



Recycling the Aboriginal Heritage Act: Everything you need to know

CATEGORIES

This post is part of the following categories:

APPROVALS AND COMPLIANCE, GENERAL, NATIVE TITLE AND CULTURAL HERITAGE, WESTERN AUSTRALIA

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The *Aboriginal Cultural Heritage Act 2021* (WA) (**ACH Act**), which came into force on 1 July this year, will officially be repealed **tomorrow, 15 November (Repeal Day)** by the *Aboriginal Heritage Legislation Amendment and Repeal Act 2023* (WA) (**Repeal Act**). As covered in our [blog post in August](#), Western Australia will be returning to an amended version of the *Aboriginal Heritage Act 1972* (WA) (**AHA**). This blog post summarises the key elements of the amended legislation and the transition process.

The relevant legislation consists of:

- the Repeal Act;
- the *Aboriginal Heritage Amendment Regulations 2023* (WA);
- the *Aboriginal Heritage (Transitional Provisions) Regulations 2023* (WA) (**Transitional Regulations**); and
- the *Aboriginal Heritage (Fees) Regulations 2023* (WA).

Transition

There are transitional arrangements as the processes and authorities introduced under the ACH Act are transitioned to the new regime. These arrangements are primarily dealt with in the Transitional Regulations.

The Transitional Regulations provide for the Aboriginal cultural heritage Directory maintained by the Department of Planning, Lands and Heritage (**DPLH**) to transition back to a register under the AHA. Any unassessed sites which were included on the ACH Act Directory as 'Aboriginal Cultural Heritage' will be transferred back to the AHA register and identified as 'unassessed sites'.

ACH permits and ACH management plans issued under the ACH Act will be automatically converted into section 18 consents on Repeal Day. Any applications for ACH permits and ACH management plans will also be converted to section 18 applications.

The Transitional Regulations also contain defences for activities which were commenced under the ACH Act, in accordance with the ACH Act processes (ie activities that were undertaken in accordance with the due diligence processes and according to the activity tiers set out in the ACH Act), provided those activities were substantially commenced prior to Repeal Day and the activities are undertaken within 1 year of Repeal Day.

Section 18 consents and 'new information'

On Repeal Day, section 18 consents will be reinstated as the only authority available to authorise impacts to 'Aboriginal Sites' (noting the expanded definition of 'Aboriginal Cultural Heritage' has not been carried over from the ACH Act). All existing and section 18 consents granted in the future will be subject to a 'new information' condition, which requires the holder to notify the Minister for Aboriginal Affairs (**Minister**) of any new information which may arise in respect of the section 18 consent. 'New information' is not defined, and we recommend that a conservative approach is taken

when assessing whether something will constitute 'new information', as the AHA currently contains no thresholds. The Minister *must* respond to any notification of new information by amending the conditions of the section 18 consent, impose new conditions, grant a new section 18 consent or revoke the section 18 consent.

Appeal rights and call in power

The changes to the AHA are focussed on increasing transparency. All section 18 applications will be published on DPLH's website. 'Native title parties' impacted by a section 18 application or section 18 consent decision will be granted appeal rights to appeal a decision to the State Administrative Tribunal. 'Native title parties' is defined in the Repeal Act and the concepts of local Aboriginal heritage services and knowledge holders have not been carried across from the ACH Act. Any 'gag clauses' in agreements which seek to restrain native title parties from objecting to or commenting on section 18 applications and consents will be invalid under the AHA.

The Premier may also intervene in the section 18 decision making process and may step in when a section 18 application is determined to be of regional or State importance.

Transfer of section 18 consents

Under the amended AHA, section 18 consents will be able to be transferred. There is some uncertainty in relation to when this right will be triggered. The wording in the Repeal Act provides that the holder of a section 18 consent has an obligation to inform the Minister of a change in ownership of the underlying land to a section 18 consent. Failure to notify the Minister will result in a fine. If the Minister is satisfied that the section 18 consent (including the conditions of the section 18 consent) will still have its intended effect, the Minister may approve that transfer (the Minister can also revoke a section 18 consent following a change in land ownership). The Minister must give notice of that decision on DPLH's website. There is some uncertainty in relation to what a 'change in landowner' means – particularly in relation to intersecting mining tenure and leases or changes in beneficial ownership. Despite the uncertainty, the potential to transfer section 18 consents is an improvement which is likely to be favourable for industry.

DPLH's guidance documents

The DPLH has advised that it will be releasing guideline documents to supplement the AHA on Repeal Day. The guideline documents have been subject to a consultation process with key industry stakeholders. We will be posting an update on the contents of the guideline documents following Repeal Day.

Aboriginal cultural heritage and environmental impact assessment

As noted in our previous [blog posts](#), there is overlap between the *Environmental Protection Act 1986* (WA) (**EP Act**) and the ACH Act, which will continue to exist under the amended AHA. In June 2023, the Environmental Protection Authority (**EPA**) released [Interim Technical Guidelines](#) which set out the interaction between the requirement for environmental impact assessments and the ACH Act. The EPA has advised that its statutory obligations and assessments remain unchanged and that it intends to amend this Interim Guideline following Repeal Day. The DPLH has advised that it is working with the EPA and the Department of Water and Environmental Regulation to improve efficiency in respect of the overlap between the EP Act and the amended AHA, but the DPLH has not provided any updates or insight into this process yet.

It is recommended that companies undertaking environmental impact assessment under Part IV of the EP Act continue to have regard to the EPA's Interim Technical Guidelines, as in the short term this guidance still reflects the EPA position.

Conclusion

The repeal of the ACH Act represents a further significant change in statutory obligations for land users in Western Australia. Although there will no longer be any positive statutory obligation for land users to consult with Traditional Owners or to conduct due diligence assessments prior to commencing activities, it is recommended that the standards of engagement and consultation introduced under the ACH Act continue to be followed.

Community and market expectations for Indigenous engagement and consultation continue to evolve rapidly towards the concept of free, prior and informed consent (**FPIC**) for any activity undertaken which may impact Aboriginal cultural heritage. Consideration of a project's impacts upon Aboriginal cultural heritage also continues to be a relevant consideration for decision makers under Part IV of the EP Act.

Although legislative change in this area in Western Australia may now stabilise for some time, in the wake of the [Senate Inquiry on Juukan Gorge](#), the Federal Government has flagged that it will be seeking to reform the federal heritage framework. To date, it has presented three options, which are currently being worked through a consultation process:

1. repeal the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (**ATSIHPA**) and replace the ATSIHPA with overarching federal legislation, and overriding any State or Territory frameworks;
2. repeal the ATSIHPA and replace it with an accreditation process and mandatory national standards for State and Territory legislation; or
3. provide 'model' legislation for States and Territories.

We anticipate that any proposal from the Federal Government will likely adopt similar concepts to the ACH Act which will promote Aboriginal heritage protection and FPIC. The timing for Federal

legislation is currently uncertain. In the interim, companies should continue to have regard to best practice standards in Aboriginal cultural heritage protection and consultation.

If you are unsure of your compliance requirements and how to best manage obligations under the AHA, please contact Melanie Debenham, Naomi Hutchings or Amelia Arndt for further advice.

Please [subscribe to our blog posts](#) to receive further updates on Aboriginal cultural heritage and environmental compliance.

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