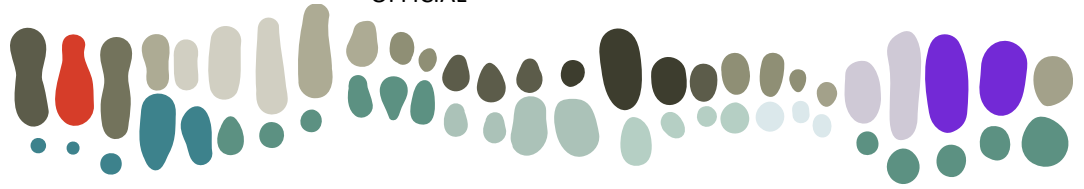




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Aboriginal Cultural Heritage Act

ABORIGINAL CULTURAL HERITAGE INVESTIGATION GUIDELINES



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1 Purpose

The *Aboriginal Cultural Heritage Act 2021* (Act) requires that, other than for exempt activities, a person proposing to carry out an activity that may harm Aboriginal cultural heritage (ACH), must undertake a due diligence assessment (DDA) in accordance with the ACH Management Code (Code) prior to the commencement of the activity. As specified in section 98 of the Act, undertaking a DDA in accordance with the Code may be used as a defence to the charge of an offence that an activity harmed ACH.

If, in undertaking a DDA for a tier 3 activity, a proponent is unable to determine whether ACH is present for the entire activity area, the Code requires that the proponent conduct an ACH investigation to determine whether ACH is present for the area of the proposed activity (*refer to Step 1C – Table 5 and Flowchart 4 of the Code*).

The purpose of the ACH Investigation Guidelines is to set out the types of ACH investigation a proponent can undertake for the purposes of a DDA as per the requirements of the Code.

2 Overview

An ACH investigation for the purpose of a DDA is to determine whether ACH is located within an activity area.

While not satisfying the requirements set out in the Code for other parts of the DDA process, an ACH investigation may also assist in:

- evaluating whether there is a risk of harm by the activity to the ACH determined to be located within the activity area¹;
- determining the level of impact to the ACH²; and
- identifying alternative ways to undertake the activity to avoid or minimise harm to the ACH³.

For the purposes of a DDA, one of three ACH investigation types are set out below:

1. ACH investigation meeting (Section 4.1)
2. ACH work area clearance survey (Section 4.2)
3. ACH avoidance survey (Section 4.3)

Prior to commencing an ACH investigation to satisfy DDA requirements under the Code, a proponent may wish to consider what type of ACH investigation to conduct. While these guidelines set out the types of investigation that are sufficient for the purposes of a DDA, it is open to a proponent to undertake an alternative type of investigation that will, in addition, identify and obtain an understanding of the characteristics of the ACH located in the activity area for which a management plan is required (see s. 141 of the Act). A proponent will need the agreement of the Aboriginal party participating in the investigation. Additional information is available on the website of the Department of Planning, Lands and Heritage.

¹ See Step 2 – Table 5 and Flowchart 4 of the Code

² See regulation 35 **ACH impact statements** of the *ACH Regulations 2022*

³ See Step 2 – Table 5 and Flowchart 4 of the Code

3 ACH investigation considerations

To be able to effectively determine whether ACH is located with an activity area, an investigation needs to be undertaken with the Aboriginal party. It is only in exceptional circumstances that these should be undertaken without such participation and a proponent must use their best endeavours to ensure the participation of the Aboriginal party.

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 persons to be consulted for the activity area, including as part of an ACH investigation. The persons to be consulted for an area or part of the area are (in order of priority) a LACHS; native title party and each knowledge holder; the native title representative body.

How an ACH investigation is conducted may vary depending on the views of the persons to be involved, type of activity proposed, and previous research and investigations conducted in the area.

Prior to undertaking an ACH investigation, and having regard to the requirements of the Survey Report Guidelines where relevant, proponents should consider and discuss the following with the Aboriginal party:

1. How the Report or Meeting Report will be endorsed by the Aboriginal party.
2. How, when and where the ACH investigation is to be undertaken.
3. Intellectual property considerations.
4. Identification of any consultants to be used.

4 ACH investigation types

There are three types of ACH investigation a proponent can undertake for the purposes of a DDA. The agreement of the Aboriginal party is required in relation to the type of investigation that is to be undertaken.

An existing ACH Report that is consistent with the ACH Survey Report Guidelines can be used to determine whether there is a need to undertake an investigation (*refer to Step 1B – Table 5 and Flowchart 4 of the Code*).

4.1 ACH investigation engagement

An ACH investigation engagement between the proponent and Aboriginal party can be relied on for the purposes of a DDA.

Where an ACH investigation engagement is held for the purposes of satisfying a DDA, the following matters for the whole of the activity area should be addressed (subject to the agreement of the Aboriginal party) in writing:

- (a) The area addressed by the engagement and its relationship to the activity area including:
 - (i) the area that is clear of any ACH and/or the location and boundary of the ACH; and
 - (ii) any cultural sensitivities or restrictions.

Additional information that may be included if provided by the Aboriginal party:

- (iii) the importance and/or characteristics of the ACH;
- (iv) potential impacts of the proposed activity on the ACH; and
- (v) any recommendations as to the management of the ACH.

(b) Whether it is tangible and/or intangible elements of the ACH.

