



Aboriginal Cultural Heritage Act 2021

CONSULTATION GUIDELINES





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1. Purpose

The *Aboriginal Cultural Heritage Act 2021* (Act) provides a modern framework for the recognition, protection, conservation and preservation of Aboriginal cultural heritage (ACH), while also recognising its fundamental importance to Aboriginal people. Consultation with Aboriginal people, as well as being a requirement under the Act, is also widely recognised as a critical component of better protecting ACH. It puts Aboriginal people at the heart of decision-making for the protection and management of their heritage.

Principles of informed consent are enshrined in the Act in relation to the process of agreement making.

These guidelines set out how consultation is to be undertaken to satisfy the obligation under section 139 of the Act to consult on an ACH management plan (Plan). Section 134 sets out when a Plan is required.

2. Overview

2.1 Principles and benefits of successful consultation

Whilst these guidelines are specific to the legislative requirements for preparing a Plan, successful consultation is the foundation of positive relationships with Aboriginal people and ultimately the protection and management of ACH. Successful consultation rests on two principles:

1. All parties have rights and responsibilities.
2. Early engagement results in better outcomes.

Early and ongoing engagement in a culturally appropriate and respectful manner contributes to the development of trust and relationships, resulting in outcomes that respond to the needs of all parties. Ongoing communication with Aboriginal communities is essential to building this trust and relationships, to strengthening understanding of proposed activities and to give confidence to Aboriginal people that their views are valued and will be considered and respected.

Once consultation has been undertaken, and if the proponent is required to develop a Plan, the proponent will subsequently be required to negotiate the Plan with the interested Aboriginal parties as set out in section 135 of the Act.

Section 141 states that a proponent who intends to carry out an activity under a Plan must take reasonable steps to identify, and obtain an understanding of the characteristics of, the ACH located in the area to which the plan is to relate. Consultation undertaken in accordance with these guidelines will assist in that identification and obtaining that understanding.

2.2 Related agreements may be used to satisfy consultation requirements

Under section 140 of the Act, a related agreement may be used to satisfy the consultation requirements set out in section 139 to the extent that the consultation complies with those requirements.

A related agreement is an agreement that contains provisions about:

- (i) the management of ACH in an area;
- (ii) the carrying out of an activity to which authorisation under Part 6 is required; and

and is between a proponent for the activity being, or a proposed activity intended to be, carried out in the area and:

- (i) a person who is an Aboriginal party to an approved or authorised Plan;
- (ii) a person who would be an interested Aboriginal party for the Plan; or
- (iii) otherwise, one or more of the persons to be notified or the persons to be consulted about proposed activities.



3. Legislative context

Consultation on a Plan must be carried out within a reasonable time and in accordance with these Guidelines [s. 139].

An approved or authorised Plan is required for any tier 3 activity that may harm ACH. A Plan can also be prepared for a tier 2 activity that may harm ACH.

4. Scope

Section 101 states that consultation that occurs in relation to the proposed activity will depend on the circumstances of the activity but should include the following –

- (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.

Other instances where engagement with Aboriginal people may be required by the Act, such as notification in relation to the grant of an ACH permit, are not covered by these guidelines.

5. Consultation requirements

5.1 Who should be consulted?

The persons to be consulted about an activity that a proponent is carrying out, or a proposed activity that the proponent intends to carry out, in an area are those persons referred to in [s. 107] comprising:

- (a) each LACHS for the area or a part of the area;
- (b) if there is no LACHS for the area or a part of the area — each native title party and each knowledge holder for the area or the part of the area;
- (c) if there is not a LACHS, native title party or knowledge holder — each native title representative body (NTRB) for the area or the part of the area.

5.2 Initial contact

The proponent must make a genuine attempt to contact and consult, in a timely manner, each person to be consulted [s. 101(a)].

Attempts at initial contact must be by email, letter, telephone, text or similar direct message, social media, fax or in person.

When making initial or follow up contact, the proponent must provide the name and position of the person making contact, the name of the organisation, details of the project, contact details for the relevant person in the organisation and an invitation to participate in the consultation.

A proponent may request the assistance of the Department to identify the persons to be consulted [s. 108].

Where the person to be consulted has indicated a preferred method or methods of contact of which the proponent is aware, the proponent must use the preferred method or methods where practicable.



5.3 Follow up contact

The proponent must take reasonable steps to follow up with persons to be consulted if there is no response to the initial contact [s. 101(e)].

Attempts to follow up with persons to be consulted must include, where practicable, more than one of the methods referred to above. Where the proponent has a mailing address, a follow up method (where not previously used) must include sending a letter outlining the details required for initial contact to that mailing address in accordance with section 283(1)(c) of the Act.

