelines:* The guidelines be amended to clearly state the circumstances in which LACHS can charge fees and that LACHS can only charge fees for works associated with the development and negotiation of a Management Plan (not for work relating to a Permit).

The additional proposed 15% Administration Charge and 20% uplift on all fees for regional and remoter areas and above the 26<sup>th</sup> parallel is not supported. These fees are excessive and will impact less well resourced, regional and remote Local Governments, and disincentivise investment and development in regional areas.

#### **Recommendation 18**

*General:* The State Government to subsidise Local Government for the increased costs to Local Governments of the new legislative ACH regime.

### **4.8 State Significance Guidelines**

As recommended in WALGA's Phase Two submission, Local Government requires guidance about its role and responsibilities with respect to the provision of municipal and other services in areas of State Significance. Assuming areas of State significance are most likely to be located away from cities and towns, the most likely intersect will be in relation to Local Government Road maintenance obligations.

#### **Recommendation 19**

*General:* Clarification be provided on the interrelationship between Local Government service delivery requirements and State significance areas.

### **4.9 Defining Substantially Commenced**

WALGA's Phase One submission recommended the term 'substantially commenced' be defined in a similar way to the definition in existing planning and environment legislation. The definition within the draft document is in line with this recommendation. No further Comment.

## 5.0 General Recommendations

For the implementation of the ACH to be successful WALGA considers it is critical that adequate guidance is provided to support Local Governments through the transition. It is recommended that further supporting documentation be developed to guide proponents through the new process. This should include DDA documentation examples for Local Government, a how to guide to determine how to assess if a place or object (such as a plant) has cultural significance and example ACH management Plans for Local Government.

### Recommendation 20

The State Government provide sufficient funding to support the efficient establishment and ongoing functioning of the new Aboriginal heritage system, in particular with respect to the ACH Council, LACHS and Local Governments.

### Recommendation 21

The State Government to ensure that a sufficient transitional period is provided upon commencement of the new ACH Act in order to prevent delays and allow for the capacity and capability building of newly established bodies.

### Recommendation 22

The *Aboriginal Cultural Heritage Act 2021* and Regulations should be reviewed after 5 years.

### Recommendation 23

DPLH to consider developing the following support documentations;

- DDA documentation example for Local Government
- How to guide to determine how to assess if a place or object (such as a plant) has cultural significance
- Example ACH management Plans for Local Government

## 6.0 Conclusion

In order for Local Government to fulfil their obligations under the new *Aboriginal Cultural Heritage Act* it is vital that it is adequately resourced and supported throughout the transition and implementation phases. Ongoing communication regarding the status of the commencement of the Act, including the establishment of the LACHS will also be essential. WALGA is therefore committed to continuing its close working relationship with DPLH throughout this process.

## Appendix 1: WALGA Engagement

### Aboriginal Heritage Reference Group Members

City of Rockingham	Shire of Augusta-Margaret River
City of Albany	City of Wanneroo
Town of Claremont	Town of Port Hedland
City of Canning	Shire of Broome
City of Vincent	City of Perth
Shire of Denmark	City of Cockburn
Shire of Lake Grace	Town of Mosman Park
Shire of Mount Magnet	City of Karratha
Shire of Derby/West Kimberly	Shire of Murchinson
Shire of Carnamah	Shire of Upper Gascoyne
Shire of Cue	

### Participants at online co-design workshops, 9 December

Shire of Yalgoo
City of Perth
City of Kalamunda
Shire of Shark Bay
Town of Claremont
Shire of Toodyay
Department of Biodiversity Conservation and Attractions
City of Kalamunda
City of Armadale
Shire of Broome
Shire of Cue
Shire of Murchison
Shire of Moora
Shire of Lake Grace
Shire of Waroona
Shire Mt Magnet
City of Bunbury
City of Karratha
City of Kwinana
City of Joondalup
Shire of Sandstone
City of Claremont

### Other Communications

- Discussion at People and Place Policy Team meeting
- LG Direct Items (various dates)