(c) A description of limitations that may have prevented all ACH present being identified.

Where limitations exist that may have prevented the accurate or reliable identification of ACH, should it be present, the written confirmation will only be valid for those parts of the survey area where the limitations did not exist.

Where an ACH Investigation engagement is not able to address the above matters for the whole of the activity area, an ACH work clearance survey or ACH avoidance survey will be required.

There must be clear evidence in writing of the agreement of the Aboriginal party in relation to the accuracy of the above.

4.2 ACH work area clearance survey

An ACH work area clearance investigation is used to identify an area that is clear of any ACH. It does not provide any information on ACH, including the location or characteristics of ACH.

ACH work area clearance surveys are typically more appropriate for activities with smaller ground disturbance footprints and with a degree of flexibility over where the activity can occur.

An ACH Report that satisfies the Survey Report Guidelines (see Appendix A) will need to be produced at the conclusion of the ACH work area clearance survey.

4.3 ACH avoidance survey

An ACH avoidance survey is used to identify any ACH that may be present in the survey area. An avoidance survey defines the boundary of the location of ACH but does not provide any information on the characteristics of the identified ACH nor record information on the ACH.

ACH avoidance investigations are typically more appropriate for activities that need to be carried out in specific locations but have a degree of flexibility to avoid any identified ACH.

An ACH Report that satisfies the Survey Report Guidelines will need to be produced at the conclusion of the ACH work area clearance survey.

5 Terms Used

<p>Aboriginal party (see section 100 of the Act)</p>	<p>Each LACHS for the area or part of the area as at the date of the Report or relevant endorsement (as applicable).</p> <p>If there is not a LACHS for the area or part of the area (as at the date of the Report or relevant endorsement) – each native title party for the area or the part of the area as at the date of the Report or relevant endorsement (as applicable).</p> <p>If there is not a native title party for the area or part of the area (as at the date of the Report or relevant endorsement) – each native title representative body as at the date of the Report or relevant endorsement (as applicable).</p>
<p>ACH</p>	<p>Aboriginal cultural heritage</p>
<p>ACH Act</p>	<p><i>Aboriginal Cultural Heritage Act 2021</i></p>
<p>ACH Directory</p>	<p>Aboriginal cultural heritage directory, established under Part 9 of the Act (part of the ACHknowledge system)</p>
<p>ACH Investigation</p>	<p>Aboriginal cultural heritage investigation</p>
<p>ACH Report</p>	<p>Aboriginal cultural heritage survey report</p>
<p>Activity area</p>	<p>The area where it is intended that the proposed activity will be carried out</p>
<p>DDA</p>	<p>Due diligence assessment, specified in section 102 of the ACH Act</p>
<p>LACHS</p>	<p>Local ACH service, as designated under Part 2 of the Act</p>
<p>Native title party</p>	<p>As defined in section 11 of the Act</p>
<p>Native title representative body</p>	<p>As defined in section 11 of the Act</p>

Appendix A**Proposed survey requirements – ACH Reports on or after 1 July 2024**

Where a survey is required for the purposes of satisfying a DDA and an ACH Report is dated on or after 1 July 2024, the ACH Report will need to address the following matters:

- (a) An endorsement of the ACH Report by the Aboriginal party.
- (b) A list of the survey participants including identification of any knowledge holders.
- (c) Details of the information provided to the Aboriginal party or survey participants relating to the purpose and context of the survey and which should include:
 - (i) details of the proposed activity, in particular any tier 2 or 3 activity;
 - (ii) the information sought to be obtained from the survey.
- (d) Detailed description of the survey methodology and information provided by the survey participants (where applicable) in relation to:
 - (i) the area of the survey and its relationship to the activity area;
 - (ii) the fitness for purpose of the survey methodology;
 - (iii) that the area is clear of any ACH (ACH work area clearance survey) or the location and boundary of the ACH (ACH avoidance survey); and
 - (iv) any cultural sensitivities or restrictions.

Additional information that may be provided by the survey participants, and which may be included in the ACH Report if endorsed by the Aboriginal party* if it is, may include:

- (v) the importance and/or characteristics of the ACH;
- (vi) potential impacts of the proposed activity on the ACH; and
- (vii) any recommendations as to the management of the ACH.
- (e) Whether the survey relates to tangible and/or intangible elements of ACH.
- (f) A description of limitations that may have prevented all ACH present being identified throughout the ACH investigation.
- (g) Where limitations exist that may have prevented the accurate or reliable identification of ACH, should it be present, the ACH Report will only be able to be relied on (for the purposes of the DDA in respect of a proposed activity area) for those parts of the survey area where the limitations do not apply.

*Additional information that may also be included in the ACH Report is:

- (i) representative photographs (and landforms where informative);
- (ii) record landform and general environmental information;
- (iii) record the land surface and vegetation conditions encountered during the survey, accounting as appropriate for things like vegetation, rock outcrops, coarse fragments, recent fires (etc.) and how these impacted on the visibility of objects;
- (iv) record any ACH (including ACH already listed in the ACH Directory) observed during the survey;
- (v) Description of how the method used to collect information relating to the presence or absence of ACH was suitable for the scope of the survey.
- (vi) record survey coverage; and
- (vii) accurate mapping including digital geospatial data and coordinated (accurate zone, northing and easting).