Follow up contact where a LACHS has been designated

Where there is no response to the initial contact, further attempts at **initial contact** must be undertaken once per week for a **minimum** period of a further three weeks.

Follow up contact where a LACHS has not been designated

Where there is no response to the initial contact, further attempts at initial contact must be undertaken across a **minimum** period of a further 10 weeks as follows:

- once a fortnight for the first the first eight weeks; then
- once per week for the remaining two weeks.

This period is inclusive of allowances for cultural conventions and commitments.

5.4 Contacting knowledge holders

The Knowledge Holder Guidelines set out the steps to be taken to identify persons who are knowledge holders for ACH or an area containing ACH. This includes contacting a registered native title body corporate (RNTBC), NTRB and the Department.

Where a proponent is aware of, but does not have contact details for, a knowledge holder for whom a RNTBC, NTRB or the Department has contact details that they are unable to provide, the proponent must as soon as is practicable request that the RNTBC, NTRB or Department provide the proponent's contact details to the knowledge holder and ask the knowledge holder to contact the proponent. RNTBCs and NTRB are encouraged to provide the proponent's contact details to the knowledge holder.

The Department will take all reasonable steps to provide the proponent's contact details to the knowledge holder and request the knowledge holder to contact the proponent.

The knowledge holders that a proponent is required to contact directly are those knowledge holders for whom it has contact details at the end of the follow up contact period referred to above.

Where there is **one or more knowledge holder** (not otherwise represented by the native title party) for whom the proponent does not have contact details, then a proponent must give public notice to be published on a website maintained by, or on behalf of, the Council. The Department will need to be contacted to arrange the public notice¹.

Where there are more than **five knowledge holders** (not otherwise represented by the native title party) for which the proponent has email, mobile telephone or social media details, the proponent can use any of these methods for the purposes of undertaking consultation irrespective of any preferred method of contact identified by the knowledge holder.

Where there are more than **20 knowledge holders** (not otherwise represented by the native title party) for whom the proponent has contact details, the proponent can give public notice to be published on a website maintained by, or on behalf of, the Council. The Department will need to be contacted to arrange for the public notice.

The public notice must include an invitation to the first consultation meeting, as detailed in section 5.6.1 below.



Other matters

1. If, throughout the process of attempting initial contact or follow up contact, a proponent does not receive a response, the proponent must take reasonable steps to identify and use alternative methods of contact. This may include contacting the RNTBC, NTRB or the Department for assistance.
2. Records must be kept of all attempts to make contact and actual contact made.
The records must include the date, time and form of attempted and actual contact, including details of any information provided and responses received.
3. Letters, emails and faxes are required to be sent as set out in s 283 of the Act.
4. Once contact has been established, a proponent must provide the opportunity for the persons to be consulted to advise of any constraints the person to be consulted may have and to respond to such constraints, particularly in relation to the timing and location of the consultation. These constraints may include:
 - periods for cultural obligations (these range between October to March depending on various factors and vary throughout the State) and sorry business; and
 - cultural and social protocols, such as gender and kinship.
5. A LACHS must publicise details of any unavailability due to cultural commitments on its website and on a website maintained by, or on behalf, of the ACH Council. A LACHS is not required to do so where not culturally appropriate.

5.5 Where initial and follow up contact with the persons to be consulted is unsuccessful

Where a proponent has:

- (a) been unable to make contact with persons to be consulted after following the steps above; and
- (b) provided the information required to be sent for initial contact and an opportunity to respond within a reasonable time, being no less than 21 days after the date that the last follow up contact was sent, including an option to meet in person:

then, if after at least 21 days, there is still no response from the persons to be consulted, the proponent has complied with the obligation to make a genuine attempt to consult within a reasonable time.

5.6 Consultation meetings

Where contact has been made with the persons to be consulted, a proponent who intends to carry out an activity under a Plan must consult with those persons about the proposed activity.

If a reasonable request for information is made at any time throughout the consultation, unless otherwise agreed, the parties are required to use their best endeavours to provide a substantive response within a maximum of four weeks.

The proponent must attempt to hold a minimum of three meetings with the persons to be consulted. The second and third meetings must, where practicable, be held at least two weeks after the previous meeting or unless otherwise agreed by all those to be consulted.

¹ Subject to the provisions relating to five and 20 knowledge holders, the proponent will still be required to contact directly those knowledge holders for whom it has contact details.



The purpose of the three meetings is:

1. the proponent must provide sufficient information about the proposed activity to the persons to be consulted to enable them to understand the proponent's reasoning and intention [s. 101(b)].
2. the persons to be consulted must be provided with an opportunity to clearly state their position on the proposed activity and to explain that position [s. 101(c)].
3. the proponent and the persons to be consulted must disclose relevant and necessary information about their position as reasonably requested [s. 101(d)].

Where none of the persons to be consulted attend the first or second meeting, or the parties agree that a second or third meeting is not required, the proponent is not required to hold any further meetings.

It is the proponent's responsibility to provide a meeting venue including reasonable weather protection. Other than participation by a LACHS (see LACHS fees guidelines), a proponent is not required to pay a fee to, or cover the costs of, a person being consulted unless there is prior written agreement between the parties.

5.6.1 First meeting

The first meeting is for the proponent to provide background, objectives and proposed outcomes of the project and an invitation to the second and third meetings.

The proponent is to invite the persons to be consulted to participate in the first meeting. The invitation to the first meeting must include:

- (i) the name of the person and contact detail of the person who is making the invitation;
- (ii) the proponent;
- (iii) a summary of the project;
- (iv) two alternative meeting dates and venue(s) for the first meeting; and
- (v) if required, request contact details of the persons to be consulted.

The first of the two meeting dates is to be organised at least two weeks from the date of the invitation/public notice. The second meeting date is to be held at least one week later.

At least one of these two meetings must, where practicable, be held in the area of the proposed activity, unless otherwise agreed by all those to be consulted that this is not required.

5.6.2 Second meeting

The second meeting is for the persons to be consulted to be able to state and explain their position on the proposed activity, including the identity and characteristics of the ACH located in the area of the activity and how impacts can be avoided or minimised.

Aboriginal people are not required to disclose culturally sensitive information.

5.6.3 Third meeting

The third meeting is for the proponent to discuss how the views provided in the second meeting have been addressed as part of the preferred method for carrying out the activity.



Other matters

1. Parties must not make unreasonable or excessive requests for information.
2. Parties must not request and are not required to disclose:
 - (i) personal and private information;
 - (ii) culturally sensitive information;
 - (iii) commercial in confidence information, legal advice or confidential communications.
3. Where reasonably requested by the persons to be consulted and is practicable:
 - (i) meetings should be held in the area of the proposed activity;
 - (ii) interpreters and/or translated material be provided;
 - (iii) information be provided in plain English or with plain English explanatory notes including the use of simplified technical terminology and supporting material such as diagrams and maps that are clear and easy to understand.
4. The proponent must seek, and respond to, advice relating to how a person being consulted prefers to be consulted, including the most effective means by which they can state or explain their position. This advice may reflect cultural protocols which must be respected where practicable.
5. Proponents should acknowledge and clearly explain how information gathered through the consultation process will be incorporated into the decision-making process.
6. Parties must use their best endeavours to provide information as reasonably requested, in relation to:
 - (i) the identification and characteristics of any ACH in the area of the proposed activity;
 - (ii) the activity including preferred method for carrying out the activity;
 - (iii) any feasible alternative methods for carrying out the activity; and
 - (iv) potential harm to ACH and why that harm cannot be avoided and/or minimised.
7. Parties must use their best endeavours to agree as to how the consultations should be documented. Consultation documentation may include:
 - (i) signed minutes of meetings;
 - (ii) audio or video recordings; and
 - (iii) summaries endorsed by the parties.
8. Where the parties cannot agree, the proponent must make a clear record of the consultation undertaken, respecting and incorporating where practicable the views of the party being consulted.

The record must include:

 - (i) the date, time and method of each consultation offered and undertaken;
 - (ii) details of information provided by the proponent and any responses received;
 - (iii) details of any information provided by the party consulted; and
 - (iv) the reasons why agreement as to documentation of the consultation could not be reached.
9. Where practicable, proponents should provide flexibility around scheduling consultation, including methods of consultation.
10. Where those being consulted have reduced capacity due to other commitments or resource limitations impacting their availability:



- (i) they must inform the proponent as soon as possible and use their best endeavours to limit the impact of the commitments or limitations on their availability;
- (ii) the proponent must use their best endeavours to accommodate such commitments or limitations in the consultation being undertaken.

11. Where an activity is substantively changed (other than in response to the views of the persons to be consulted), including but not limited to location and scale, a proponent must offer to the persons to be consulted an additional two meetings, so that any amendments can appropriately be considered by the persons being consulted.
12. Where practicable, videoconferencing such as Microsoft Teams or Zoom should be made available.
13. Separate consultation sessions may be undertaken as appropriate.

5.7 Consultation framework

A proponent must give due consideration to any reasonable request for consultation, in addition to the three meetings referred to above, to be undertaken.

Where the parties agree to additional consultation being undertaken, the parties may agree on a consultation framework as the appropriate mechanism to manage that further consultation, having regard to:

- (i) the nature, scope and complexity of the proposed activity and extent of the potential harm to ACH;
- (ii) the requirement on the proponent to take reasonable steps to identify, and obtain an understanding of the characteristics of, the ACH located in the area to which the Plan is to relate [s. 141]; and
- (iii) the persons being consulted having an opportunity to clearly state and explain their position on the proposed activity.

The need for a consultation framework will need to be considered and agreed on a case by case basis and is not a mandatory requirement. Where there isn't a LACHS, a proponent may seek to agree on a consultation framework(s) with the native title party and with any knowledge holders.

Where the parties agree on the need for a consultation framework:

- (a) the parties are to use their best endeavours to agree on a framework having regard to the matters set out in these guidelines;
- (b) the maximum period to agree on a framework is eight weeks from the date of the request, unless otherwise agreed;
- (c) the framework should address consultation timeframes, including any meetings required and expected response times to any reasonable requests (from either party);
- (d) the maximum period for a party to provide a substantive response is four weeks unless otherwise agreed.

Where not all the persons to be consulted have agreed or are party to a consultation framework, a proponent should, for the period covered by the consultation framework, provide updates on any relevant changes to the proposed activity, including any changes to the method the proponent intends to use to carry out the activity, to those persons to be consulted who are not party to a framework and provide them with an opportunity to state their position in relation to those changes. Where the proponent has email details for knowledge holders, an update sent via email is sufficient.

The consultation framework may be updated as required by agreement.



6. Related documents

These guidelines relate to the following documents:

- Knowledge Holder Guidelines
- State Significance Guidelines
- LACHS (Fees) Guidelines
- ACH Management Code
- ACH Management Plan Form and Guiding Notes

7. Acronyms and definitions

| | |
|--|--|
| ACH | Aboriginal cultural heritage |
| Act | <i>Aboriginal Cultural Heritage Act 2021</i> |
| Plan | ACH management plan |
| Department | Department of Planning, Lands and Heritage |
| ILUA | Means an indigenous land use agreement registered on the Register of Indigenous Land Use Agreements established and maintained under Part 8A of the <i>Native Title Act 1993</i> |
| LACHS | Local Aboriginal cultural heritage service |
| Native title party | In relation to an area, means — (a) a registered native title body corporate for the area; or (b) a registered native title claimant for the area; or (c) a person who was a registered native title body corporate for the area or a registered native title claimant for the area but — (i) under an ILUA, has surrendered their native title rights and interests in respect of the area; or (ii) whose native title rights and interests in respect of the area have been compulsorily acquired or otherwise been extinguished; or (d) if the area is the subject of a settlement ILUA — a regional corporation in relation to that area. |
| Native title representative body | Native title representative body means — (a) a body that is recognised as a representative body under the Native Title Act section 203AD; or (b) a person or body funded under the Native Title Act section 203FE to perform all, or specified, functions of a body referred to in paragraph (a). |
| Proponent | Section 100. Terms used A person who — (a) intends to carry out an activity that may harm Aboriginal cultural heritage; or (b) carries out an activity authorised under Division 4 |
| Regional corporation | Has the meaning given in section 40 of the Act |
| Registered native title body corporate/ claimant | Has the meaning given in section 253 of the <i>Native Title Act 1993</i> |



Appendix A

| Who should be consulted – Initial Contact | Follow up if no response to Initial Contact | Consultation (subject to alternative arrangements agreed between the parties) | | |
|---|---|--|---|--|
| | | Meeting 1 (two alternatives) | Meeting 2 | Meeting 3 |
| Each LACHS for the area or a part of the area | Where there is no response to the initial contact, further attempts at initial contact must be undertaken once per week for a minimum period of a further three weeks . | For the proponent to provide background, objectives and proposed outcomes of the project and an invitation to the second and third meetings. | For the persons to be consulted to be able to state and explain their position on the proposed activity, including the identity and characteristics of the ACH located in the area of the activity and how impacts can be avoided or minimised. | For the proponent to discuss how the views provided in the second meeting have been addressed as part of the preferred method for carrying out the activity. |
| <p>If there is no LACHS for the area or a part of the area — each native title party and each knowledge holder for the area or the part of the area.</p> <p>If there is not a LACHS, native title party or knowledge holder — each NTRB for the area or the part of the area.</p> | <p>Where there is no response to the initial contact, further attempts at initial contact must be undertaken across a minimum period of a further 10 weeks as follows:</p> <ul style="list-style-type: none"> • once a fortnight for the first the first eight weeks; then • once per week for the remaining two weeks. | | | |
| | | Parties may agree on an alternative consultation framework | | |